Premerger Coordination

The Emerging Law of Gun Jumping and Information Exchange

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request or subpoena additional information, conduct depositions, open an entirely separate and parallel investigation, or use other investigative tools. Party resources also are likely to be diverted from the substantive merger review to the gun-jumping investigation. Unlawful premerger coordination may also affect the government's views of party arguments or credibility. The practical implication of a gun-jumping investigation is that the merger review takes additional time and resources and delays the closing of the merger. This is an additional cost of gun jumping in addition to the penalties identified above.

In the most extreme case, gun jumping can provide the government with demonstrable evidence that the merger is, in some respect, anticompetitive. For example, if prices increase as a result of the buyer taking operational control of the seller or the seller refraining from competing against the buyer, the agencies may equate such price increases to an anticompetitive effect of the merger.

SUMMARY OF PREMERGER COORDINATION ENFORCEMENT ACTIONS

This chapter summarizes all of the enforcement actions to date relating to premerger coordination under Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Section 7A or the HSR Act),[1] section 1 of the Sherman Act (Section 1 or the Sherman Act),[2] or section 5 of the Federal Trade Commission Act (Section 5 or the FTC Act)[3] brought by the Antitrust Division of the Department of Justice (the DOJ) or the Federal Trade Commission (the FTC) (collectively the agencies). These actions provide the richest source of information on the DOJ's and FTC's approach to gun jumping.[4] These actions proceeded on a number of different theories, including premature transfer of beneficial ownership and preconsummation acquisition of operational control under the HSR Act, unreasonable restraints of trade under Section 1, and unfair methods of competition under Section 5. In addition, all the orders are settlements, most of which were filed simultaneously with the complaint. Each summary identifies the factual allegations as a whole and the particular allegations that formed the basis for each count claimed by the government. Each summary also describes the remedy agreed to by the parties and the relevant agency. Prior chapters should be reviewed for further details on the relevant law discussed here. The actions are presented chronologically.

A. United States v. Atlantic Richfield Co. (ARCO I) (1991)[5]

According to a government complaint, in 1989, Atlantic Richfield Co. (ARCO) entered an agreement to acquire urethane polyether polyol and propylene glycol assets and operations from Union Carbide Corp.

1. 15 U.S.C. § 18a.
2. *Id.* § 1.
3. *Id.* § 45.
4. For limitations on the value of enforcement actions as gun-jumping authority, see Chapter 1.A.
5. 1991-1 Trade Cas. (CCH) ¶ 69,318 (D.D.C. 1991) [hereinafter *ARCO I* Order].

(Union Carbide).[6] The complaint alleges that, on September 27, 1989, prior to making a filing required under the HSR Act, ARCO

> paid Union Carbide Chemicals in full for the Union Carbide assets, which payment, according to the terms of the acquisition agreement, was non-refundable, even if [ARCO was] later blocked from taking title to the Union Carbide assets as a result of the subsequent Hart-Scott-Rodino antitrust review.[7]

According to the complaint, "[u]nder the terms of the acquisition agreement [Union Carbide was] to operate the business in the ordinary course and in accordance with its existing business plan."[8] Union Carbide continued to operate the business, with the understanding that if ARCO was prohibited from acquiring the assets for antitrust reasons, a trustee would sell the assets to an alternate acquirer and pass the proceeds to ARCO.[9] Further, after September 27, 1989, ARCO "was required to cover liabilities from the continued operation of the Union Carbide assets . . . including environmental liabilities."[10] The FTC filed a complaint in district court seeking a preliminary injunction that would prevent any future transfer of beneficial ownership and rescind prior premature transfers. The court case was stayed pending completion of the FTC investigation.

Thereafter, the FTC referred the matter to the DOJ. The government complaint, filed in conjunction with a proposed settlement, alleged that ARCO and Union Carbide violated the HSR Act by executing and implementing a purchase and sale agreement that transferred beneficial ownership of the Union Carbide assets such that ARCO acquired the assets prematurely.[11] To resolve the alleged violation of Section 7A, ARCO and Union Carbide each agreed to pay a civil penalty of $1 million.[12]

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6. Complaint for Civil Penalties for Violation of Premerger Reporting Requirements of [the] Hart-Scott-Rodino Act ¶ 11, *ARCO I*, 1991-Trade Cas. (CCH) ¶ 69,318 (No. 91-0205). The *ARCO I* Complaint is reproduced at Appendix 1 to this book.
7. *Id.* ¶ 12.
8. *Id.* ¶ 13.
9. *Id.* ¶ 15.
10. *Id.* ¶ 14.
11. *Id.* ¶¶ 17, 20-21.
12. *ARCO I* Order, *supra* note 5.

In addition to its investigation under the HSR Act, the FTC concluded that the acquisition was likely to violate section 7 of the Clayton Act (Section 7)[13] and Section 5 by lessening competition substantially for urethane polyether polyol, propylene glycol, and potential competition for a third product.[14] ARCO and Union Carbide settled the matter by entering into a consent order that required the parties to divest the assets of Union Carbide as well as other assets previously acquired by ARCO from Texas Chemical Company.[15]

B. United States v. Atlantic Richfield Co. (ARCO II) (1992)[16]

This was another enforcement action the FTC referred to the DOJ. The government complaint alleged that on December 29, 1986, U.F. Genetics agreed to acquire the voting securities of the ARCO Seed Company from ARCO for $18 million.[17] Simultaneously, U.F. Genetics allegedly obtained 49 percent of the outstanding stock of ARCO Seed, and received the "immediate and permanent right to vote the remaining 51 percent of ARCO Seed"[18] voting securities, which were transferred to an escrow agent.[19] ARCO received 49 percent of the $18 million purchase price ($8.82 million) and 51 percent of the purchase price was put into escrow ($9.18 million).[20] The government charged that this

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13. 15 U.S.C. § 18.
14. *See* Complaint, *In re* Atlantic Richfield Co., 113 F.T.C. 1050, 1050 (1990) (No. C-3314) (alleging that the merger of ARCO and Union Carbide violated § 7); *see also* Press Release, Fed. Trade Comm'n, FTC Authorizes Staff to Seek an Injunction Against ARCO's Acquisition of Union Carbide Assets (June 29, 1990), http://www.ftc.gov/opa/predawn/F93/arco-ucc.htm.
15. *See Atlantic Richfield*, 113 F.T.C. at 1060-63.
16. There are two orders relating to this matter (one for each company involved), 1992-1 Trade Cas. (CCH) ¶ 69,695 (D.D.C. 1992) [hereinafter *ARCO II* Order] (final judgment for ARCO); 1992-1 Trade Cas. (CCH) ¶ 69,803 (D.D.C. 1992) [hereinafter *U.F. Genetics* Order] (final judgment for U.F. Genetics).
17. Complaint for Civil Penalties for Violation of Premerger Reporting Requirements of the Hart-Scott-Rodino Act ¶ 22, *ARCO II*, 1992-1 Trade Cas. (CCH) ¶ 69,695 (No. 91-3267). The *ARCO II* Complaint is reproduced at Appendix 2 to this book.
18. *Id.* ¶ 18.
19. *Id.* ¶¶ 18-20.
20. *Id.* ¶ 22.

transaction transferred beneficial ownership of 100 percent of the ARCO Seed voting securities.[21] The parties filed their HSR Act notifications the following day, and the HSR Act waiting period expired on January 29, 1987.[22]

Thereafter, the government charged the companies with selling stock prior to making their HSR Act notifications. In 1992, after delays caused by U.F. Genetics' bankruptcy filing, separate judgments were entered against ARCO and U.F. Genetics, in which the companies agreed to pay civil penalties of $290,000 and $150,000, respectively.[23] Based on the alleged 31-day violation of the HSR Act, the maximum civil penalty that could have been assessed against each company under then-existing law was $310,000.

C. In re Torrington Co. (1991)[24]

According to an administrative complaint issued by the FTC, Torrington Company (Torrington) and Universal Bearings, Inc., (Universal) violated Section 5 by taking actions that restrained competition and affected customers during the HSR Act waiting period.[25]

According to the FTC's complaint, in 1990 Torrington sought to acquire Universal and its needle roller business. On April 11, 1990, Torrington's parent company, Ingersoll-Rand Co., and Universal each made the requisite HSR Act notifications and, on May 11, 1990, each received a request for additional information and documentary material from the FTC, which extended the HSR Act waiting period.[26]

Universal, knowing that Torrington intended to consolidate both companies' axle shaft production after consummation, allegedly decided to exit the market for axle shafts.[27] Following discussions between Universal and Torrington as to "whether Torrington could supply axle shafts to [one of Universal's customers] to meet the customer's immediate production schedules,"[28] Universal allegedly "advised

21. *Id.* ¶¶ 23-24.
22. *Id.* ¶ 26.
23. *See ARCO II* Order, *supra* note 16, § II; *U.F. Genetics* Order, *supra* note 16, § II.
24. 114 F.T.C. 283, 285 (1991) [hereinafter *Torrington* Order].
25. *See* Complaint ¶ 5, *Torrington*, 114 F.T.C. at 284 (No. C-3330).
26. *See id.*
27. *Id.* ¶ 7.
28. *Id.* ¶ 6.

Torrington of its [exit] plan and suggested to the customer that it purchase the product from Torrington."[29] The customer apparently maintained its desire to purchase from Universal, and in the end, Universal acquiesced. When the customer approached Universal for a price quote on a different type of axle shaft, however, Universal allegedly "returned the customer's request with a 'No Quote' pursuant to its . . . plan 'to get out of the axle business as soon as it is possible.'"[30]

The FTC alleged that these actions violated Section 5 during the waiting period. The FTC alleged that the conduct may have stabilized or fixed prices for needle-roller components.[31]

The FTC entered a consent order in which Torrington and Universal agreed that, for future transactions involving rollers, pins, and axle shafts, each company would refrain from "directing, implementing or otherwise providing for any consolidation of the business or assets of the person to be acquired and the acquiring person prior to the consummation of the proposed acquisition."[32] In the analysis of proposed consent order to aid public comment, the FTC stated that neither "customary due diligence in order to determine the value of the business or assets [to be acquired],"[33] nor "planning, independently or jointly, for consolidation of the business or assets after the acquisition is consummated"[34] was prohibited by the language in the consent order.[35]

The FTC's complaint did not allege a violation of Section 7A and did not seek civil penalties.[36] In November 1990, the FTC did, however, find that the proposed transaction was likely to lead to a substantial lessening of competition under Section 7 and Section 5 and authorized the staff to seek a preliminary injunction. Torrington and Universal

29. *Id.* ¶ 7.
30. *Id.* ¶ 8.
31. *Id.* ¶ 9.
32. *Torrington* Order, *supra* note 24, § I.
33. Torrington Co.; Proposed Consent Agreement With Analysis to Aid Public Comment, 56 Fed. Reg. 7712, 7714 (F.T.C. Feb. 25, 1991).
34. *Id.*
35. *Id.*
36. The FTC does not have direct authority to prosecute violations of § 7A. Rather, the FTC refers such matters to the DOJ for enforcement. *See* Chapter 4 (discussing FTC referrals of HSR Act matters to the DOJ).

abandoned the transaction after the FTC indicated that it was prepared to seek a preliminary injunction to challenge the merger.[37]

D. United States v. Titan Wheel International, Inc. (1996)[38]

On May 7, 1996, after a referral from the FTC, the DOJ issued a complaint alleging that Titan Wheel International, Inc. (Titan) agreed on July 17, 1994, to acquire the agricultural tire business of Pirelli Armstrong Tire Corporation (Pirelli) and related operations at Pirelli's facility in Des Moines, Iowa.[39] At about the same time, the union servicing Pirelli's Des Moines facility was on strike, as the collective bargaining agreement under which the union operated had expired on July 15, 1994.

According to the complaint, after executing the acquisition agreement, and

> [p]ending the closing of the acquisition, [Pirelli] has agreed to permit [Titan] to have immediate possession and use (but not title) to, and to operate, the acquired assets (and to hire the employees) at the Facility for [Titan's] account, but subject to an "unwinding" . . . in the event that the closing does not occur.[40]

For thirteen days (i.e., until July 29th) and prior to modifications of the purchase agreement returning possession and control to Pirelli that followed an inquiry from the Premerger Notification Office of the FTC,

37. Press Release, Fed. Trade Comm'n, FTC Charges Torrington [and] Universal Bearings [of] Illegally Started Consolidating Businesses During Merger Review; Companies Settle Charges With Consent Agreement (Feb. 11, 1990), http://www.ftc.gov/opa/predawn/F93/universal2.txt.
38. 1996-1 Trade Cas. (CCH) ¶ 71,406 (D.D.C. 1996), *available at* http://www.usdoj.gov/atr/cases/f2600/2640.htm [hereinafter *Titan Wheel* Order].
39. Complaint for Civil Penalties for Violation of Premerger Reporting Requirements of the Hart-Scott-Rodino Act ¶ 14, *Titan Wheel*, 1996-1 Trade Cas. (CCH) ¶ 71,406 (No. 96-01040) [hereinafter *Titan Wheel* Complaint]. The *Titan Wheel* Complaint is reproduced at Appendix 3 to this book.
40. *Id.* ¶ 16 (quoting Titan Premerger Notification and Report Form).

Titan allegedly had operational control of the assets and commenced some manufacturing at Pirelli's facility despite the ongoing strike.[41]

The government asserted in its complaint that Titan's actions during the thirteen days violated Section 7A of the Clayton Act by taking control of Pirelli's assets prior to the conclusion of the government's review.[42] In a settlement filed simultaneously with the complaint, Titan agreed to pay the maximum civil penalty of $10,000 per day for violating Section 7A, resulting in a total penalty of $130,000.[43]

Notably, the Commission did not challenge the underlying acquisition as a substantial lessening of competition or unfair method of competition, and the companies consummated the transaction after expiration of the HSR Act waiting period.

E. In re Insilco Corp. (1998)[44]

According to the FTC's administrative complaint, Insilco Corporation (Insilco), through a series of transactions (for which HSR Act notifications appear not to have been required), acquired aluminum tube manufacturing facilities from its competitor, Helima-Helvetion, Inc. (Helima).[45] The relevant acquisitions, according to the complaint, made Insilco the only supplier or one of only two suppliers in various markets for welded aluminum tubes.[46] In response to a potential FTC challenge to enjoin the transaction under Section 7, Insilco agreed to divest certain assets related to welded aluminum tubes.[47]

41. *Id.* ¶¶ 17-19; Fed. Trade Comm'n Annual Report to Congress for Fiscal Year 1996 (undated), *available at* http://www.ftc.gov/bc/hsr/96anrpt.htm (noting that the parties amended their agreement after an inquiry from the FTC).
42. *See Titan Wheel* Complaint, *supra* note 39, ¶¶ 21-23.
43. *Titan Wheel* Order, *supra* note 38, § II. Pirelli did not pay any civil penalty.
44. 125 F.T.C. 293, 297 (1998), *available at* http://www.ftc.gov/os/1998/01/insilcodo.pdf [hereinafter *Insilco* Order].
45. Complaint ¶ 7, *Insilco*, 125 F.T.C. at 293 (No. C-3783), *available at* http://www.ftc.gov/os/1998/01/insilcocmp.pdf [hereinafter *Insilco* Complaint]. This appears to be the only gun-jumping enforcement action brought by either the FTC or DOJ based solely upon an information exchange without any other premerger conduct.
46. *Id.* ¶ 13.
47. *Insilco* Order, *supra* note 44, § II.

In addition, the FTC asserted that Insilco and Helima violated Section 5 of the FTC Act by exchanging certain nonpublic customer data prior to completion of the acquisitions. Information allegedly exchanged included "descriptions of prior customer negotiations; detailed customer-by-customer price quotes; current pricing policies and strategies; and detailed, customer-by-customer future pricing strategies."[48] The complaint alleged that such information exchanges could have resulted in anticompetitive harm if the acquisitions had been abandoned or delayed.[49]

To prevent similar information exchanges by Insilco in the future, the consent order limited Insilco's ability to obtain or provide certain nonpublic information prior to consummating an acquisition. Thus, during the term of the consent order, Insilco is prohibited from exchanging with a competitor: "(1) current or future Non-Aggregated, Customer-Specific Information; (2) current or future pricing plans; (3) current or future strategies or policies related to competition; and (4) analyses or formulas used to determine costs or prices,"[50] unless the information is first provided to an independent agent for masking and aggregation.[51] If the proposed transaction involves a competitor in the design, manufacture, or sale of certain welded aluminum tubes, the restrictions are effective for a period of twenty years,[52] double the standard time span of an FTC consent order relating to mergers or acquisitions at the time. For acquisitions involving a competitor in any other product or service, the restrictions apply for the standard ten-year term.[53]

F. In re Commonwealth Land Title Insurance Co. (1998)[54]

In this matter, the FTC alleged that Commonwealth Land Title Insurance Co. (Commonwealth) and First American Title Insurance Co. (First American) were the only operators of privately-owned title plants in the District of Columbia through which customers could obtain real

48. *Insilco* Complaint, *supra* note 45, ¶ 9.
49. *Id.* ¶ 18.
50. *Insilco* Order, *supra* note 44, §§ V.A, V.B.
51. *Id.* § V.C.
52. *Id.* § V.A.
53. *Id.* § V.B.
54. 126 F.T.C. 680, 684 (1998), *available at* http://www.ftc.gov/os/1998/11/9810127.do.htm [hereinafter *Commonwealth* Order].

property ownership information.[55] The FTC further alleged that in November 1997, the companies consolidated their operations into one of First American's title plant locations, following negotiations dating back to 1996 for a possible joint venture between the two companies and a September 1997 letter of intent to form a joint venture entity.[56]

According to the FTC, after the consolidation of title plants in 1997, Commonwealth began changing commercial terms offered to its customers. For example, pending formation of the joint venture, Commonwealth began terminating customer contracts, providing services jointly with First American, and requiring customers to sign new interim contracts, with some prices "significantly higher . . . than under their prior contracts for title plant services."[57] Further, the new contracts "did not permit some forms of title plant access which had been available to customers and users under their prior contracts for title plant services."[58]

The FTC asserted that the joint activity violated Section 5 and the joint venture, if consummated, would violate section 7 of the Clayton Act.[59] To settle FTC concerns that the transaction would substantially lessen competition, Commonwealth agreed: (1) to separate its facilities from First American's, (2) to relocate and maintain an independent title plant competing with First American, (3) to rescind all agreements relating to services jointly provided by Commonwealth and First American, (4) for a period of one year, to offer services under the prices, terms, and conditions in effect prior to consolidation of the companies' facilities, and (5) to pay refunds to customers that were charged prices during the period of consolidation that were less favorable than the prices

55. Complaint ¶ 10, *Commonwealth Land Title Ins.*, 126 F.T.C. at 682 (No. C-3835), *available at* http://www.ftc.gov/os/1998/11/9810127cmp.htm [hereinafter *Commonwealth* Complaint].
56. *Id.* ¶ 11. The joint venture was never formally consummated, however, because in response to questions from FTC staff, the companies abandoned their efforts to combine.
57. *Id.* ¶¶ 12-13.
58. *Id.* ¶ 13.
59. *Id.* ¶¶ 15-16. The joint venture was not reportable under the HSR Act. *See* Joseph G. Krauss, Ass't Director, Bureau of Competition, Fed. Trade Comm'n, New Developments in the Premerger Notification Program, Prepared Remarks Before the District of Columbia Bar Association (Oct. 7, 1998), http://www.ftc.gov/os/1998/10/dcbar.htm.

negotiated under contracts in effect before November 1997.[60] Refunds were to be paid based on the difference in price between the preconsolidation and postconsolidation contracts.[61] To provide customers with notice of their rights and Commonwealth's obligations under the order, Commonwealth agreed to provide written notice to all customers within fourteen days of signing the order.[62]

To prohibit future violations, Commonwealth agreed, for a period of twenty years, to

> cease and desist from entering into, attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, or continuing or attempting to continue, any combination, agreement, or understanding, express or implied, for the purpose or with the effect of raising, lowering, fixing, maintaining or stabilizing the price, terms or other forms or conditions of compensation paid for title plant services in the District of Columbia.[63]

G. United States v. Input/Output, Inc. (1999)[64]

On September 30, 1998, Input/Output, Inc. (Input/Output), a manufacturer of seismic data acquisition systems, allegedly executed an Agreement and Plan of Merger with a subsidiary of The Laitram Corporation (Laitram), DigiCOURSE.[65] DigiCOURSE manufactured cable positioning systems and was allegedly the sole source for a specific system integral to ocean seismic data acquisition systems.[66] The parties made their HSR Act notifications two weeks after the merger agreement was executed, but the agencies took no formal action against the

60. *Commonwealth* Order, *supra* note 54, §§ II.A-E.
61. *Id.* § II.E.
62. *Id.*
63. *Id.* § V.
64. 1999-1 Trade Cas. (CCH) ¶ 72,528 (D.D.C. 1999), *available at* http://www.usdoj.gov/atr/cases/f203600/203656.htm [hereinafter *Input/Output* Order].
65. Complaint for Civil Penalties for Violation of Premerger Reporting Requirements of the Hart-Scott-Rodino Act ¶ 13, *Input/Output*, 1999-1 Trade Cas. (CCH) ¶ 72,528 (No. 99-00912), *available at* http://www.usdoj.gov/atr/cases/f203600/203653.htm [hereinafter *Input/Output* Complaint].
66. *Id.* ¶ 6.

transaction. The HSR Act waiting period expired on November 13, 1998.[67]

The DOJ, upon the recommendation and with the participation of the FTC, initiated legal action against Input/Output and Laitram for violations of the HSR Act alleged to have occurred during the HSR Act waiting period.[68] Specifically, the complaint alleged that the companies engaged in a pattern of conduct, beginning no later than October 10, 1998, and lasting more than twenty days, by which Input/Output "took operational control of DigiCOURSE's business" thereby "transfer[ring] beneficial ownership of DigiCOURSE to Input/Output prior to the expiration of the [HSR Act] waiting period."[69]

The alleged preconsummation conduct that prematurely gave Input/Output beneficial ownership of DigiCOURSE included: (1) restructuring Input/Output into product-based units under which "[m]anagers of the newly structured Input/Output Marine managed all operations of DigiCOURSE and the existing marine operation of Input/Output";[70] (2) assigning at least three other DigiCOURSE employees positions within Input/Output;[71] and (3) holding DigiCOURSE out to the world as a part of Input/Output.[72]

The government also alleged that Input/Output used DigiCOURSE officers to act as its representatives, including the president of DigiCOURSE who "traveled to the United Kingdom to resolve a commercial dispute between Input/Output and one of its customers,

67. *Id.* ¶¶ 13, 18.
68. Although analysis of the merger under § 7 of the Clayton Act was conducted by the FTC, the matter was referred to the DOJ for prosecution under § 7A. The FTC remained involved in the matter and eventually voted to approve a settlement with Input/Output and DigiCOURSE.
69. *Input/Output* Complaint, *supra* note 65, ¶ 16.
70. *Id.* ¶ 15a.
71. *Id.* ¶¶ 15a-d.
72. At least six DigiCOURSE employees, who were moved into Input/Output's offices, "received Input/Output e-mail addresses and access to Input/Output's internal reports and e-mail systems." *Id.* ¶ 15b. DigiCOURSE employees "obtained business cards bearing Input/Output titles," *id.* ¶ 15c, that were "distributed to DigiCOURSE customers and others." *Id.* The government did not assert that information sharing independently violated the antitrust laws, and no separate remedial action relating to the information sharing was sought. Further, the "phones in all DigiCOURSE offices were answered under the Input/Output name." *Id.* ¶ 15d.

Horizon Exploration, Ltd."[73] Further, the president of DigiCOURSE "was consulted by Input/Output officials and asked to review and comment upon the possible acquisition by Input/Output of another marine equipment company."[74]

To settle the allegations contained in the complaint, Input/Output and Laitram each agreed to pay $225,000 in civil penalties.[75] These penalties covered the period from October 10 until Input/Output and Laitram took steps, starting approximately November 3, 1998, to cease actions that allegedly violated Section 7A.[76] The civil penalties accepted as settlement represented a significant portion (but not all) of the $11,000 per day civil penalty the government could have sought against each company under existing law.

H. United States v. Computer Associates International, Inc. (2002)[77]

The DOJ filed a gun-jumping complaint against Platinum Technology International, Inc. (Platinum) and its alleged horizontal competitor Computer Associates International, Inc. (Computer Associates). According to the DOJ's complaint, on March 29, 1999, Computer Associates and Platinum agreed to merge.[78] The DOJ alleged

73. *Id.* ¶ 15e.
74. *Id.* ¶ 15f.
75. *Input/Output* Order, *supra* note 64, § II.
76. Such steps included: (1) "DigiCOURSE officials vacat[ing] their Input/Output offices, leaving behind any internal Input/Output materials, turning in Input/Output business cards, and terminating participation in Input/Output Marine's business"; and (2) Input/Output "sen[ding]letters to its customers stating that the acquisition had not yet been consummated and asking them to contact Input/Output officials with questions regarding its own product line." *Input/Output* Complaint, *supra* note 65, ¶ 17.
77. 2002-2 Trade Cas. (CCH) ¶ 73,883, at 95,249 (D.D.C. 2002) [hereinafter *Computer Associates* Order]. The DOJ has posted the proposed final judgment on its website, which is identical to the final judgment and can be found at http://www.usdoj.gov/atr/cases/f11000/11083.htm.
78. Complaint for Equitable Relief and Civil Penalties ¶ 1, *Computer Assocs.*, 2002-2 Trade Cas. (CCH) ¶ 73,883 (No. 01-02062), *available at* http://www.usdoj.gov/atr/cases/f9200/9246.htm [hereinafter *Computer Associates* Complaint]. *Computer Associates* put an end to a minor debate in the antitrust community concerning whether gun jumping was purely an FTC concern because, prior to this complaint, the DOJ had never

that certain provisions in the Merger Agreement and conduct following implementation of that agreement violated both Section 1 and Section 7A.[79]

The complaint alleged that the merger agreement contained "extraordinary"[80] restrictions on Platinum's preconsummation conduct, removing Platinum as an independent competitor.[81] For example, the complaint alleged that the merger agreement prohibited Platinum from doing the following without Computer Associates' prior written approval:

> (ii) enter[ing] into any agreement pursuant to which [Platinum] will provide services for a term of more than 30 days at a fixed or capped price or otherwise pursuant to terms that are not consistent with agreements entered into by [Platinum] in the ordinary course of business, (iii) enter[ing] into any customer sale or license agreement with non-standard terms or at discounts from list prices in excess of 20%, . . . [and] (viii) enter[ing] into or amend[ing] any contract to provide for "year 2000" remediation services.[82]

These provisions, according to the DOJ, granted Computer Associates sole authority to decide "whether to grant exceptions to these business restrictions during the HSR Act waiting period and [Computer Associates] installed a Division Vice President at Platinum headquarters to approve Platinum customer contracts."[83] Further, Computer Associates allegedly "entered into consulting and non-compete agreements with Platinum's Chief Executive Officer, Chief Operating Officer, and Chief Financial Officer that included provisions providing that each may be

independently brought a gun-jumping action. For industries over which the DOJ has expertise in merger review, this complaint served as notice that gun jumping would be enforced actively by both federal agencies.
79. *Id.* ¶¶ 4-5. Moreover, the DOJ found competitive problems with the proposed transaction in six markets related to mainframe systems management software and required divestitures in each market. *Id.* ¶ 13.
80. *Id.* ¶ 2.
81. In support of this allegation, the DOJ cited a 1999 Platinum Form 10-Q SEC filing stating that "the merger agreement imposes extremely tight restrictions on [Platinum's] ability to take various actions and to conduct its business without Computer Associates' consent. These restrictions could have a severe detrimental effect on [Platinum's] business." *Id.* ¶ 17.
82. *Id.* ¶ 16 (quoting section 5.1(j) of the merger agreement).
83. *Id.* ¶ 2.

held personally liable if Platinum failed to comply [with the relevant provisions] of the Merger Agreement."[84]

Following execution of the merger agreement, Computer Associates and Platinum allegedly engaged in conduct that transferred operational control of Platinum to Computer Associates. For example, Platinum allegedly altered its ordinary course customer contracting process such that "Platinum sales representatives were required to complete contract pre-approval forms"[85] and submit them to Computer Associates for approval. When filled out, the forms allegedly provided Computer Associates with competitively sensitive information such as "the customer, the products or services offered, list price, discount, and a justification for the discount."[86] "The forms also contained a section for CA [Computer Associates] to note its approval."[87] According to the complaint, "the Platinum sales representatives were required to submit the pre-approval forms and supporting documents (e.g., the contract and/or statement of work) to a contract review and approval team located at Platinum's Oakbrook Terrace headquarters,"[88] which could "approve or reject the contract or request additional information from the Platinum sales force."[89]

Computer Associates' alleged control allowed it "to systematically collect competitively sensitive information relating to Platinum's competitive bids,"[90] some of which was provided to Computer Associates employees who were "involved in the competitive bid process."[91] Computer Associates also allegedly "changed Platinum's method of booking revenues and reversed revenues previously recognized for customer contracts"[92] and "cancel[led] Platinum's participation at a trade show where Platinum would have presented its products and sought future business."[93]

The complaint alleged that Platinum's and Computer Associates' activities affected Platinum's prices, and denied customers competition

84. *Id.* ¶ 18.
85. *Id.* ¶ 20.
86. *Id.*
87. *Id.*
88. *Id.* ¶ 21.
89. *Id.*
90. *Id.* ¶ 25.
91. *Id.*
92. *Id.* ¶ 26.
93. *Id.*

in violation of Section 1.[94] The conduct allegedly reduced discounts offered by Platinum (which had previously offered discounts at up to 80 percent of standard prices when faced with significant competition),[95] as

> some Platinum sales representatives modified their normal discounting practices and kept discounts below the levels on which [Computer Associates] and Platinum had agreed, including bids where the sales representatives would have otherwise recommended, and Platinum would likely have approved, discounts above agreed-upon levels.[96]

When Platinum representatives did recommend discounts, the government complaint alleged that Computer Associates sometimes "found the justification given to support an exception was insufficient, [and Computer Associates] requested further explanation or required the offer to be modified before granting approval."[97]

With respect to Section 7A, the government asserted that, upon executing the merger agreement, Computer Associates took control of Platinum's customer contracting process by

> (a) installing CA employees at Platinum headquarters to review and approve customer contracts; (b) restricting Platinum's right to set discounts for software products and consulting services without CA's approval; (c) limiting Platinum's right to negotiate terms of customer contracts without CA's approval; (d) limiting Platinum's right to enter fixed-price contracts without CA's approval; (e) limiting Platinum's right to offer Y2K remediation services without CA's approval; (f) collecting and disseminating within CA competitively sensitive information, including the identity of Platinum's prospective customers and the specific price, discounts and contract terms offered to each customer; and (g) making day-to-day management decisions, including decisions related to recognition of revenue and participation at industry trade shows.[98]

To remedy the Section 7A violation the defendants, jointly and severally, agreed to pay a civil penalty of $638,000.[99] The civil penalty covered the fifty-seven days (from the first full day after the parties

94. *Id.* ¶ 32.
95. *Id.* ¶ 19.
96. *Id.* ¶ 23.
97. *Id.* ¶ 24.
98. *Id.* ¶ 37.
99. *Computer Associates* Order, *supra* note 77, § VIII.

signed the merger agreement – March 30 – until expiration of the HSR Act waiting period on May 25, 1999) that the parties were in violation of the HSR Act.[100] The government could have sought the maximum $11,000 per day penalty from both Computer Associates and Platinum, for a total of approximately $1.27 million, but the settlement only required a joint and several payment of $638,000. The DOJ obtained no affirmative injunctive relief with respect to the Section 7A violation. The relevant materials do not explain why the DOJ did not require the defendants to adhere to affirmative conduct restrictions in future transactions.

In contrast, to remedy the Section 1 violation, the DOJ obtained equitable relief that required Computer Associates to adhere to certain conduct restrictions for a period of ten years.[101] In particular, the order prohibited Computer Associates from agreeing with any transaction partner, prior to consummation of the transaction, to

> (A) establish[] any price or discount for any product or service of the other party to be purchased, used or re-sold in the United States; (B) grant[] to one party to the transaction the right to negotiate, approve or reject any bid or customer contract for any product or service of the other party to be purchased, used or re-sold in the United States; and (C) require[] a party to provide bid information to the other party for any product or service to be purchased, used or re-sold in the United States.[102]

The judgment further required Computer Associates to implement an antitrust compliance program and to provide the government with periodic reports and written certifications of compliance.[103]

In addition to restricting the conduct of Computer Associates, the order identified lawful premerger conduct in which Computer Associates may engage when contemplating another transaction.[104] The order delineated certain provisions that Computer Associates could place in a merger or acquisition agreement, despite the conduct remedies imposed on the company. Such permissible provisions included a commitment

100. The merger was consummated three days after expiration of the waiting period, *Computer Associates* Complaint, *supra* note 78, ¶ 14, but penalties under Section 7A were not applicable for that time period.
101. *Computer Associates* Order, *supra* note 77, §§ IX, X.
102. *Id.* § IV.
103. *Id.* §VI.
104. *Id.* § V.

that the to-be-acquired person or assets operate the business in the ordinary course consistent with past practices, a condition that the person holding the relevant assets refrain from conduct that would cause a material adverse change, and a provision that the to-be-acquired person not sign contracts that grant enhanced rights or discounts upon a change of control. The order also permitted Computer Associates to engage in reasonable and customary due diligence. If the transacting party is a competitor, however, Computer Associates cannot receive or provide prospective bid or pricing data, unless they are material to future earnings and are subject to a nondisclosure agreement that limits their use and prohibits persons at the receiving party involved in pricing, marketing, or sales of the relevant product or service from reviewing the bid or pricing materials.[105]

Furthermore, the DOJ listed customary conduct of business provisions that likely do not violate the HSR Act because they are reasonable and necessary to a legitimate business interest, such as protection of the value of assets to be acquired.[106] The DOJ's list of acceptable provisions includes restrictions on the rights of the to-be-acquired person to

> (1) [d]eclare or pay dividends or distributions of its stock; (2) issue, sell, pledge, or encumber its securities; (3) amend its organizational documents; (4) acquire or agree to acquire other businesses; (5) mortgage or encumber its intellectual property or other material assets outside the ordinary course; (6) make or agree to make large new capital expenditures; (7) make material tax elections or compromise material tax liabilities; (8) pay, discharge or satisfy any claims or liabilities outside the ordinary course; and (9) commence lawsuits other than routine collection of bills.[107]

105. *Id.*
106. Competitive Impact Statement § II.C.2, *Computer Assocs.*, 2002-2 Trade Cas. (CCH) at 95,256 (No. 01-02062), *available at* http://www.usdoj.gov/atr/cases/f11000/11082.htm.
107. *Id.*

I. United States v. Gemstar-TV Guide International, Inc. (2003)[108]

According to allegations in the DOJ complaint, before merging, Gemstar International Group Limited (Gemstar) and TV Guide, Inc. (TV Guide) competed to provide interactive program guides (IPGs)[109] and IPG technology used by subscription and satellite television service providers and by manufacturers of consumer electronics.[110] To resolve patent infringement litigation pending between the companies, Gemstar and TV Guide allegedly commenced negotiations in June 1999 to form a joint venture that would market IPGs and related products.[111] According to the complaint, when joint venture talks failed, the companies decided instead to merge, signing a merger agreement in October 1999.[112] The parties reported the transaction under the HSR Act. In July 2000, after a review that lasted several months, the parties consummated the transaction without further government action.[113]

In its complaint, issued several years after the merger was consummated, the DOJ alleged that before and during the HSR Act waiting period, Gemstar and TV Guide engaged in various activities that violated Section 1 and Section 7A. The complaint contained three counts arising out of the Sherman Act and one count that Gemstar and TV Guide acquired operational control over each others' assets prior to the end of the HSR Act waiting period in violation of Section 7A.[114]

The first count under the Sherman Act centered around an agreement between Gemstar and TV Guide during joint venture negotiations. "[I]f they proceeded with negotiations to combine their IPG businesses in a joint venture, [Gemstar and TV Guide] would 'slow roll' one or more service providers, i.e., to cease or suspend competition for that

108. 2003-2 Trade Cas. (CCH) ¶ 74,082, at 96,764 (D.D.C. 2003), *available at* http://www.usdoj.gov/atr/cases/f201400/201493.htm [hereinafter *Gemstar* Order].
109. IPGs allow the user to preview programming schedules, view program information, and select programs.
110. *See* Complaint for Equitable Relief and Civil Penalties ¶ 2, *Gemstar*, 2003-2 Trade Cas. (CCH) ¶ 74,082 (No. 03-00198), *available at* http://www.usdoj.gov/atr/cases/f200700/200737.htm. Examples of consumer electronics that employ IPGs include televisions and video cassette recorders.
111. *Id.* ¶¶ 29-30.
112. *Id.* ¶¶ 31-32.
113. *Id.* ¶ 3.
114. *Id.* ¶¶ 64-84.

business."[115] Two customers allegedly affected by the agreement between Gemstar and TV Guide were Cox Communications, Inc., and Charter Communications, Inc.[116]

The second Sherman Act count alleged that, between signing the merger agreement and consummation, Gemstar and TV Guide agreed, "with minor exceptions, to allocate the relevant market(s) to TV Guide and, more specifically, not to compete for particular service provider customers."[117] The parties allegedly implemented this plan using two agreements

> a general agreement that Gemstar would phase out its marketing operations in the relevant markets in order to focus on sales and licensing of IPGs to consumer electronics . . . firms while TV Guide negotiated IPG agreements with most service providers . . . [and a more specific agreement] to allocate specific service provider customers between them, reaching specific understandings as to whether TV Guide or Gemstar would approach and negotiate with particular customers.[118]

The more specific agreement included a commitment that "TV Guide would negotiate with most service providers . . . adhering to prices and terms developed in coordination with Gemstar."[119] The DOJ asserted that Gemstar phased out its IPG business except to "small service providers that used technology platforms that were different from those used by traditional cable and satellite television service providers";[120] these small providers typically were not serviced by TV Guide.

The third Section 1 count involved an alleged agreement between Gemstar and TV Guide "on the prices and terms to be offered and charged to service providers in contracts offered and executed prior to the consummation of the merger agreement."[121] Under the alleged terms of the agreement,

> TV Guide's offers to service providers would generally adhere to the "standard terms" that [Gemstar and TV Guide] had previously agreed

115. *Id.* ¶ 66.
116. *See id.* ¶¶ 37-43.
117. *Id.* ¶ 70.
118. *Id.* ¶¶ 44-45.
119. *Id.* ¶ 46.
120. *Id.* ¶ 47.
121. *Id.* ¶ 74.

> upon, with details and responses to counter-offers to be worked out through further discussion between the merging parties.[122]

Information shared between Gemstar and TV Guide to facilitate these terms allegedly included "detailed and specific information about many offers and counter-offers to large service providers"[123] and descriptions of "various individual contacts with customers."[124] The government claimed that "TV Guide also provided Gemstar with its 'rate card,' which included both rates and terms, and, on at least two occasions, provided Gemstar with full drafts of proposed IPG contracts before they were sent to service providers."[125] According to the complaint, TV Guide accepted some of Gemstar's suggested revisions on these drafts.[126]

The DOJ determined that these agreements were not necessary to promote a legitimate business interest relating to the joint venture or merger, such as preventing a material change in, or affecting the value of, either party's business.[127]

With respect to Section 7A, the DOJ alleged that Gemstar and TV Guide had acquired each other's assets, de facto, when they "entered into and implemented an agreement to eliminate competition between their two firms, to act jointly for their common benefit prior to the expiration of the statutory waiting period, and to effectively combine their IPG businesses."[128] Alleged activities that prematurely transferred operational control included TV Guide "submit[ting] for Gemstar's review and approval numerous decisions relating to TV Guide's marketing of IPGs to service providers"[129] and requesting "guidance in how to respond to service provider counter-proposals."[130] TV Guide allegedly informed some customers that "it was acting on Gemstar's behalf and that the two companies had agreed on the prices and terms that TV Guide was offering."[131] Further, with respect to sales of advertising space on IPG screens, Gemstar and TV Guide allegedly

122. *Id.* ¶ 49.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* ¶¶ 67, 71, 75.
128. *Id.* ¶ 81.
129. *Id.* ¶ 57.
130. *Id.*
131. *Id.* ¶ 58.

> shared confidential information on prices and IPG advertising capabilities, met jointly with consultants retained by TV Guide to develop pricing and marketing strategies, and discussed the optimum prices and capacity for their IPG advertising business.[132]

Through these activities, including allegedly "disclosing substantial amounts of confidential information, shutting down much of Gemstar's competitive marketing operations, and sharing business opportunities,"[133] Gemstar and TV Guide allegedly "merged their operations and substantially scrambled their assets at a time when they were required by law to remain independent economic actors."[134] These alleged activities even transpired "after having been advised by counsel that 'gun jumping' during the merger review process was illegal."[135]

To resolve the allegations, the combined company agreed to certain conduct restrictions designed to avoid Section 1 and Section 7A violations during the ten year term of the consent order[136] and to pay civil penalties in the amount of $5,676,000,[137] the maximum allowed by the HSR Act. The combined company agreed to terminate (at a customer's request) any of the eight IPG agreements signed during the period covered by Gemstar's and TV Guide's allegedly illegal conduct.[138] The consent order also required the combined company to implement an

132. *Id.* ¶ 60.
133. *Id.* ¶ 62.
134. *Id.*
135. *Id.* ¶ 63.
136. *Gemstar* Order, *supra* note 108, § X. One conduct restriction prohibited the combined company from, with respect to any transaction requiring notification under the HSR Act, "combin[ing], merg[ing], or transfer[ring] (in whole or in part) any operational or decision-making control over the marketing or distribution of any to-be-acquired product, service or technology" before the earlier of the consummation of the relevant transaction or expiration of the relevant HSR Act waiting period. *Id.* § IV. Other restrictions enjoined the company from entering into an agreement, prior to consummation of a transaction involving a competitor, to fix prices or output, to allocate customers or markets, or to delay sales efforts with respect to any competitive product. Finally, with respect to a competitive product, the company was precluded from sharing information about current or future prices or contracts. These conduct restrictions would apply unless subject to an exception in a separate provision of the consent order. *Id.*
137. *Id.* § VIII.
138. *Id.* § IV.

antitrust compliance program and provide the government with periodic reports and written certifications of compliance.[139]

The order details some specific conduct that is permissible during preconsummation periods of future transactions. The order, for example, permitted the combined company to agree to operate such assets in the ordinary course of business and to refrain from conduct that would cause a material adverse change (unqualified and undefined by the order) to the assets prior to consummation.[140] The company could also participate in reasonable and customary due diligence,[141] and, in the case of litigation or settlement, disclose information about a competitive product, subject to a protective order.[142] Finally, for intellectual property licensing, the company could agree to a nonexclusive field of use restriction or a royalty fee.[143]

139. *Id.* § VI.
140. *Id.* § V.
141. To qualify as permitted conduct, the information must be "reasonably related to a party's understanding of future earnings and prospects" and the disclosure must take place "pursuant to a non-disclosure agreement that (a) limits use of the information to conducting due diligence and (b) prohibits disclosure of any such information to any employee of the person receiving the information who is directly responsible for the marketing, pricing or sales of [a competitive product]." *Id.*
142. *Id.*
143. *Id.*

Chapter 7

PREMERGER COORDINATION ENFORCEMENT OUTSIDE OF THE UNITED STATES

A. Introduction

Where businesses operate or transactions have effects outside of the United States, firms contemplating mergers, acquisitions, or joint ventures must also consider the premerger notification rules of other jurisdictions. Many jurisdictions have established premerger notification systems, are adopting new merger control regulations, or are modifying their existing merger control regimes. A large number of these jurisdictions have merger control rules that contain suspensory obligations. Suspensory obligations require parties to delay implementing a transaction before obtaining clearance from the relevant competition authority or court. In this context, clearance means that the relevant agency or court must affirmatively approve, or at least choose not to challenge, a proposed transaction.

This chapter highlights the key features of suspensive merger control regimes. It is intended as a preliminary guide for practitioners to identify the jurisdictions where explicit or de facto implementation of mergers and acquisitions before the expiration of the relevant waiting periods is prohibited. The changing face of international merger control demands, however, that counsel check the regulations of all legal regimes that may have jurisdiction over particular transactions or merging parties.

In addition to the suspensory obligations of the merger control regulations, anticartel rules may be applicable in the same way section 1 of the Sherman Act applies to merging parties before consummating a merger in the United States. For example, in certain circumstances merging parties may violate article 81(1) of the Treaty of Rome[1] (Article 81) if they fail to act independently prior to the merger. For that reason, counsel must be aware not only of the obligations imposed upon merging parties by the merger control rules, but also of those imposed by relevant anticartel provisions.

1. Treaty Establishing the European Community (as in effect 1957), 1997 O.J. (CM 340) 173 (official consolidated version), as amended.