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Gun Jumping in India: Understanding the Significance of Gun-Jumping in Merger Control under Indian Competition Law

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Gun jumping is the early implementation of a merger or acquisition without obtaining the appropriate regulatory authorization. In the context of antitrust and merger control legislation, corporations must obtain clearance from appropriate regulatory agencies to verify that the transaction is compliant with competition rules. This can take many forms, including disclosing commercially sensitive information, pooling resources, or making operational adjustments. Merger control is a regulatory mechanism designed to prevent anti-competitive behaviour and ensure healthy competition in the market.¹ It entails a thorough examination of the possible impact of a merger on market competition, consumer welfare, and other relevant considerations under the country's antitrust or competition laws, regulatory authorities impose rigorous laws against gun-jumping for various reasons, including locking in customers, suppliers, and important assets, gaining an unfair edge over competitors, and harming public trust in the merger control process. The purpose of adopting standstill duties is to ensure that parties to a proposed combination continue to compete before the CCI approves the combination.² This approach helps prevent harmful effects on competition within a sector or industry, even if the proposed combination is rejected or accepted with specific revisions to the arrangement between the parties. The CCI has

¹ Sneha Mahawar, 'Gun jumping under the merger control regime : an analysis' (iPleaders, 26 October 2023) <<https://blog.ipleaders.in/gun-jumping-under-the-merger-control-regime-an-analysis/>> accessed 25 April 2024

² Rahul Rai et al., Merger control in India: overview' (AZB Partners, 01 March 2019) <<https://www.azbpartners.com/bank/merger-control-in-india-overview/>> accessed 03 April 2024

identified several cases of gun-jumping,³ these cases highlight the importance of ensuring that the structure and subject matter of temporary agreements and plans are related in proportion to the goal of preserving the target company's value. The cases are Jet-Etihad case⁴, Hindustan Colas Private Limited case⁵, and UltraTech Cement Limited case⁶. Parties can prepare for integration before authorities' clearance, but cannot prematurely merge or integrate operations, share private data, control the target's assets, engage in joint actions, present themselves as merged, acquire or exert control over each other's shares, or assets, post personnel at another party's headquarters, allow representatives to discuss contracts or handle legal problems, or access the other side's computer systems. Competition regulators should enforce gun jumping laws to promote fair competition and protect investors and customers.

Keywords: CCI, gun jumping, merger control, premature action.

INTRODUCTION

In the field of merger control regimes, gun-jumping refers to a situation in which merging entities complete a transaction without obtaining necessary regulatory approvals or fail to comply with the waiting period/statutory notice period from the date of making a binding decision to merge under the merger control rules and regulations. The Competition Act 2002 requires timely notification to the CCI by parties engaging in a combination. To strengthen CCI, the Act allows for penalties of up to 1% for late or non-filing. As per Section 43A of the Competition Act 2002⁷, If any person or enterprise fails to give notice to the Commission under sub-section (2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent, of the total turnover or the assets, whichever is higher, of such a combination.⁸

The primary goal of standstill obligations under the Act is to make sure that all parties to a combination transaction contend as they did before the start of the combination process until the transaction has been examined for any significant negative impact on competition and

³ Praveen Raju and Janhavi Joshi, 'Gun Jumping Under The Merger Control Regime' (Mondaq, 15 September 2022) <<https://www.mondaq.com/india/corporate-and-company-law/1230292/gun-jumping-under-the-merger-control-regime>> accessed 03 April 2024

⁴ Combination Registration No C-2013/05/122

⁵ Combination Registration No C-2015/08/299

⁶ Combination Registration No C-2015/02/246

⁷ Competition Act 2002, s 43A

⁸ *Ibid*

authorized by the Commission. In other words, the standstill duties effectively oblige the parties to continue with their normal business activities fully independent of one another. As such infringements rise over time, regulatory bodies throughout the world have intensified their attention on them through mergers. As a result, this essay will present a thorough explanation of gun-jumping, mitigating measures, and the ramifications of antitrust legislation.

TYPES OF GUN-JUMPING

There are two sorts of defaults in disclosing to competition authorities: procedural gun-jumping and substantive gun-jumping.

Procedural Gun Jumping: The most basic type of gun-jumping is when the parties to a merger that meets the necessary jurisdictional standards fail to inform the relevant competition authority. Examples of such cases, which often arose in the Act's early years of operation, were due to a lack of knowledge about the transaction needing a filing or notification under the Act, the merger entailed the indirect acquisition of an Indian firm (Wheels India Limited) due to Titan International acquiring Titan Europe's full share capital or because of an absence of clarity regarding the calculation of the essential threshold when the acquisition involved only a portion of the company's division/undertaking, rather than the entire target enterprises, acquisition of lab diagnostics and point of care business of Piramal Enterprises Limited by Diasys Diagnostics Systems GmbH, Germany.

Substantive Gun Jumping: Substantive gun-jumping requires a much more complex assessment of whether or not the parties engaged in any actions that put a transaction subject to notification 'into effect' early or prohibited competitive behaviour even before the combination closed. CCI stated the nature of such activity as follows: *"The substantive issue involved is that of the conduct of the parties to a combination and not only that of timing of conduct. Going by the arguments of the Acquirer, it would imply that parties, during the stage of negotiations, may enter into cooperation on any commercial/financial/marketing aspects leading to integration of their operations and yet claim that the conduct cannot amount to gun jumping, as it occurred before the execution of definitive agreements or filing of notice. Hence, what is critical in such cases is the determination of the fact whether*

the alleged conduct is according to the combination and has the effect of consummating a part of a combination and not the timing of the same..."

MITIGATING MEASURES AGAINST GUN-JUMPING

As a result, before implementing an arrangement, the parties must strike a delicate balance between preserving the target's worth and future endeavours. To establish such a balance, meticulous strategy and careful preparation are required. Yet, the following measures can be taken:

Exchanging of Confidential Data: In terms of exchanging confidential and highly sensitive data, both parties to the merger may adopt the following proposals made by CCI in the 'Compliance Manual for Companies'.

*"To mitigate such risks, it is recommended that while conducting due diligence /integration planning, parties constitute a limited team of individuals, comprising preferably members of the senior management, internal legal team as well as external legal counsel (Clean Team). Commercially sensitive information of the other party should only be accessible to such Clean Teams. The Clean Teams should not include personnel who are involved in pricing, marketing, sales, etc. to ensure that such personnel are not (consciously or unconsciously) influenced by any competitively sensitive information in the course of the day-to-day operations of the business (such as determining pricing, pricing strategy, sales quantity, marketing strategy, terms of consumer contracts, etc)."*⁹

Premature Collaboration: Both sides ought to prevent participating in tangible acts of purchase execution such as staff transfers or the goal's employees acting as delegates of the purchaser and vice versa, integrating information technology systems, combining accounts or reporting on finances, or interacting in joint purchase or bidding before clearance.

Collaboration of Competitive Behaviour: The parties ought to prevent enacting organized company plans, such as competing jointly for agreements or distributing agreements against

⁹ Compliance Manual for Enterprises

which they might not compete, stating costs or allocating goods, territories, or consumers, or stepping into deals or promises on the other party's their behalf just before closing.

DECISIONS BY CCI

The phrase gun-jumping is not defined anywhere in the Act¹⁰. A transaction may be considered 'consummated' if the Parties have taken actions toward future integration before receiving CCI clearance.

The CCI has identified the following occurrences as gun-jumping:

In the Jet-Etihad case, Etihad requested clearance for the acquisition of a 24 per cent ownership stake while approving the transaction, the CCI observed that some elements of the commercial cooperation agreement were already implemented, and the sale of certain Jet landing and take-off slots at London Heathrow airport had not been notified for CCI approval before the consummation of the acquisition transaction. This sale was determined to represent the conclusion of the agreement, and Etihad was penalized for violating its standstill requirements.

In the Hindustan Colas Private Limited case, partial payment of the consideration in the form of a refundable deposit paid on the day of signing the share purchase agreement was deemed to result in part-consummation of the combination. The CCI held that this type of pre-payment of consideration would have the impact of establishing tacit collaboration between the parties, as it may (i) result in an advantage in strategy for the acquirer; (ii) minimize its incentive and will of the target business to be competitive; and (iii) becomes the rationale for the buyer's request to be offered with access to the private data.

In the UltraTech Cement Limited case, the CCI determined that the acquirer's offer of a corporate guarantee on behalf of the target to a lending institution to secure a loan to the target firm constituted consummation. It is significant because the financing amount was repayable regardless of whether the planned merger got CCI clearance.

¹⁰ Competition Act 2002

In the Adani Transmission Limited case¹¹, the purchasing corporation was ruled to have advanced the funds to the seller of the target company before the clearance of CCI.

In case of LT Foods Limited¹², it was determined that certain interim covenants were placed upon the sellers, such as (i) needing the transfer of certain stocks to the acquirers, (ii) asking the acquirer's introduction and interacting with the seller's vendors, (iii) putting a limit on the seller's promotional spending, and (iv) setting limitations on the vendor's actions about getting into or exit from areas, were all thought about to be giving influence on the deal, and therefore pushing the gun.

The case of Bharti Airtel Limited¹³ sheds light on the CCI's methodology for determining what constitutes 'gun-jumping'. In this case, the CCI acknowledged that specific elements in transaction documents were required to protect the target business's value. As a result, both parties involved in this instance were able to put typical interim limits on the target. The CCI stated that parties must ensure which structure and subject matter of such temporary agreements and plans are related in proportion to the goal of preserving the target company's value, rather than being carried out as a roundabouts breach of a standstill duty.

In the process of establishing its law, the CCI has frequently relied on decisional norms or regulatory advice given by jurisdictions with more developed merger control regimes. A quick summary of similar observations from a variety of jurisdictions is provided below.

PENALTY AS PER THE ACT

To enact the provisions addressed above, such as the parties' ex-ante obligation, Section 43A¹⁴ was added to the Act by an amendment in 2007, empowering the CCI to impose penalties in cases in which parties fail to provide notification of a merger/combination under Section 6(2)¹⁵. It may be worth noting that the concept of mens rea (or deceitful intent) is not essential in this

¹¹ Combination Registration No C-2018/01/547

¹² Combination Registration No C-2016/04/387

¹³ Combination Registration No C-2017/10/531

¹⁴ Competition Act 2002, s 43A

¹⁵ Competition Act 2002, s 6(2)

case, as the penalty imposed under section 43A¹⁶ is for the violation of a civil duty, and the proceedings were neither criminal nor quasi-criminal.

Inability to report an identifiable combination in the manner specified by Section 6(2)¹⁷ of the Act, or de facto completion of the transaction throughout the standstill period, may result in a fine of up to 1% of the combination's entire turnover or 1% of its assets, whatever is higher. The CCI is increasingly employing its ability to impose fines per Section 43A¹⁸.

Competition Law Review Committee: On July 26, 2019, the Competition Law Review Committee, set up by the Ministry of Corporate Affairs, published a report offering numerous suggestions and modifications to the Act, which is notably concerning gun leaping. Among the several proposals proposed by the Committee, the following stand out: Dilution of standstill responsibilities in the event of public offers and hostile acquisitions to allow individuals to the transactions to buy securities, while giving up any advantageous rights (of dividends and voting) linked to such investments till the transaction is approved and placing like assets in an escrow account and encourage CCI to enable exception of impasse responsibilities in necessary situations, requiring authority to be maintained only in rare instances¹⁹.

CONCLUSION

After the procedure for acquiring begins, employ the 'antitrust protocols' to reduce the danger of gun-jumping by crafting a section in the M&A agreements that explicitly defines the parties' actions and duties during the static period. Conducting comprehensive due diligence before entering into a merger deal, conduct rigorous due diligence on the target firm. This will assist in determining the value of the target and identifying any prospective antitrust concerns that might lead to gun jumping. Protect the sharing of economically private information by keeping data spaces, making clean teams of people who are not involved in everyday company activities, redacting papers, and making all parties engaged sign confidentiality agreements. The corporation being purchased must carry out every action in the typical manner of business to

¹⁶ Competition Act 2002, s 43A

¹⁷ Competition Act 2002, s 6(2)

¹⁸ Competition Act 2002, s 43A

¹⁹ Ministry of Corporate Affairs Government of India, *Report of Competition Law Review Committee* (2019), para 7.3

maintain the target's value of assets, which can be secured by putting stipulations in the merger contracts.

Ensuring honest interactions with competition officials throughout the process. Companies should alert competition regulators about their merger proposals and actively comply with any inquiries, establishing efficient internal oversight and compliance processes, companies must have sufficient internal surveillance and compliance processes to guarantee that they follow merger control rules. Furthermore, regulatory agencies ought to keep implementing the laws prohibiting and increasing consciousness regarding its consequences to promote equitable competition and defend the best interests of stockholders and customers.