

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Suspensory Effects of Merger Notifications and Gun Jumping - Note by Belgium

27 November 2018

This document reproduces a written contribution from Belgium 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

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Belgium

1. The relevance and investigation of gun jumping

1. The Belgian Competition Authority has sanctioned one case of gun jumping: decision BMA-2015-C/C-79 of 23 December 2015 in the Cordeel Group NV/Imtech België nv and Imtech Belgium Holding NV case (Cordeel).
2. The Investigation and Prosecution Service (*Auditorat*) read about the transaction in the press and invited the undertaking.
3. The facts were rather specific. Cordeel, a construction company, was among the companies approached in mid-summer by the receiver of the bankruptcy in the Netherlands of the Royal Imtech group with a proposal to acquire the Belgian subsidiary of the group. The Belgian subsidiary was a key subcontractor for Cordeel. Because Imtech Belgium had no longer access to the cash pool of the Imtech group, the Belgian subsidiary could only be saved if it was taken over without delay. Cordeel decided to buy the Belgian Imtech companies for a modest price and failed to realize that the transaction needed to be notified to the BCA. If notified it would have been cleared in a simplified procedure.
4. While they tried to get the deal on the correct track, the president of the BCA granted a waiver in respect of the suspension period in its decision of 22 October 2015 by application of article IV.10, §7 of the Code of economic law (CEL).
5. The Minister for the Economy intervened in the hearing as an intervening party (the first and only time he did so since the re-establishment of the BCA as an independent administrative authority). He asked the authority to take into account the fact that Cordeel had been willing to save a company employing 786 persons under high pressure in difficult circumstances. He asked the authority not to impose a fine.
6. In its decision of 23 December the Competition College of the BCA authorized the acquisition. The College decided that it would give the wrong signal if it did not impose a fine. But in view of all the specific circumstances including the purchase price, the College decided that a deterrent fine would not be proportional and it imposed a symbolic fine of 5000 € for gun jumping.
7. The BCA screens the financial and general press. Most significant acquisitions are reported in the financial press. The BCA thinks therefore that the risk that a really significant deal would remain unnoticed is limited.

2. Legal consequences and fining of gun jumping

8. An infringement of the obligation to notify can be sanctioned with a fine no higher than 1% of the consolidated turnover in Belgium or export out of Belgium in the previous fiscal year (article IV.71 CEL). An infringement of the standstill obligation can be sanctioned with a fine no higher than 10% of the consolidated turnover in Belgium or export out of Belgium in the previous fiscal year (article IV.72 CEL).
9. The legal consequences for the transaction depend on the measures the BCA may impose when it decides not to authorize the transaction.

3. Pre-merger exchanges of information and HR decisions

10. The pre-merger exchange of confidential information about prices, cost data, customers, future strategies, etc., and decisions affecting the compositions teams in the acquiring or target entities, raise delicate issues. They have not yet been the object of College decisions.

11. It cannot be ruled out that the exchange of information may be examined under the article 101 TFEU or its Belgian law equivalent (article IV.1 CEL) rather than sanctioned under the gun jumping provision, especially in case the transaction would not be authorized or the concentration would not take place.

4. Practical guidance, rules and derogations

12. The BCA provides no standard communication or guidance to the business community and has not yet developed a widely known practice with regard to the kind of interactions it considers to be legitimate and illegitimate in the context of mergers. It aligns its thinking on the practice of the European Commission.

13. But the BCA provides the opportunity for pre-notification talks during which these issues can be and are discussed..

14. Article IV.10, §6 enables the president of the BCA, after hearing the competition prosecutor, to waive the obligation to suspend the transaction at any time during the procedure or before the notification. Article IV.10, §8 CEL states that the suspension can be conditional and partial.

15. The president took two decisions on waivers. One in the abovementioned Cordeel case. And one in a case where it was particularly important that a transaction could be closed before a certain date. Because it was already clear to him that the transaction would be authorized, the president waived the suspension period. The waiver was never used because the College finalized its decision before the critical date.

16. We may add that article IV.10, §6 CEL provides for an exception to the standstill obligation in case of acquisitions by public bid, provided the transaction is notified without delay and the exercise of voting rights is suspended.