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New Enforcement Developments Regarding Pre-Merger Coordination ("Gun-Jumping")

There were two significant developments with respect to antitrust issues that arise from attempts by merging companies to coordinate their activities prior to closing. This conduct, known generically as "gun-jumping", has been the subject of articles by commentators[1] as well as speeches by government antitrust enforcement officials. However, the topic has remained a murky one, with no court opinions for guidance.

On April 23, 2002, the Department of Justice, Antitrust Division ("DOJ") announced that it had reached a proposed settlement with Computer Associates International Inc. and Platinum *technology* International *inc.* for violating the pre-merger waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"). As part of the settlement, Computer Associates will pay $638,000 in civil penalties, and will be prevented from agreeing on prices, approving or rejecting proposed customer contracts, and exchanging prospective bid information with all future merger partners.[2]

On March 29, 1999, Computer Associates announced a $3.5 billion cash tender offer for Platinum. Up to that point, the two companies had competed aggressively in numerous computer software markets. The merger agreement imposed extraordinary "conduct of business" restrictions on Platinum during the HSR waiting period. For example,

- Platinum needed the approval of Computer Associates before entering into contracts with its customers that provided for discounts of more than 20% off of list price or that amended standard contract terms.
- Computer Associates installed an employee at Platinum's headquarters to review and approve customer contracts and other activities relating to the management of Platinum.
- Computer Associates was given access to a database maintained by Platinum to track contracts in the pre-approval process, which database contained competitively sensitive information.
- Platinum sales representatives were notified that no fixed-price contracts or computer consulting service contracts could be presented to customers without approval of Computer Associates.
- Three senior officers of Platinum entered into consulting and non-compete agreements that included provisions that each may be held personally liable if Platinum failed to comply with these competitive restrictions.

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1 R. Donovan, "Antitrust Risks of Jumping the Gun," *Metropolitan Corporate Counsel* at 4 (May 1994).

2 The press release, proposed final judgement, and competitive impact statement are available on the Division's website at www.usdoj.gov/atr/public/press_releases/2002/11029.htm.

On September 28, 2001, the United States filed a two-count complaint against the parties. Count One alleges the violation of Section 1 of the Sherman Act based on the anticompetitive agreements entered into by the parties. Count Two alleges that the defendants violated the HSR Act because "the defendants' merger agreement and pre-consummation conduct altered their status as separate and independent economic actors by transferring to CA control of substantial aspects of Platinum's business."

The competitive impact statement filed in support of the proposed settlement by DOJ, and remarks made by DOJ and FTC officials during the annual ABA Section of Antitrust meeting in Washington last week, provide some further guidance on how merging parties are expected to behave. First, the government officials emphasized that the parties should not merge until they are allowed by law to merge. "The pendency of a proposed merger does not excuse the merging parties of their obligations to compete independently. Thus, pending consummation, activities by one party to control or affect decisions of another with regard to price, output or other competitively significant matter may violate Section 1." As one official commented, the government does not assume, and the parties should not assume, that the merger will be consummated; therefore, they should not limit their respective ability to compete until the actual closing.

The government agencies believe that it is inherent in the HSR Act that competition existing before the merger should be maintained to the extent possible pending review by the antitrust enforcement agencies and the court. Some members of the private bar question whether the HSR Act was intended to reach conduct of this type.

At the same time, the government officials recognize that restrictions that are ancillary to a merger agreement may be reasonable, and that, for example, the typical provision that the party to be acquired would continue to operate its business in the ordinary course does not violate the law. Similarly, the agencies recognize that other standard provisions intended to prevent a to-be-acquired person from taking actions that could seriously impair the value of what the acquiring firm had agreed to buy are often reasonable and necessary to protect the value of the transaction. The problem in the Computer Associates case was that the parties went beyond such ordinary and justifiable restraints. Indeed most lawyers who counsel in this area believe that *Computer Associates* was not a close call.

In their informal comments at the ABA meeting, the government officials mentioned certain actions that they would likely consider to be problematic:

- Joint calls on customers by representatives of the merging parties, especially if specific post-closing issues are discussed, and in particular, issues related to pricing. One-on-one discussions with customers by the potential acquiring party are fine.
- The transfer of a substantial portion of the to-be-acquired company's staff to the employ of the acquiring party.
- Decisions by the acquiring company on the investments of the to-be-acquired company, such as whether to expand capacity, invest in research and development, make an acquisition, or enter into a substantial lease.
- One example given was a question as to which of two software platforms the acquiring company would support after the acquisition. It was noted that the acquiring company could discuss this issue with prospective customers, but not in a three-way discussion with the to-be-acquired company participating.

The Computer Associates settlement must still be approved by the federal district court, but no problems are anticipated. Companies should be aware that this area remains one of concern for the FTC and DOJ, such that future enforcement actions are likely. On the positive side, the agencies acknowledged that they could do more to provide guidance to the public in this area and they are looking at ways to do so this year.

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