



LIDC Webinar
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Risk of Failing to Notify a Transaction: Gun Jumping

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Failure to notify and gun jumping

- Failure to notify reportable mergers:
 - infringement of Art. L. 430-8 I of the French Commercial Code (subject to fine of up to 5% of French turnover)
 - infringement of Art. 4(1) and 7(1) of the EUMR (subject to fine up to 10% of aggregate turnover (Art. 14(2) EUMR))
- Gun-jumping (implementing a notified transaction before clearance):
 - infringement of Art. L. 430-8 II of the FCC (subject to fine of up to 5% of French turnover)
 - infringement of Art. 7(1) (not 4(1)) of the EUMR (subject to fine up to 10% of aggregate turnover (Art. 14(2) EUMR))

Failure to notify – Recent cases (1/2)

■ France:

- 11 May 2012, *Colruyt* (12-D-12): €392,000 fine; confirmed by Conseil d'Etat, 24 June 2013, *Colruyt*
- 31 Jan. 2013, *Réunica* (13-D-01): €400,000 fine
- 20 Dec. 2013, *Castel* (13-D-22): €4 million fine; reduced to €3 million on appeal due to lack of intent (CE, 15 April 2017, *Copagef*)

■ European Commission:

- 10 June 2009, *Electrabel/CNR* (M.4994): €20 million fine; confirmed by General Court, 12 December 2012, *Electrabel v. European Commission* (T-332/09)
- 23 July 2014, *Marine Harvest/Morpol* (M.7184): €20 million fine; confirmed by General Court, 26 October 2017, *Marine Harvest v. European Commission* (T-704/14)

Failure to notify – Recent cases (2/2)

- Takeaways from General Court, 26 October 2017, *Marine Harvest v. European Commission* (T-704/14):
 - a situation in which the *de facto* sole control of the target is acquired by means of a single initial private transaction is followed by a mandatory public offer resulting in *de jure* control do not constitute a single concentration (initial acquisition of *de facto* control must be notified);
 - under these circumstances, Art. 7(2) EUMR (derogation in case of a public bid provided the acquirer does not exercise voting rights) does not apply because control has already been acquired by means of an initial private acquisition;
 - the seriousness of infringement is compounded by the fact the fact that the merger raised serious doubts, that its implementation could have had an adverse impact on competition in the relevant market and that it was "*at least possible that the competitive interaction between the [acquirer and the target] had been affected as a result of [the initial unreported acquisition]*" (para. 501)

Gun Jumping – Recent cases (1/3)

- European Commission:
 - SO issued in *Altice/PT Portugal* (M.7993): press release IP/17/1368
- French Competition Authority:
 - 8 November 2016, *Altice*, 16-D-24: €80 million for jumping the gun in *Altice/SFR* and *Altice/OTL (Virgin Mobile)*
 - Three questions (Michael Cousin's presentation):
 - i. Are veto rights over certain target decisions still permissible?
 - ii. Do clean teams still constitute an effective safeguard against gun-jumping?
 - iii. Could the merging parties work together on future products before clearance?

Gun Jumping – Recent cases (2/3)

- Veto rights after the French *Altice* decision:
 - the decision recognizes that acquirers may protect their financial interests in mergers by using provisions that prevent the target from depreciating their business (§ 199). Test: whether those provisions restrain the target's autonomy to a point where the acquirer exercises decisive influence
 - in *Altice* (*Virgin Mobile* deal), veto rights not limited to significant investments and instead amounted to day-to-day control
- Clean teams after the French *Altice* decision:
 - due diligence or integration planning are legitimate and permissible provided the parties do not disclose strategic information under the meaning of the Guidelines on Horizontal Cooperation Agreements
 - *Altice* decision does not ban clean teams as a valid safeguard – rather invites striking the right balance between the type of safeguards adopted and the content of information to be exchanged

Gun Jumping – Recent cases (3/3)

- Discussing future products before clearance:
 - baseline principle: the purpose of the standstill obligation is to prevent harm to emerge as a result of the merger. It also makes it possible to implement effective remedies or to prohibit a merger. As a result, the standstill obligation means that merging parties must remain competitors before clearance;
 - the FCA found that exchanging strategic information (here designing future commercial offers) in anticipation of the merger amounts to gun jumping if the exchange relates to significant aspects of the Parties' business activities (§ 293);
 - in *Altice*, the Parties exchanged information on a new set-up box and future pricing, all significant factors of retail differentiation and competition. Ceasing to compete on those aspects of their business thus contributed to gun jumping.



Thank you for your attention.