

# **Gun-Jumping:** How do you protect clients from compliance violations?

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# Agenda

- ▶ What is gun jumping?
- ▶ Why is it a hot topic now?
- ▶ Identifying the boundary line when a merger is implemented (and what can we learn from recent cases)
- ▶ Managing derogations in practice
- ▶ What businesses can do to manage compliance

## What is gun jumping?

- ▶ Implementing a merger;
- ▶ When there is a prohibition against doing so;
- ▶ Pending a merger clearance.

NB – In the UK, also need to consider practical risks in lawful implementation of a merger, where implementation might be unwound, or paused part way.

## Why is gun-jumping a hot topic?

- ▶ At UK level, routine use of IEOs has created more circumstances where there is a gun-jumping prohibition, even within a voluntary regime
- ▶ At EU and UK level, recent cases have clarified what “implementing a merger” means
- ▶ In both jurisdictions (and others), much greater focus on enforcement, with more cases and more fines (part of a wider trend re procedural requirements)

# Why is gun-jumping a hot topic?

Case	Gun-jumping action	Date	Jurisdiction	Fine
EY/KPMG	CSI/pre-merger coordination	May 2018 (ECJ judgment)	EU	n/a
Altice/Portugal Telecom	veto rights/operational decisions/CSI	April 2018 (decision, under appeal)	EU	€124.5 m
Ansurus/CuFe	Directing payments/lack of delegation authority	December 2018 (decision)	UK	£300,000
Electro Rent/Micolease	Exercising break option on lease/Appointing director	Feb 2019 (CAT judgment)	UK	£100,000 £200,000
JLA/Washstation	Sale of stock	March 2019 (decision)	UK	£120,000
Nicholls/DCC Energy	Staff relocation/use of branding/failure to provide compliance statements	July 2019 (decision)	UK	£146,000
Cannon/Toshiba	Use of warehousing structure	September 2019 (appeal filed)	EU	€28 m
Paypal/iZettle	Selling campaign beyond scope of derogation	September 2019 (decision)	UK	£250,000

## When is a merger being implemented? (EU perspective)

- ▶ Warehousing provisions to avoid appearance of control are unlikely to work:  
*Cannon/Toshiba*
- ▶ Protection against material adverse change between exchange and completion need to be strictly limited to the necessary: *Altice/Portugal Telecom*
- ▶ Key threshold is change of control over the target: *Altice/Portugal Telecom, EY/KPMG*
- ▶ But actions falling short of change of control might also be caught by Article 101:  
*EY/KPMG*

## Case study: *Altice*

- ▶ Altice fined 124.5m EUR for obtaining veto rights over PT Portugal's ordinary business
- ▶ Focus on three areas which contributed to an infringement:
  - rights granted in transaction agreement went beyond what was necessary to preserve value
  - Altice exercised control over operational decisions that did not impact value
  - extensive unnecessary CSI disclosed by PT Portugal to Altice without the appropriate safeguards
- ▶ EC stated whether a measure falls within the ordinary course of business serves as a “good indication” as to whether it will have a material impact on the value of the target

## When is a merger being implemented? (UK perspective)

- ▶ Compliance with IEO a proxy for “not implementing merger” – they are designed to prevent integration and ensure competition between businesses continues
- ▶ Prevents the taking of action “which might prejudice a reference...or impede the taking of any action under the [EA02] which may be justified by the CMA’s decisions on such a reference”
- ▶ Captures more than just actual prejudice or impediments
- ▶ Onus is on the addressee to consider their conduct and comply
- ▶ BUT no option to self assess impact - if derogation necessary from strict requirements of IEO, it must be sought from CMA (*Electro Rent*) and derogation must be complied with within its limits (*Paypal/iZettle*)

# Mergers before and after imposition of IEO

Pre-imposition of IEO: nothing to prevent merger implementation/integration steps, BUT:

- ▶ Actions taken pre-IEO, if implemented or lead to follow on actions post IEO, will breach it (*JLA/Washstation, Nicholls/DCC Energy*)
- ▶ Pre-IEO integration steps can be unwound (*Tobii/Smartbox, Bottomline/Experian*)
- ▶ IEOs not solely a concern for completed or Phase 2 mergers. Can be imposed where the CMA is concerned about integration of merging businesses in cases of anticipated mergers

# Derogations

## CMA

- ▶ Granted to:
  - ▶ safeguard viability of target business
  - ▶ ensure effective operation of interim measures
  - ▶ meet obligations
- ▶ Must not create risk of pre-emptive action
- ▶ Usually needed and granted to fit specific circumstances of the merger

## EC

- ▶ Consider, on a 'balance of interests':
  - ▶ effects of the suspension on one or more undertakings
  - ▶ threat to competition posed by concentration
- ▶ High bar for granting of derogations - exceptional circumstances only

## Practical tips: An overview

- ▶ Need to consider gun-jumping risk and compliance at an early stage and throughout the transaction:
  - ▶ Throughout, in relation to exchange of CSI
  - ▶ In negotiation of the SPA
  - ▶ in the period between exchange and completion, when exercising Gap controls or planning integration
- ▶ UK cases where an IEO is likely need careful advance planning: to anticipate and plan for derogations, to have a proper compliance framework

## Practical tips: Information Exchange

- ▶ Is the information necessary for the purpose it is being shared?
- ▶ CSI should only be shared with appropriate controls in place
- ▶ Keep records of safeguards which are implemented prior to exchange of CSI
- ▶ Consider gap provisions in the SPA and the possibility of decisive influence through provision and use of information

## Practical tips: Gap Provisions

- ▶ Veto rights should be genuinely necessary for value preservation:
  - ▶ Materiality thresholds set at an appropriate level
  - ▶ No coverage of ordinary course business decisions
  - ▶ Avoid conferring control in practice e.g. through excessive acquirer oversight
- ▶ Post-signing
  - ▶ Follow procedure and scope agreed in covenants
  - ▶ Take conservative approach to exercising rights under pre-closing covenants
  - ▶ Any CSI involved should be exchanged only under express protocols with safeguards

## Practical Tips: Mandatory filings - implementation planning vs implementation

- ▶ To ensure that the acquirer is not crossing the line to exercise control over target prior to clearance, parties should avoid:
  - ▶ implementing the merger e.g. joint decisions on business plans, or consultation of acquirer on plans
  - ▶ acquirer managing, directing or participating in day-to-day business decisions of the target
  - ▶ taking possession or control of any assets or businesses of the target
  - ▶ acquirer nominating directors for the target
  - ▶ integrating IT or other resources
  - ▶ entering into commercial relationships with each other (other than on an arm's length and ordinary course basis)
  - ▶ holding out employees as being employed by the other party
  - ▶ joint marketing
  - ▶ relocation of staff to the other party's properties

## Practical Tips: CMA issues

- ▶ Integrate at risk if not using a CP – CMA has powers to unwind integration and has used these recently
  - ▶ Tobii/Smartbox (April 2019)
  - ▶ Bottomline/Experian (August 2019)
- ▶ Work with parties to gain a thorough understanding of integration that has occurred and potential issues
- ▶ Consider potential derogation requests prior to implementation of IEO
- ▶ Provide clear and concise guidance to the businesses on compliance with the IEO
- ▶ Communicate with the CMA if in doubt

# Questions?

# EC Case Updates

## Canon/Toshiba appeal penalty decision, September 2019

- ▶ Canon was fined €28 million for partially implementing acquisition of Toshiba prior to notification through the use of a two-step warehousing structure
  - ▶ 1. 95% of shares transferred from Toshiba to MS Holding (a special purpose company indirectly set up by the parties) for €800
  - ▶ 2. Canon immediately paid entire purchase price (€5.28 billion) to Toshiba for 5% stake and option to acquire MS Holding's 95% stake
  - ▶ 3. Canon exercised share option
- ▶ EC found that above steps were all part of a single transaction
- ▶ September 2019 - Canon seeks annulment of Commission's decision

## EY/KPMG, May 2018 (ECJ case C-633/16)

- ▶ The scope of gun-jumping rules was clarified by the ECJ in this case
- ▶ Standstill obligation was limited to actions directly related to bringing about a change in control
- ▶ Highlighted that pre-merger coordination outside the scope of suspension obligation may fall under Article 101
- ▶ Judgment may provide more scope for certain pre-clearance measures

# CMA Case Updates

## Ansurus/CuFe Investments Penalty Decision, December 2018

▶ Fines totalling £300k imposed for:

- directing customers of the target business to make payment into the acquirer's bank account and making payments to suppliers of the target from the acquirer's bank account, without seeking the consent of the CMA
- failing to give the MD of the target business a clear delegation of authority to take decisions without consulting, or obtaining the permission of, the acquiring business

▶ The CMA noted that the breaches took place after the first time the CMA had imposed a fine for breach of an IEO, with the level of fine set as a deterrent

## PayPal/iZettle Penalty Decision, September 2019

- ▶ PayPal fined £250,000 for breaching IEO
- ▶ CMA found PayPal had acted beyond the remit of a derogation granted by the CMA:
  - ▶ CMA granted a derogation allowing cross-selling pilot campaigns involving PayPal's non-UK businesses;
  - ▶ In conducting such activities, PayPal contacted a number of UK customers and failed to put adequate safeguards in place to prevent this
- ▶ The breach risked undermining the separate sales identities of PayPal and iZettle

## Nicholls/DCC Energy Penalty Decision, July 2019

- ▶ Fines totalling £146k imposed for:
  - ▶ relocation of staff from target's offices to premises occupied by Nicholls prior to CMA giving written consent (£120k)
  - ▶ use of Nicholls-owned and branded mini-tanker and Nicholls' drivers to make deliveries to customers of the target business (£20k)
  - ▶ failing to provide three compliance statements (£6k)
- ▶ Shows that consequent actions, even where taken prior to the IEO being in force / as a result of integration prior to IEO, must be assessed in light of the IEO

## JLA/Washstation Penalty Decision, March 2019

- ▶ Fine of £120k by CMA for sale of stock which potentially impaired the ability to compete independently
- ▶ The stock sold was a distinguishing characteristic between the two businesses
- ▶ No internal or external counsel were informed by JLA of the proposed sale when the IEO came into force
- ▶ Gaps in emails relating to compliance with the IEO considered by the CMA an aggravating factor
- ▶ CMA suggested both occurrence and completion must take place before the commencement of the IEO for there to be no breach