# Integration planning and pre-closing conduct: gun-jumping risks

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Complex transactions are subject to an increased level of antitrust scrutiny by competition authorities. This often results in extended waiting periods between signing and closing – it can nowadays be one year or even longer before the parties are able to implement the deal. For the acquiring company it is often important to start planning the integration of the target into the future organization already during that period to maximize deal value.

At the same time competition authorities across the globe are increasingly looking more closely at potential "gun jumping" violations. In 2016, the **French competition authority** imposed a record fine of **€80 million** on telecoms operator Altice for early implementation of two transactions and the exchange of commercially sensitive information without the appropriate safeguards in place. In a second case involving Altice, the **European Commission** recently issued a **Statement of Objections** alleging several gun-jumping violations in relation to its 2015 acquisition of PT Portugal. If the Commission were to issue a fining decision against Altice this would be the first fine for such a violation at EU level (previous fining decisions concerned failure to notify situations). In Germany, the **Federal Cartel Office** (FCO) prohibited the early implementation of a framework agreement for the bundling of purchases, the transfer of central purchasing functions and the closing down of "carve out" branches in the **Edeka/Tengelmann** case in 2014 without however imposing a financial penalty (the FCO's position was only partially accepted by the Higher Regional Court Düsseldorf and, to the extent it was confirmed, with a different reasoning). Several other countries have also recently imposed sanctions for “jumping the gun”, incl. the US (Duke Energy in 2017), Brazil (Technicolor/Cisco Systems, 2016) and Norway (Norgesgruppen, 2014).

In a broad sense “gun jumping” includes (i) the early implementation of the deal, (ii) inappropriate exchange of commercially sensitive information and (iii) a failure to notify the transaction in the first place.

***Early implementation of the deal*.** Most merger regimes provide for a standstill obligation, which means that the transaction cannot be implemented before the competition authority has cleared the deal. During that time, one can already plan for the integration of the target company, but the transaction must not already be implemented. This rule appears clear-cut in theory, but it can be difficult to determine in practice whether a specific behaviour is allowed or not. In some cases, violations are obvious, e.g. the acquirer cannot yet effectively control / influence the target’s strategic business decisions before clearance / closing. But how about the installation of an IT system by the acquirer at the target during the stand-still period? How about sharing financial reporting methodology and parameters between the parties and testing the target’s system with “dummy data” before merger clearances have been obtained? Can the HR departments of the parties meet and discuss specifics of post-closing employees redundancies?

From recent precedent cases it seems that the following factors are taken into account by different competition authorities in relation to potential gun-jumping:

(i) is the measure **merger-specific** or taken irrespective of the transaction?

(ii) can the measure be easily **reversed** if needed or is it irreversible?

(iii) **timing** – measures taken early in the process are more problematic than those shortly before closing after all merger clearances have been obtained.

(iv) does the measure potentially have **market effects**?

(v) is the measure a **unilateral** one or taken jointly by the parties?

After the French Altice decision companies should also take care in relation to **buyer consent rights for non-ordinary course of business actions** as part of pre-closing covenants in SPAs. Any such consent rights should be closely tied to the **preservation of the target’s value**. Thresholds, e.g. for the target’s capital expenditure, should be set at an **appropriate level** in order to avoid any influence over ordinary course activities in practice. It will not always be easy to determine what the appropriate level is in the individual case (as this will vary by sector) and caution should be exercised in light of Altice.

***Exchange of competitively sensitive information***. Such information must not be exchanged between competitors before closing outside of clean team structures. Examples of competitively sensitive information include prices, customer lists, production costs, capacities and investment, marketing or strategic business plans. Factors that are commonly taken into account when determining whether information is competitively sensitive are (i) market structure / the respective market positions of the parties, (ii) level of aggregation of the data, (iii) age of the data, (iv) whether the data is publicly available and (v) when in the process such data is shared (prior to merger clearance vs. post-clearance). In both – the French and EU – Altice case the exchange of sensitive information without the appropriate safeguards in place was raised as an issue by the authorities.

Another question is how **clean teams** should be structured and who should be part of them. Any clean team structure needs to be **robust and defendable** vis-à-vis competition authorities and should involve only a limited number of company employees, ideally without any business / operational responsibilities. In its Altice decision the French competition authority criticized that sensitive information was only channelled through in-house counsel and that this was not sufficient to prevent the information to be shared more widely. For the exchange of highly sensitive information it may be necessary to set up a "super clean team" staffed only with external advisors – this may however not always be the most practical solution from a business perspective.

***Failure to notify***. This relates to the situation where companies do not notify a transaction for which a notification requirement exists. At EU level, there are two prominent cases – Electrabel (2010) and Marine Harvest (2014). In both cases, the companies were fined €20 million each for their failure to notify a reportable concentration. We have also seen such cases at EU Member States level, e.g. in France, the Netherlands and Portugal. Authorities outside of the EU are increasingly active in this area as well. In January 2017, MOFCOM fined Canon for its failure to notify the acquisition of Toshiba, the first foreign-to-foreign transaction to be sanctioned in China (with a limited fine of ~€39,000). In the US, ValueAct was fined US$11 million for violation of the HSR filing requirement in

2016.

This is a space to watch: we may have additional **clarity and guidance** after a **decision by the Commission in the Altice case** has been taken and also from the **European Court of Justice** following a preliminary ruling referral of several gun-jumping questions by a Danish court in the Danish **EY/KPMG merger case**.