Gun-Jumping and EU Merger Control

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The EC Merger Regulation "ECMR",[1] like the US Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"),[2] prohibits the closing of a notifiable transaction until antitrust approval has been received. Violation of this suspensory obligation, commonly referred to as "gun-jumping", is a violation of applicable merger control rules in both jurisdictions and, if the parties to the transaction are competitors, may also violate Art.81 of the EC Treaty or its US counterpart, s.1 of the Sherman Act.[3]

The US Department of Justice (DOJ) and Federal Trade Commission (FTC) have repeatedly pursued gun-jumping violations in transactions notified under the HSR Act. R. Hewitt Pate, Assistant Attorney-General at the DOJ's Antitrust Division, recently stated that prosecution of gun-jumping violations is "a priority for the antitrust division".[4] The DOJ promptly proved the point in *Gemstar*, where the defendants jointly agreed to pay the highest fine ever imposed for gun-jumping—$5.7 million.[5] *Gemstar* follows another highly publicised gun-jumping case in 2002, *Computer Associates*,[6] as well as a long line of previous US cases that have received considerable scholarly attention.[7]

Gun-jumping has not attracted the same level of attention on the other side of the Atlantic. The European Commission has apparently found a gun-jumping violation in only one notified transaction,[8] and in that case it imposed no fine. The Commission so far has not identified gun-jumping as an enforcement priority. However, unless one believes that European companies are less prone to gun-jumping than US companies, the Commission may be expected, following the example of the US agencies, to become increasingly sensitive to this issue.

What is "gun-jumping"?

The expression "gun-jumping" is not clearly defined in either EU or US competition law. Usually, gun-jumping refers to the partial or complete implementation of a merger, acquisition or joint venture[9] earlier than permitted under applicable merger control law. In a broader sense, gun-jumping may also refer to restrictive agreements or practices between companies that are considering an acquisition, if those agreements or practices would be unlawful in any other circumstances. Thus, gun-jumping violations may be (and in the United States, have been) sanctioned in two different ways:

- As violations of the ECMR and HSR Act prohibitions of the premature implementation of notifiable transactions. The ECMR provides that reportable transactions "shall not be put into

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1 Reg.4064/89 (Merger Control (Antitrust) Regulation) [1989] O.J. L395/1; [1990] 4 C.M.L.R. 286 ("ECMR").

2 15 USC. § 18a (2000).

3 15 USC. § 1 (2000).

4 R. Hewitt Pate, "Antitrust Enforcement at the DOJ — Issues in Merger Investigations and Litigation", speech before the Association of the Bar of the City of New York, December 10, 2002, available at *www.usdoj.gov/atr/public/speeches/200868.htm*.

5 *US v Gemstar-TV Guide International, Inc*, No.03–00198, Proposed Final Judgment, 68 Fed.Reg. 14, 996 (March 27, 2003) at VIII (D.D.C. filed February 6, 2003), available at *www.usdoj.gov/atr/cases/f200700/200731.htm*.

6 *US v Computer Associates International, Inc*, No.01–02062, Proposed Final Judgment and Competitive Impact Statement, 67 Fed. Reg. 41,472 (June 18, 2002), and Complaint for Equitable Relief and Civil Penalties (D.D.C. filed September 28, 2001), all available at *www.usdoj.gov/atr/cases/indx139.htm*.

7 See William Blumenthal, "The Scope of Permissible Coordination Between Merging Entities Prior to Consummation" (1994) 63 *Antitrust Law Journal* 1; M. Howard Morse, "Mergers and Acquisitions: Antitrust Limitations on Conduct Before Closing" (2002) 57 *The Business Lawyer* 1463; David A. Balto and Scott A. Sher, "Navigating Troubled Waters: Managing the Relationship Between Merging Companies" (2003) 6 *The M&A Lawyer* 19; Joseph G. Krauss, " 'Gun-Jumping': What are the Standards Governing Pre-consummation Activities?", *Global Competition Review*, October 2002, p.48.

8 *Bertelsmann/Kirch/Premiere* (1999/153/EC), May 27, 1998 [1999] O.J. L53/1; [1999] 4 C.M.L.R. 700. See Commission press releases IP/97/953, IP/97/1062 and IP/97/1119, available at *http://europa.eu.int/rapid/start/cgi/guesten.ksh*.

9 For convenience, in this article we refer to a typical acquisition agreement and use terms such as "buyer", "seller" or "target". Of course, the issues discussed below also arise in the context of a merger or joint venture.

effect" before regulatory approval.[10] Violations may be punished with fines of up to 10 per cent of the merging parties' aggregate turnover.[11] In the United States, the HSR Act provides for a mandatory waiting period during which the buyer must not acquire "directly or indirectly, any voting securities or assets of any another person".[12] Violations may result in fines of up to $11,000 per day.[13] Under the applicable implementing regulations, a transaction is ultimately deemed to be consummated when the buying party has "beneficial ownership" of the target's shares or assets.[14] The meaning of "beneficial ownership" is not defined in the HSR Act or these implementing regulations, and what constitute indicia of a transfer of beneficial ownership is left to the agencies' interpretation and to judicial review.

- If the parties are competitors, as violations of Art.81 EC (in the European Union) and s.1 of the Sherman Act (in the United States) prohibiting agreements in restraint of competition.[15]

Closing a notifiable transaction without making a required notification, or before approval is received or the waiting period has expired, is the clearest case of gun-jumping under the ECMR or HSR Act. The most difficult interpretive issues, however, arise as a result of pre-closing conduct in notified transactions, such as exchanges of confidential information, involvement by the acquiror in the target's business and, finally, steps to integrate the acquiror's and target's businesses.[16] While the same conduct may constitute a violation of either or both sets of rules, the characterisation of a particular action may affect the applicable procedures and sanctions that can be imposed. Pre-merger clearance does not legitimate previous infringements, so that a gun-jumping violation may be found even where the notified transaction is approved.

EU and US precedents

Enforcement in Europe

In Europe, the Commission has apparently detected and prohibited a partial implementation of a notified transaction before approval only in *Bertelsmann/Kirch/Premiere*.[17]

Bertelsmann/Kirch/Premiere involved a joint venture between Bertelsmann, Kirch and Premiere for the launch of the first digital pay-TV channel in Germany. Shortly after execution of the joint venture agreement and prior to notification, Premiere reportedly started marketing Kirch's digital decoder to subscribers and using such decoder for the purpose of providing its digital television services. The Commission warned the parties that this conduct would amount to the partial implementation of the planned concentration contrary to the ECMR. The Commission threatened to apply fines of up to 10 per cent of the parties' turnover.[18] Following notification, the Commission insisted that, even though "the introduction of a single decoder is not a competition problem," the parties' behaviour represented the partial implementation of the notified agreement and ordered them to cease this behaviour. Thus, the Commission refused to allow this activity to continue until it

10 ECMR, Art.7(1). The Commission has the power to grant derogations from this prohibition under Art.7(4), although the Commission rarely exercises this power. Furthermore, Art.7(3) permits the implementation of a notified public bid provided that the buyer abstains from exercising the voting rights attaching to the shares (or does so only to maintain the full value of its investment) upon the grant of an *ad hoc* derogation by the Commission. The Commission has recently proposed replacing the ECMR with a new regulation, which would involve certain changes to the standstill obligation. See Proposal for a Council Regulation on the control of concentrations between undertakings [2003] O.J. C20/4, paras 65–68. The proposed new Art.7(2) would clarify the definition of "public bids" exempted from the stand still obligation. Under the new proposed Art.7(4), "[t]he Commission may, by regulation, define categories of concentrations for which a derogation within the meaning of paragraph 3 from the obligations imposed in paragraphs 1 and 2 shall be deemed to have been granted subject to the concentration being notified and to any other requirements defined in such a regulation. Such categories may only cover concentrations which, in general, do not lead to a combination of market positions giving rise to competition concerns."

11 ECMR, Art.14(2)(b).

12 15 USC. § 18a(a) (2000).

13 16 C.F.R. § 1.98(a). Officers, directors and partners may also be fined individually. 15 USC. § 18a(g)(1) (2000).

14 16 C.F.R. § 801.1(c)(1).

15 Art.81 EC prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market." S.1 of the US Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal".

16 Antitrust issues under Art.81 and s.1 can also arise at the negotiation stage, although violations during this period may not be described as "gun-jumping". These risks may be especially serious where negotiations are long drawn out, or are intermittent or are restarted after initially failing, or if the initial talks concerned a closer arrangement than the later talks (and therefore involved closer co-operation). Negotiating parties should take precautions including execution of a confidentiality agreement limiting both the information exchanged and its use by the receiving party.

17 See *Bertelsmann/Kirch/Premiere*, n.8 above.

18 See Commission press release IP/97/953, available at *http://europa.eu.int/rapid/start/cgi/guesten.ksh*.

completed its review.[19] In the end, the parties expressly undertook to stop the gun-jumping activities, and the Commission imposed no fine.

While the Commission has shown its readiness aggressively to pursue parties who have not notified concentrations having a Community dimension,[20] *Bertelsmann/Kirch/Premiere* is apparently the only case in which the Commission has officially found a gun-jumping violation in a notified transaction.[21]

Nor has the Commission to date found that co-ordination of competitive behaviour between merging parties violated Art.81. In *Bertelsmann/Kirch/Premiere*, the Commission did not appear to challenge the merging parties' behaviour under Art.81. Nonetheless, Art.81 EC continues to apply to merging parties as long as they are independent. The case law of the Commission and the European courts offers numerous examples of sanctions against agreements and practices between independent competitors that would be illegal between competitors that plan or have agreed to merge but that have not yet done so, including agreements regarding prices, restrictions on investments or output[22] and allocation of customers[23] or territories.[24] The Commission considers these practices as prohibited *per se*.

Perhaps the most common potentially anti-competitive behaviour engaged in by parties planning to merge is the exchange of confidential information. The European courts and the Commission have found that the exchange of confidential information by competitors may violate Art.81,[25] although, contrary to the hard-core cartel activities described above, such exchanges are not prohibited automatically.[26] While some exchanges of information in connection with pre-merger due diligence or integration planning must be justified, exchanges that go beyond such permissible purposes or are not accompanied by measures to limit the scope of such exchanges and the use of the exchanged information may violate Art.81.

19 See Commission press release IP/97/1062, available at *http://europa.eu.int/rapid/start/cgi/guesten.ksh*. A decision to suspend the transaction was required because under the wording of the ECMR in force prior to the adoption of Reg.1310/97 amending the ECMR ([1997] O.J. L180/1; [1997] 5 C.M.L.R. 387), notifiable transactions were automatically suspended for only three weeks following notification, subject to the possibility for the Commission to extend such period until the end of the procedure.

20 In *Skanska/Scancem* (1999/458/EC), November 11, 1998 [1999] O.J. L183/1; [2000] 5 C.M.L.R. 686, para.8, the Commission carried out an investigation at the companies' premises in an effort to determine whether a notification should have been made. The Commission has imposed fines for failure to notify in *Samsung/AST* (1999/594/EC), February 18, 1998 [1999] O.J. L225/12, paras 24–30 and Case IV/M.969 *A.P. Møller* (1999/453/EC), February 10, 1999 [1999] O.J. L183/29, paras 23–25, where the companies concerned had implemented transactions without filing. In *Samsung/AST*, the Commission explained that the ECMR permits fines to be imposed "not only [in cases of] intentional circumvention, but also for negligent circumvention" (para.10). In Case COMP/M.2650 *Haniel/Cementbouw/JV*, June 26, 2002 (on appeal, Case T–282/02 *Cementbouw v Commission*, judgment pending; see also Commission press release IP/02/933, available at *http://europa.eu.int/rapid/start/cgi/guesten.ksh*), Haniel and Cementbouw failed to notify their acquisition in 1999 of joint control of CFK. The parties notified the transaction after the Commission learned about this acquisition in 2002. The Commission found that the transaction created a dominant position, but it approved the concentration subject to the condition that the parties would terminate their joint control over the joint venture. In practice, this was a prohibition decision disguised as a conditional approval decision. This approach may have been intended to allow the companies to avoid fines for implementation of a non-notified anti-competitive concentration.

21 Interestingly, Computer Associates' acquisition of Platinum (see n.6 above) was also notified in Europe, but the Commission approved the transaction without objecting to any gun-jumping violation (see Case IV/M.1580 *CAI/Platinum*, June 28, 1999 [1999] O.J. C227/19).

22 See, *e.g.* Case 246/86 *Belasco v Commission* [1989] E.C.R. 2117, [1991] 4 C.M.L.R. 96; (72/474/EEC), *Cimbel,* December 22, 1972 [1972] O.J. L303/24; *Zinc Producer Group* (84/405/EC), August 6, 1984 [1984] O.J. L220/27, [1985] 2 C.M.L.R. 108; *Italian Cast Glass* (80/1334/EEC), December 17, 1980 [1980] O.J. L383/19, [1982] 2 C.M.L.R. 61; *Welded Steel Mesh* (89/515/EEC), August 2, 1989 [1989] O.J. L260/1, [1991] 4 C.M.L.R. 13 (appeals were mostly unsuccessful save for reduction in some of the fines; see, *e.g.* Case T–141/89 *Tréfileurope Sales v Commission* [1995] E.C.R. II–791); and *Cartonboard* (94/601/EC), July 13, 1994 [1994] O.J. L243/1, [1994] 5 C.M.L.R. 547 (this decision also was in large part upheld in subsequent appeals; see, *e.g.* Case T–295/94 *Buchmann v Commission* [1998] E.C.R. II–816).

23 See, *e.g. Belasco v Commission*, *ibid.*; *European Sugar Industry* (73/109/EEC), January 2, 1973 [1973] O.J. L140/17 (on appeal, Case 40/73 *Suiker Unie v Commission* [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295); *BP Kemi/DDSF* (79/934/EEC), September 5, 1979 [1979] O.J. L286/32, [1979] 3 C.M.L.R. 684 and *Flat Glass* (89/93/EEC), December 7, 1988 [1989] O.J. L 33/44, [1990] 4 C.M.L.R. 535 (on appeal, Case T–68/89 *SIV v Commission* [1992] E.C.R. II–1403, [1992] 5 C.M.L.R. 302, partly annulling the decision on evidential grounds).

24 See, *e.g. Suiker Unie v Commission*, *ibid.*; *Siemens/Fanuc* (85/618/EEC), December 18, 1985 [1985] O.J. L376/29, [1988] 4 C.M.L.R. 945; and *Cement Cartel* (94/815/EC), November 30, 1994 [1994] O.J. L343/1, [1995] 4 C.M.L.R. 327, appealed to the CFI in Case T–26/95 *Cimenteries CBR v Commission* [2000] E.C.R. II–491.

25 See, *e.g.* Case T–1/89 *Rhône Poulenc v Commission* [1991] E.C.R. II–897; Case T–34/92 *Fiatagri UK Ltd. and New Holland Ford Ltd. v Commission* [1994] E.C.R. II–905; Case T–35/92 *John Deere Ltd v Commission* [1994] E.C.R. II–957; *Cimenteries CBR v Commission*, n.24 above; and Case T–16/98 *Wirtschaftsvereinigung Stahl v Commission* [2001] E.C.R. II–1217, [2001] 5 C.M.L.R. 9 (in this case, the CFI applied Art.65 of the ECSC Treaty, which is equivalent to Art.81). See also *Cobelpa/VNP* (77/592/EEC), September 8, 1977 [1977] O.J. L242/10, [1977] 2 C.M.L.R. D28; *Vegetable Parchment* (78/252/EEC), December 23, 1977 [1978] O.J. L70/54, [1978] 1 C.M.L.R. 534; *Fatty Acids* (87/1/EEC), December 2, 1986 [1987] O.J. L3/17, [1989] 4 C.M.L.R. 445; *Flat Glass*, n.23 above; and *Cement Cartel*, n.24 above.

26 *Wirtschaftsvereinigung Stahl v Commission*, n.25 above, para.44.

Enforcement in the United States

The most recent and striking example of the US authorities' prosecution of gun-jumping violations is the DOJ's action against Gemstar-TV Guide International, Inc ("Gemstar") and TV Guide, Inc ("TV Guide"). Prior to closing, the parties agreed to stop marketing their services in competition with one another and allocated customers between them.[27] Gemstar had a right of approval over TV Guide's customer contracts and, in turn, TV Guide acted as Gemstar's agent in customer negotiations and third-party settlement negotiations.[28] Finally, the parties shared substantial information about prices, marketing strategies and capacity. The DOJ alleged that this conduct amounted to a *de facto* acquisition by each merging party of assets of the other party in violation of the HSR Act, as well as to a violation of s.1 of the Sherman Act.[29] To settle the allegations, the parties agreed to pay a civil penalty of $5,676,000, the maximum amount allowable under the HSR Act.[30] The proposed consent decree authorises the exchange of data during due diligence activities, provided that a non-disclosure agreement guarantees that this information is used only for the purposes of due diligence and is not disclosed to persons engaged in competition with the disclosing company.[31]

Before *Gemstar*, concerns regarding the early transfer of management control and exchanges of confidential information were raised in connection with Computer Associates International, Inc's ("Computer Associates") acquisition of Platinum Technology International, Inc ("Platinum")[32] In this case as well, the DOJ focused on Computer Associates' influence over Platinum's day-to-day business prior to antitrust approval. For instance, Platinum was prohibited from altering its standard contract terms or offering more than a 20 per cent discount from its list prices without the approval of Computer Associates, which was also allowed to make certain day-to-day management decisions for Platinum. For this purpose, a vice-president of Computer Associates moved to Platinum's headquarters.[33] The DOJ found the parties' conduct to infringe both the HSR Act and the Sherman Act. The HSR allegations were settled by payment of a $638,000 penalty, and a consent decree limited the permitted exchange of information on terms and conditions similar to those in *Gemstar*.[34]

In both *Gemstar* and *Computer Associates*, the buyers exercised an unusual level of influence over the target's business prior to antitrust approval. The same occurred, according to the FTC, in connection with Input/Output, Inc's acquisition of DigiCOURSE, Inc in 1999.[35] The FTC claimed that steps taken to integrate the parties' businesses gave Input/Output effective ownership of DigiCOURSE, immediately after execution of the agreement, in violation of the HSR Act. The parties paid a $225,000 penalty, the maximum allowed on the basis of the FTC's allegations.[36]

Two other US precedents involved challenges to a different type of gun-jumping violation. In 1992, the DOJ and the FTC commenced action regarding the sale of a subsidiary by Atlantic Richfield Company (ARCO) to UF Genetics, Inc.[37] UF Genetics paid all of the consideration at execution (49 per cent to ARCO and 51 per cent in escrow). In return, ARCO simultaneously surrendered all of the acquired shares (subject to the same 49/51 split) and granted UF Genetics an immediate and permanent right to vote all of the shares, including those in escrow. The agencies alleged that this arrangement constituted an immediate transfer of beneficial ownership and therefore violated the HSR Act. To settle the case, both parties separately agreed to pay civil penalties.[38]

In a separate case involving ARCO, the agencies focused on the transfer of excessive economic risk as a gun-jumping violation in the context of ARCO's 1989 acquisition of certain assets from Union Carbide Corporation.[39] ARCO made a non-refundable payment of the purchase price to Union Carbide on the execution date and agreed that, if the parties could not later consummate the transaction for antitrust reasons, a

27 *US v Gemstar-TV Guide International, Inc*, No.03–00198, Complaint for Equitable Relief and Civil Penalties, paras 43–44 (D.D.C. filed February 6, 2003), available at *www.usdoj.gov/atr/cases/f200700/200737.htm*.
28 See *Gemstar*, *ibid*., Complaint for Equitable Relief and Civil Penalties, paras 56–58.
29 *ibid*.paras 73, 81.
30 See *Gemstar*, n.5 above, Proposed Final Judgment, at VIII.
31 *ibid*.at V.
32 *US v Computer Assocs. Int'l, Inc*, n.6 above, Complaint for Equitable Relief and Civil Penalties.
33 *ibid*.para. 5.
34 *US v Computer Assocs. Int'l, Inc*: see n.6, Proposed Final Judgment and Competitive Impact Statement.
35 *US v Input/Output, Inc*, No.99–0192, Complaint for Civil Penalties for Violation of Premerger Reporting Requirements of the Hart-Scott-Rodino Act, (D.D.C. filed April 12, 1999), available at *www.usdoj.gov/atr/cases/f2300/inputoutput_complaint.pdf*.
36 *US v Input/Output, Inc*, No.99–0192, Final Judgment (D.D.C. May 13, 1999), available at *www.usdoj.gov/atr/cases/f23000/inputoutput-fj.pdf*.
37 *US v Atlantic Richfield Co.*, 1992–1 Trade Cas. (CCH) ¶ 69,695 (D.D.C. 1992) (as to ARCO); and *US v Atlantic Richfield Co.*, 1992–1 Trade Cas. (CCH) ¶ 69,803 (D.D.C. 1992) (as to U.F. Genetics).
38 See "Arco resolves charges of not notifying FTC, DOJ before sale of subsidiary's stock", 62 *Antitrust & Trade Reg. Rep.* (BNA) 110 (January 30, 1992). See *Atlantic Richfield Co.*, n.37 above, 1992–1 Trade Cas. (CCH) ¶ 69,803.
39 *US v Atlantic Richfield Co.*, 1991–1 Trade Cas. (CCH) ¶ 69,318 (D.D.C. 1991).

trustee would sell the business to a third party and deliver the proceeds to ARCO. Further, ARCO assumed responsibility for all liabilities of the business as of the date of execution, and the parties agreed on a purchase price adjustment mechanism to transfer to ARCO any operating losses or revenues associated with the business after execution. ARCO and Union Carbide each agreed to pay a $1 million civil penalty in respect of the HSR Act violation.[40]

As noted above, if merging parties are competitors, conduct that violates the HSR Act may also violate s.1 of the Sherman Act.[41] In view of the 1990 acquisition of Universal Bearings, Inc ("Universal") by The Torrington Company ("Torrington"),[42] the president of Universal told a particular Universal customer to purchase parts from Torrington and, following discussions about which of the two companies should supply parts, refused to quote a price at which Universal would supply the parts. In the consent order, the parties agreed to cease and desist from the alleged conduct and to report to the FTC about their ongoing activities.

The Sherman Act may also apply to pre-merger exchanges of information. Such exchanges are generally reviewed under the rule of reason.[43] As a result, an analysis of whether the information exchange unreasonably restrains competition must take into account the legitimate purposes of negotiating, planning for and completing the anticipated transaction. Thus, providing confidential information in connection with pre-merger due diligence or integration planning may be reasonable, even if the same exchange between two competitors who did not intend to merge would be suspect or unlawful. Nevertheless, information exchanges may be closely scrutinised in the merger context, particularly in situations where the parties were vigorously competing prior to filing. The DOJ cited such exchanges of information as aspects of the Sherman Act violations alleged in both the *Gemstar* and *Computer Associates* cases.[44]

Conclusions and practical suggestions

The contrast between the aggressive US prosecution of gun-jumping violations and the Commission's apparent lack of interest in this area is striking, particularly if one considers that the ECMR's prohibition against putting a notifiable transaction "into effect" before approval appears, on its face, to provide a clearer statutory basis than the HSR Act for prohibiting gun-jumping violations short of a premature closing. The fines that may be imposed for gun-jumping violations under the ECMR are also potentially higher than those that may be imposed in the United States.[45] Similarly, the treatment of hard-core cartel activities such as co-ordination of prices and allocation of products, territories and customers, as well as information exchanges, are similar in the European Union and the United States. The different approach to gun-jumping thus does not reflect major differences in the underlying legal principles.

There are a number of possible explanations for the Commission's relative inaction. Since the adoption of the ECMR, notified merger transactions have been examined by the Directorate-General Competition's Merger Task Force, *i.e.* not by the officials normally in charge of cases involving the application of Art.81; conversely, the rest of DG Comp does not review merger transactions. Under the procedural regime established by Reg.17/62,[46] DG Comp has been forced to devote a substantial part of its resources to processing notifications on Form A/B, often in cases not raising significant antitrust issues, thus reducing the resources available for it to pursue violations on its own initiative.

Further, the ECMR thresholds for notification to the Commission are generally higher than those for HSR Act filings. These thresholds limit the Commission's review to larger transactions, when compared to the US agencies. Parties to these transactions may be expected to be more aware of antitrust issues, and more likely to

40 *ibid.*
41 See Mary Lou Steptoe, "Remarks Before the National Health Lawyers Association", February 14, 1991 and "Prepared remarks before the American Bar Association, Section of Antitrust Law", March 22, 1990. Note that one federal court of appeals has questioned the view that the Sherman Act continues to apply until the parties consummate their merger. The Eighth Circuit held in *International Travel Arrangers v NWA, Inc* that two merging parties could "lack independent economic consciousness" as a result of an executed, but unconsummated, merger agreement and thus be incapable of conspiring for purposes of Sherman Act liability. 991 F.2d 1389 (8th Cir. 1993).
42 *The Torrington Co.*, 114 F.T.C. 283 (1991).
43 See *US v US Gypsum Co.*, 438 U.S. 422 (1978); John M. Sipple, "Gun Jumping and Exchanges of Competitively Sensitive Information", Corporate Counseling Report-ABA (Winter 2002), p.4; and Mary Lou Steptoe, Acting Director, Bureau of Competition, FTC, "Remarks before the ABA Antitrust Section Spring Meeting", April 7, 1994, p.5.
44 See *Gemstar*, n.28 above, Complaint for Equitable Relief and Civil Penalties, paras 59–62, and *Computer Associates, Inc.*, n.6 above, Proposed Final Judgment and Competitive Impact Statement. See also *Insilco Corp.*, 125 F.T.C. 293 (1998), in which the FTC detected an anti-competitive exchange of information and obtained a consent decree preventing Insilco from exchanging information on price quotes, details of prior negotiations and current and future pricing strategies with any potential merger partner for a period of 20 years.
45 See nn.10–11 and the related text.
46 Reg.17/62 First Regulation implementing Articles 85 and 86 of the E.C. Treaty [1962] J.O. P13/204.

seek antitrust advice on the limits of permissible pre-clearance conduct, than parties notifying transactions under the HSR Act.

Whatever the reason for the disparity between the approach of the Commission and the DOJ and FTC so far, it is questionable whether this disparity will continue. For one thing, the intensified US focus on gun-jumping violations will be closely watched in Brussels. Secondly, with the end of the Commission's exclusive power to apply Art.81(3) EC under Reg.1/2003,[47] DG Comp will have more resources to pursue antitrust violations on its own initiative. Thirdly, the partial reorganisation of DG Comp's merger control activities along sectoral lines will encourage the control of gun-jumping by ending the rigid separation between DG Comp officers who enforce the ECMR and those who enforce Art.81 EC.[48]

In the absence of clear EU precedents, parties to concentrations having a Community dimension would be well advised to avoid the following types of conduct that have led to the imposition of fines and other sanctions in the United States.

- *Unprotected exchanges of information.* The parties should not share competitively sensitive information beyond what is required for legitimate purposes such as negotiation, due diligence and integration planning. The parties should share such information only in accordance with a confidentiality agreement limiting the use of the information to consideration of the transaction and its disclosure to persons who need access to it for this purpose. Special care may be appropriate in sensitive situations, such as where the exchange of information may go both ways (in a merger or joint venture, for example) or where the parties are competitors in a concentrated market. US precedents recognise that exchanges of confidential information for due diligence purposes are permissible if the information is protected by an appropriate confidentiality agreement. Good arguments can be made that exchanges of confidential information for purposes of integration planning should also be permissible. In this case, however, consideration should be given to creating special procedures, for instance limiting such exchanges to members of a "clean team" not involved in either party's day-to-day business operations.
- *Premature integration of the parties' businesses.* Although the exchange of confidential information for integration planning purposes should be permitted if appropriate precautions are taken, activities prior to closing that lead to changes in the target's business conduct should be avoided. Examples of such conduct could include transfers of personnel or the target's employees holding themselves out as representatives of the buyer and vice versa. The parties should also be careful to avoid giving the appearance of acting as a single company, for instance by changing their business cards or letterhead, the target using the buyer's name when answering to customer phone calls, and the like.
- *Transfer of management control.* Before closing, the buyer must not exercise or be in a position to exercise any management control over the target's business. This issue commonly arises in the negotiation of "ordinary course" covenants in merger or purchase agreements, which typically limit the seller's freedom to manage the target's business during the pre-closing period, protecting the integrity of the target's business. While customary limits to unusual operations or material changes to the target's business are acceptable, subjecting the target's routine management decisions to approval by the buyer, or giving the buyer an influence over the target company's conduct, may constitute a gun-jumping violation.
- *Co-ordination of competitive behaviour.* Before closing, the parties should not under any circumstances co-ordinate their competitive behaviour, for instance by co-ordinating their marketing strategies, agreeing on prices or allocating products, territories or customers. Examples of such conduct would include the parties' ceasing to compete against one another for particular contracts or allocating customers, the seller granting the buyer unlimited access to the target's premises and accounting and administrative records, or forming joint committees to monitor the target's business.[49] Similarly, the parties should not conduct joint sales

47 Reg.1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] O.J. L1/1. Reg.1/2003 will come into effect on May 1, 2004.

48 See Commission press release IP/03/603, available at *www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/603\0\RAPID&1g=EN&display=*

49 The Italian Antitrust Authority detected similar conditions in *Groupe Canal/Stream*. Following notification, the Italian Authority decided to open an in-depth investigation and, for the first time, ordered the suspension of a notified transaction (Case C5109, February 28, 2002, Bulletin No.7/2002).

activities or enter into negotiations or commitments on behalf of the other party prior to closing.

- *Transfer of an excessive amount of the business risk associated with the target's business.* In its proceedings against *ARCO*,[50] the FTC took the position that a transfer of the economic risk associated with the target's business prior to approval of the transaction was a gun-jumping violation. Although this case has been criticised by US practitioners,[51] and it is questionable whether the Commission would follow the US precedents in this area, it would be prudent to review merger or purchase agreements to ensure that the transfer or allocation of economic risks does not remove the seller's incentive to compete or to preserve the integrity of the target's business.

What activities may constitute gun-jumping depends on the facts and circumstances of the case. Especially in transactions that may raise substantive antitrust issues, the parties to notifiable transactions should consult antitrust counsel early in the negotiation process. Antitrust counsel will want to pay particular care to pre-closing covenants in the transaction documents, which may give the buyer an influence in the conduct of the target's business prior to closing, as well as to the scope of proposed due diligence and integration planning by the parties, whether or not they are required by the transaction documents. Applying the same level of prudence to notifiable transactions under the ECMR as merging parties are required to apply in the United States should help the parties to such transactions avoid making new EU gun-jumping law.

50 See nn.39 and 40 and the related text.
51 See Joseph G. Krauss, "'Gun-Jumping': What are the Standards Governing Pre-consummation Activities?", n.7 above.