Organisation for Economic Co-operation and Development

DAF/COMP/WD(2018)94

Unclassified **English - Or. English**

21 November 2018

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Suspensory Effects of Merger Notifications and Gun Jumping - Note by the United States

27 November 2018

This document reproduces a written contribution from the United States submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

JT03440133

This document, as well as any data and map included herein, are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

United States

1. The Relevance and Investigation of Gun-Jumping

1.1. In the United States, Section 7A of the Clayton Act Requires Companies to Maintain Separate Operations Until the Expiration of a Waiting Period Following Merger Notification

1. In the United States, merging parties that meet certain threshold requirements[1] must file a notification and observe a waiting period to allow the federal antitrust agencies to investigate the competitive impact of proposed transactions, and if necessary, to seek an injunction to prevent the consummation of anticompetitive transactions. The notification and waiting period requirements apply to direct and indirect acquisitions when a size of person and commerce threshold contained in Section 7A of the Clayton Act ("Section 7A") [2] are met and if the acquiring person would hold a threshold amount of voting securities or assets after the acquisition.[3] The regulations adopted pursuant to Section 7A (the "Premerger Notification Rules") define "hold" to mean "beneficial ownership."[4] Although the term beneficial ownership is not defined, the agencies generally look to who bears the risk of loss or may realize potential gains, who makes decisions in the normal course of business, and who exercises control over assets or contracts.[5]

2. Gun-jumping is illegal under Section 7A, which prohibits the acquisition of beneficial ownership of certain assets or voting securities before the end of a statutory waiting period and provides for civil penalties. Firms that fail to observe the statutory waiting period—for example, by beginning to coordinate business activities prior to consummation of their merger—may be liable for gun-jumping. Therefore, although some communication and coordination is necessary in order for firms to plan for an upcoming

---

[1] For 2018, generally, if the transaction is valued between $84.4 million and $337.6 million, and one party has sales or assets of $168.8 million or greater and the other party has sales or assets of $16.9 million or greater, then the parties must file a notification with the Federal Trade Commission and the Antitrust Division of the Department of Justice. If the size of the transaction is more than $337.6 million, the parties must file notification with the agencies, no matter the size of the parties, unless an exemption applies. *See, e.g.*, https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing.

[2] 15 U.S.C. 18a. Section 7A also is referred to as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 or the HSR Act.

[3] 15 U.S.C. 18a(a)-(b).

[4] 16 C.F.R. § 800 *et. seq.*

[5] The Statement of Basis and Purpose accompanying the Premerger Notification Rules states that the "existence of beneficial ownership is to be determined in the context of particular cases with reference to the person or persons that enjoy the indicia of beneficial ownership," which include "[1] the right to obtain the benefit of any increase in value or dividends, [2] the risk of loss of value, [3] the right to vote the stock or to determine who may vote the stock, [4] the investment discretion (including the power to dispose of the stock)." 43 Fed. Reg. 33,449, 33,458 (July 31, 1978).

proposed merger, each company should be careful to keep operating as a separate, independent entity during the waiting period.

1.2. The Purpose of the Statutory Waiting Period Specified in Section 7A of the Clayton Act is to Allow Time to Review Proposed Mergers before the Assets Become Too Difficult to Unscramble.

3. The U.S. antitrust agencies principally challenge anticompetitive acquisitions under Section 7 of the Clayton Act ("Section 7"), which allows prospective challenges to mergers before the harm to consumers actually occurs.[6] Prior to the enactment of Section 7A, the agencies did not receive advance notice through premerger notifications and merging firms did not observe a statutory waiting period. As a result, Section 7 proved difficult to enforce because the U.S. agencies could challenge mergers only after their consummation and the agencies' only recourse was to sue to unwind anticompetitive mergers after the fact.[7] If a court later found that a merger was illegal and ordered relief, the interim loss of competition during trial harmed consumers.[8] Additionally, once companies had merged, effective relief was difficult to fashion because the companies' operations and assets often were irrevocably changed and entwined.

4. The U.S. Congress enacted Section 7A in 1976, requiring firms to file a notice and observe a waiting period. The legislative history leading to the enactment of Section 7A demonstrates Congress's intent to create a more effective enforcement mechanism "to detect and prevent illegal mergers prior to consummation."[9] Congress believed a premerger injunction is "often the only effective and realistic remedy against large illegal mergers—before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened. . . ."[10] This legislative history underscores Congress's desire that competition existing before the merger be maintained pending review by the antitrust enforcement agencies and a court.

5. The legislative history also underscores Congress' desire to maintain the integrity of the premerger investigation. The purpose is to give the "the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of

[6] "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. 18. Although agencies can challenge mergers under Sections 1 and 2 of the Sherman Act, they rarely do because the Sherman Act requires proof of actual harm to competition and the Section 7 requires proof that an acquisition "may" substantially lessen competition. *Id.*

[7] *See, e.g.*, Competitive Impact Statement at 11. *United States v. Gemstar-TV Guide International, Inc.*, No. 03CV000198 (D.D.C. 2003), https://www.justice.gov/atr/case-document/competitive-impact-statement-108 ("Gemstar CIS").

[8] Gemstar CIS at 11.

[9] S. Rep. No. 94-803, pt. 1 at 63 (1976).

[10] H.R. Rep. No. 94-1373, at 5 (1976).

questionable legality before they are consummated."[11] In discussing waiting period requirements, Congressman Rodino explained: "[T]here may well be cases in which the merging companies act in bad faith, or conceal relevant data from the Government . . . . If they do so, they act at their peril, and would properly be subject to sanctions. . . ."[12] Congress left it to the agencies to determine the information that they need from the parties and provided equitable and civil relief in the event merging parties did not substantially comply with requests for information.

1.3. Gun-Jumping Also May be Illegal under Section 1 of the Sherman Act or Section 5 of the Federal Trade Commission Act

6. Section 1 of the Sherman Act ("Section 1") prohibits agreements between competitors that harm competition.[13] Thus, during the pre-consummation period, competing firms also may be liable for agreements that violate Section 1. Conduct illegal under Section 1 may include merging firms' jointly setting prices or contract terms, or entering market division or customer allocation agreements. In addition, if competing firms use the other party's competitively sensitive information during the pre-consummation period, their exchange and use of such information may constitute an agreement in violation of Section 1. These agreements harm consumers by eliminating competition at a time when firms should behave as separate and independent competitors. The agencies also may use conduct that violates Section 1, including exchanges and use of competitively sensitive information, as indicia of operational control to prove violations of Section 7A that provide for civil penalties.[14] As discussed below, several gun-jumping complaints have alleged violations of Section 1.

1.4. The Agencies May Discover Evidence of Gun-jumping During Merger Review From the Parties or Third Parties

7. Evidence of gun-jumping usually is discovered when the agencies investigate the proposed transaction. In the United States, agencies collect contemporaneous documents during merger review; these documents sometimes reveal communications between the parties about illegal gun-jumping activity. In other instances, third-party witnesses may provide information that suggests the parties have engaged in illegal gun-jumping activity. Both the Antitrust Division and the Federal Trade Commission have authority to subpoena documents or testimony or issue civil investigative demands requesting interrogatory

---

[11] *Id.*

[12] 122 Cong. Rec. 30878 (1976) (statement of Representative Rodino).

[13] 15 U.S.C. 1. The Federal Trade Commission has jurisdiction under Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition in or affecting commerce. 15 U.S.C. § 45. Despite enforcement using different statutes, the overwhelming majority of FTC competition cases rely on the same standards as those used by the Antitrust Division, including in cases alleging conduct that would violate Section 1 of the Sherman Act.

[14] *See, e.g.*, Complaint at 8-9. *United States v. Flakeboard America Ltd.*, No. 3:14-cv-4949 (N.D. Cal. 2014), https://www.justice.gov/atr/case-document/file/496511/download ("Flakeboard Complaint"); Complaint at 11, 13. *United States v. Computer Associates Int'l Inc.*, Civ. No. 1:01CV02062 (D.D.C. 2002) https://www.justice.gov/atr/case-document/complaint-equitable-relief-and-civil-penalties ("Computer Associates Complaint").

responses from the parties and from third-party witnesses. Based on initial findings, the agencies can determine whether they need additional information and can use their subpoena power to obtain this information to understand the conduct. Parties also often submit white papers and engage in discussions with the agencies to explain and defend the relevant conduct.

2. Legal Consequences and Remedies for Gun-Jumping

8. Under Section 7A(g)(1) of the Clayton Act, firms in violation of Section 7A are liable for civil penalties.[15] Only the Antitrust Division may obtain civil penalties; the Federal Trade Commission may refer its cases to the Antitrust Division to obtain civil penalties. Each party is liable to pay the applicable civil penalty. In 2018, the maximum penalty per company per day in violation of Section 7A is $41,484.[16] Thus, a 7A violation lasting ten days could lead to a penalty for each party of up to $414,840 or $829,680.[17] To date, the largest civil penalty obtained by either agency for a violation of Section 7A was $11,000,000.[18]

9. Defendants that violate Section 1 also may be liable for equitable remedies, including disgorgement. For example, the United States sought and obtained disgorgement of $1.15 million in illegally obtained profits during the six-month period leading up to its settlement with Flakeboard and SierraPine.[19] Additional equitable remedies have included rescission of contracts entered into during the pre-consummation period[20] and injunctive relief.[21]

10. Pre-merger conduct for mergers that do not meet the Section 7A thresholds or otherwise are not notifiable cannot technically violate Section 7A. However, parties that are not covered by Section 7A still may be liable for violations of Section 1 during the pre-consummation period of their merger.

[15] 15 U.S.C. § 18a(g)(1).

[16] *See* 16 C.F.R. § 1.98.

[17] Each party pays $41,484 multiplied by the ten days of the violation – i.e., 10-Day Penalty = 2*($41,484*10).

[18] Final Judgment at 7. *United States v. VA Partners I*, No. 16-cv-01672 (WHA) (N.D. Cal. 2016), https://www.justice.gov/atr/case-document/file/908516/download.

[19] Competitive Impact Statement at 11. *United States v. Flakeboard America Ltd.*, No. 3:14-cv-4949 (N.D. Cal. 2014), https://www.justice.gov/atr/case-document/file/496496/download (“Flakeboard CIS”).

[20] *See, e.g.,* Gemstar CIS at 15.

[21] *See, e.g.,* Flakeboard CIS at 11-12; Competitive Impact Statement at 15. *United States v. Computer Associates Int’l Inc.*, Civ. No. 1:01CV02062 (D.D.C. 2002), https://www.justice.gov/atr/case-document/competitive-impact-statement-76 (“Computer Associates CIS”).

3. Interactions and Communications Indicating Gun-Jumping

11. As discussed above, gun-jumping occurs when parties to an acquisition prematurely transfer beneficial ownership prior to the end of the required waiting period. A common way in which parties prematurely transfer beneficial ownership is by allowing the buyer to take operational control over the assets that are the subject of the acquisition.[22]

3.1. Taking Control of Physical Assets Such as a Plant, Inventory, or Machinery

12. The agencies have challenged conduct as gun-jumping when one party to a merger took control of the other parties' plant, inventory, or machinery. For example, in 2014, the United States alleged Flakeboard America Ltd. and Sierra Pine entered an illegal premerger agreement to close a Sierra Pine mill and divert customers to Flakeboard. The agreement to close the mill and allocate customers constituted an illegal agreement between competitors to reduce output and allocate customers in violation of Section 1 of the Sherman Act. Additionally, the complaint alleged that by coordinating to close the mill, allocate customers, and exchange competitively sensitive information, Flakeboard exercised operational control (and thereby obtained beneficial ownership) of SierraPine's business prior to the end of the waiting period in violation of Section 7A. As a result of the agreement, Flakeboard successfully secured a substantial amount of business from SierraPine and harmed competition.

13. In this example, the parties abandoned their merger in response to competitive concerns raised by the United States. To remedy the Section 1 violation, the settlement agreement provides for disgorgement of $1.15 million, the approximate amount of profits that Flakeboard illegally obtained from closing the mill and allocating customers. Additionally, each party agreed to pay a civil penalty of $1.9 million ($3.8 million total) to remedy the Section 7A violation.

14. Other cases have alleged that assuming control over physical assets constituted a gun-jumping violation. For example, Titan Wheel took immediate possession and operations of a Pirelli Armstrong plant and used the plant to manufacture tires during a thirteen-day period in violation of Section 7A[23]; Titan Wheel agreed to pay the maximum civil penalty of $130,000 to settle the case. In another case, two competitors in the market for title plant services,[24] Commonwealth Land Title Insurance and First American, agreed to consolidate their title plants in the District of Columbia. Before relocating, Commonwealth terminated existing contracts with customers. After the relocation, the

---

[22] There are no litigated gun-jumping cases, but several consent decrees provide guidance about gun-jumping violations. Practitioners may look to litigated cases involving Section 1 violations for additional guidance.

[23] Complaint at 6-7. *United States v. Titan Wheel*, No. 1:96CV01040 (D.D.C. 1996), https://www.justice.gov/atr/case-document/file/628336/download ("Titan Wheel Complaint").

[24] Title plant services are used by abstractors, title insurers, title insurance agents, and others to determine ownership of and interests in real property in connection with the underwriting and issuance of title insurance policies and for other purposes. Complaint at 3. *In re Commonwealth Land Title Insurance Co.* No. C-3835 (F.T.C. 1998), https://www.ftc.gov/sites/default/files/documents/cases/1998/11/ftc.gov-9810127cmp.htm ("Commonwealth Complaint"). The FTC also alleged the combination violated Section 7.

parties jointly set prices and terms for plant title services. The Federal Trade Commission alleged this constituted an agreement to raise prices and fix output in violation of Section 5.[25] The settlement included injunctive relief.[26]

15. *United States v. Duke Energy* provides another example of parties taking control of assets.[27] In this case, Duke Energy entered into an agreement to acquire the Osprey Energy Center from Calpine Corp. In conjunction with the acquisition agreement, Duke also entered into a tolling agreement for the Osprey plant.[28] Under the tolling agreement, Duke immediately began exercising control over the Osprey plant, making decisions about its output. Duke began earning profits from and assuming risk for the day-to-day operations of the business. Duke admitted it entered the tolling agreement only as part of its acquisition of the Osprey plant.[29]

16. Management agreements, such as tolling agreements, may be permissible outside of the merger context. However, because management agreements "entered into in connection with an acquisition transfers operating control of the assets or business," they may violate Section 7A when entered in conjunction with a merger agreement.[30] In these instances, the buyer takes over the business and obtains operational control through the management agreement while the seller essentially exits prior to merger review.[31] In this case, the combination of the tolling agreement and the acquisition agreement allowed Duke Energy to acquire beneficial ownership of the Osprey plant by taking operational control of the plant. Through these intertwined agreements, Calpine ceased to be an independent competitor and the parties harmed competition. The parties agreed to pay a $600,000 civil penalty.[32]

3.2. Taking Control of Management Functions

17. Evidence that the acquiring company has taken control of management functions in some way is a common form of gun-jumping alleged in the agency complaints. This control takes many forms and includes *ad hoc* decision making and formalized agreements

[25] Commonwealth Complaint at 4. The allegations correspond to a violation of Section 1 of the Sherman Act.

[26] Analysis of Proposed Consent Order to Aid Public Comment at 3-4. *In re Commonwealth Land Title Insurance Co.*, No. C-3835 (F.T.C. 1998), https://www.ftc.gov/sites/default/files/documents/cases/1998/08/ftc.gov-9810127.ana_.htm.

[27] Complaint at 2-3. *United States v. Duke Energy Corp.*, No. 1:17-cv-00116 (D.D.C. 2017), https://www.justice.gov/atr/case-document/file/928986/download ("Duke Energy Complaint").

[28] Tolling agreements are commonly used in the energy industry. These agreements are contracts where a buyer supplies fuel to an electric generator, and the generator provides power to the buyer.

[29] *United States v. Duke Energy Corp.*, No. 17-cv-00116 (D.D.C. 2017) ("Duke Energy CIS") at 3, https://www.justice.gov/atr/case-document/file/929006/download.

[30] Lawrence R. Fullerton, Deputy Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice, Address before the Business Development Associates Antitrust 1997 Conference: Current Issues in Radio Station Merger Analysis (Oct. 21, 1996) at 8.

[31] *Id*. at 8.

[32] Duke Energy CIS at 6.

contained in the merger contracts. The conduct alleged includes joint decision-making, agreement on prices and contract terms, reorganizations, and even settlement of disputes on behalf of another party to the merger.

18. In its case against Gemstar-TV Guide International, Inc., the United States alleged that prior to their merger, the parties engaged gun-jumping by "effectively merg[ing] most of their decision-making processes."[33] They did so by developing standard contract prices and terms, exchanging and redlining draft contracts and using TV Guide to act as Gemstar's agent during customer contract negotiations in violation of Section 7A.[34] Additionally, Gemstar and TV Guide agreed on contract prices and terms, agreed to slow customer negotiations during the pre-consummation period to get better terms after the merger, and entered into a market and customer allocation agreement in violation of Section 1.[35] The United States alleged that this joint decision-making eliminated both companies as independent competitors during the pre-consummation period.[36] The agreements harmed competition through increased prices and more onerous contract terms.[37] Gemstar agreed to pay a $5,676,000 civil penalty under Section 7A violations and agreed to injunctive relief, including rescission of contracts entered into during the statutory waiting period.[38]

19. In another instance, Input/Output announced a reorganization of Digicourse, the business Input/Output planned to acquire. Pursuant to this reorganization, Input/Output assigned key Digicourse executives to new roles and titles, moved them into Input/Output facilities, and provided them with Input/Output business cards and email addresses. The United States alleged that these actions "constituted a transfer of beneficial ownership of DigiCourse to Input/Output prior to the expiration of the waiting period" in violation of Section 7A.[39] The parties agreed to pay $450,000 in civil penalties.[40]

3.3. Limitations of Day-to-Day Operations Through Merger Contract Provisions.

20. Often merging parties will include provisions in their merger agreements designed to maintain the value of the acquired firm during the pre-merger period. These "interim conduct of business" provisions require approval from the acquiring firm for certain decisions taken after the merger agreement is signed but before the merger has closed. These types of provisions often require approval for decisions such as undertaking large capital projects, selling significant assets, or incurring significant debt. Usually, merging

[33] Gemstar Complaint at 15.

[34] *Id.* at 15-17.

[35] *Id.* at 10-15.

[36] Gemstar Complaint at 16-17.

[37] Gemstar CIS at 10-11.

[38] *Id.* at 15. The decision to rescind the contracts at issue rested solely with the third parties who entered into the contracts.

[39] Complaint at 4. *United States v. Input/Output, Inc.*, No. 1:99CV00912 (D.D.C. 1999), https://www.justice.gov/atr/case-document/complaint-civil-penalties-violation-premerger-reporting-requirements-hart-scott ("Input/Output Complaint").

[40] Final Judgment at 2. *United States v. Input/Output, Inc.*, No. 1:99CV00912 (D.D.C. 1999), https://www.justice.gov/atr/case-document/proposed-final-judgment-154.

parties have legitimate business reasons for including such provisions and they do not run afoul of gun-jumping laws. However, if the interim conduct of business provisions require approvals for decisions the acquired firm would make in the ordinary course of its business, the provisions may constitute gun-jumping. Three matters provide examples of overly restrictive conduct of business provisions.

21. In 2010, the United States entered into a consent decree to address gun-jumping that occurred between Smithfield Foods and Premium Standard Farms.[41] Smithfield entered into a merger agreement with Premium Standard Farms that contained provisions limiting Premium Standard's operations during the waiting period. These provisions also included a requirement that Premium Standard "carry on its business in the ordinary course consistent with past practice."[42] Because of this provision, Premium Standard submitted three ordinary course purchase contracts to Smithfield Foods for its approval.[43] Each time Premium Standard sought consent for the contracts, it provided Smithfield with proposed terms include price, quantity, and length of contract.[44] The United States alleged a violation of Section 7A and obtained a $900,000 civil penalty.[45]

22. *United States v. Computer Associates* provides a similar example. Computer Associates and Platinum Technology International were leading vendors of management software products and competed aggressively prior to their agreement to merge.[46] The merger agreement contained several provisions governing how Platinum would conduct its business prior to consummation of the merger, including requirements that it seek approval to change standard license terms or offer discounts greater than 20 percent.[47] Before entering into the merger agreement, Platinum routinely entered into contracts with discounts greater than 20 percent.[48] Platinum changed its customer contract approval procedures to ensure that the company met these limitations and Computer Associates executives made decisions about Platinum contracts during the HSR waiting period. Computer Associates executives had access to competitively sensitive information when making decisions about whether to approve or deny changes.[49] The merger agreement also limited Platinum's ability to offer certain services without Computer Associates' approval. Computer Associates also changed some of Platinum's accounting practices and cancelled

[41] Final Judgment at 1. *United States v. Smithfield Foods, Inc.*, No. 1:10-cv-00120 (D.D.C. 2010), https://www.justice.gov/atr/case-document/final-judgment-171 ("Smithfield Final Judgment").

[42] Complaint at 5. *United States v. Smithfield Foods, Inc.*, No. 1:10-cv-00120 (D.D.C. 2010), https://www.justice.gov/atr/case-document/complaint-211 ("Smithfield Complaint").

[43] Smithfield Complaint at 6.

[44] *Id*.

[45] Smithfield Final Judgment at 2.

[46] Computer Associates Complaint at 5. *United States v. Computer Associates Int'l Inc.*, Civ. No. 1:01CV02062 (D. D.C. 2002), https://www.justice.gov/atr/case-document/complaint-equitable-relief-and-civil-penalties ("Computer Associates Complaint").

[47] *Id*. at 2.

[48] *Id*. at 8.

[49] *Id*. at 8-10.

Platinum's participation in trade shows.[50] The United States alleged violations of both Section 7A and Section 1. Computer Associates and Platinum each agreed to pay a civil penalty of $638,000 as well as injunctive relief.[51]

23. *United States v. Qualcomm* provides a third example of an acquiring firm exercising control over the day-to-day operations of Flarion, the to-be-acquired firm.[52] The merger agreement required Flarion to support certain pre-existing technologies, but prohibited it from expanding the scope of the existing deployments of technologies or supporting new deployments of technologies.[53] Within days of the merger agreement, Flarion sought Qualcomm's consent before entering transactions with third parties even when the merger agreement did not oblige Flarion to do so.[54] The United States alleged a violation of Section 7A and obtained a $1.8 million civil penalty.[55]

24. In all of these examples, the acquired firm stopped exercising its own independent business judgment and deferred to the acquiring firm. The acquiring firm then exercised control over business operations and acquired beneficial ownership of the business prior to the expiration of the waiting period. In doing so, consumers were denied the benefits of competition prior to the end of the statutory waiting period and the agencies were denied the ability to review the merger while the parties remained independent during the waiting period.

3.4. Negotiating Contracts or Settlements on Behalf of the Other Party

25. The agencies have alleged Section 7A violations where executives from one of the merging companies attempted to negotiate contracts or seek settlements to lawsuits on behalf of the other party. In *United States v. Input/Output*, an executive from the acquired company traveled to the United Kingdom to resolve a commercial dispute between the acquiring company and one of its customers and eventually accepted settlement on behalf of the acquiring firm.[56] Ordinarily, we expect competitors to try to win business when customers become unhappy=, not try to improve their competitor's customer relationships.

26. In *United States v. Gemstar-TV Guide International, Inc.*, an executive from TV Guide led negotiations to settle a patent dispute between Gemstar and another market participant. The discussed terms were against TV Guide's interests because they would have made it more difficult for TV Guide to compete effectively.[57] In both instances, the

[50] *Id*. at 10.

[51] Computer Associates CIS at 14-19.

[52] Complaint at 3-4. *United States v. Qualcomm Inc.,* No. 1:06CV00672 (PLF) (D. D.C. 2006), https://www.justice.gov/atr/case-document/complaint-civil-penalties-violation-premerger-reporting-requirements-hart-scott-0 ("Qualcomm Complaint").

[53] *Id*. at 3-4.

[54] Qualcomm Complaint at 4.

[55] Final Judgment at 2. *United States v. Qualcomm Inc.,* No. 1:06CV00672 (PLF) (D. D.C. 2006), https://www.justice.gov/atr/case-document/final-judgment-152.

[56] Input/Output Complaint at 4.

[57] Gemstar Complaint at 16.

settlement discussions reflected the parties' failure to act as independent competitors. Instead, they demonstrated aligned economic interests prior to the expiration of the waiting period in violation of Section 7A.

3.5. Exchanges of Competitively Sensitive Information

27. Exchanges of competitively sensitive information between competitors could lead to violations of Section 1 of the Sherman Act or violations of Section 7A.[58] Additionally, the agencies have alleged exchanges of competitively sensitive information as indicia of operational control leading to beneficial ownership in violation of Section 7A.[59]

28. The *Insilco* case provides an example of an illegal information exchange in conjunction with a merger agreement. During the pre-consummation period for Insilco's acquisition of a close competitor in the allied tube industry, Insilco requested and received customer specific information that included prior negotiations, price quotes, and present and future pricing policies and strategies in alleged violation of Section 5.[60] In *Gemstar*, the United States alleged that an exchange and use of information was part of an agreement to fix prices and terms in violation of Section 1.[61]

29. Although merging firms need some information during the due diligence and pre-consummation planning periods, they need to be careful about what and to whom they transmit this information. A key question to ask is, if the merger does not go through, would the exchange of information between competitors facilitate collusion or harm competition in another way. If so, the parties should not freely exchange the information. If the information is necessary to the merger process, the merging parties should take care to employ a "clean team" or use other protections to prevent the information from reaching people responsible for the normal operation of the businesses during the waiting period.

[58] Exchanges of competitively sensitive information among competitors also could lead to violations of Section 1 of the Sherman Act outside of the pre-merger context. *See, e.g., United States v. Gypsum,* 438 U.S. 422 (1978); *United States v. Container Corp. of America,* 393 U.S. 333 (1969). Although cases outside the premerger context are illustrative, we limit the discussion to pre-merger cases.

[59] Flakeboard Complaint at 9 (including competitively sensitive information as one of the assets acquired when the Flakeboard obtained beneficial ownership of the Sierra Pines plant in violation of Section 7A); *see also* Gemstar Complaint at 16-17 (alleging the exchange of competitively sensitive information as evidence of operational control in violation of Section 7A); Computer Associates Complaint at 11 (including the exchange of information as evidence and indicia of operational control over Platinum).

[60] Complaint at 2. *In re Insilco Corp.,* No. C-3783 (F.T.C. 1998), https://www.ftc.gov/sites/default/files/documents/cases/1998/01/insilcocmp.pdf.

[61] Gemstar Complaint at 13-14.