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Suspensory Effects of Merger Notifications and Gun Jumping

Background Note by the Secretariat

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More documentation 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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Suspensory Effects of Merger Notifications and Gun Jumping

Background note by the Secretariat*

Most jurisdictions impose mandatory pre-merger control for transactions meeting certain thresholds. This typically involves a duty on the merging parties to notify the transaction, coupled with a standstill obligation. Violations of these legal obligations, such as failure to notify or merger implementation during the standstill period amount to unlawful “gun jumping” by the merging parties. Gun jumping is subject to heavy fines, and there is evidence of increased scrutiny and enforcement in recent years.

Information exchange and co-ordination between merging parties in the pre-closing period may also be sanctioned under the rules against anti-competitive horizontal conduct. At the same time, merging parties often need to exchange information before a transaction is cleared. This is to secure the buyer’s position as regards its investment in the target until the transaction is closed, and to start integration planning.

This tension between the interests of competition agencies and merging parties is not irreconcilable. Experience shows that competition agencies recognise business needs and will not stand in the way of the exercise of influence or exchanges of information and co-ordination that may exceed what would normally be deemed permissible between competitors, provided that adequate safeguards are adopted and the notification and standstill obligations are complied with.

A recent increase in enforcement against gun jumping has been noted by the business community and triggered concerns on their part. However, it also provides a welcome source of guidance with regard to potentially risky actions in the pre-closing stage of a merger, as competition agencies have gone to great lengths to explain their actions and publishing additional guidance.

Multijurisdictional merger filings may face particular challenges in reconciling the various rules and requirements that apply to pre-merger clearance in different jurisdictions. However, these challenges seem to be manageable. A comparison of the EU and US practice on gun jumping violations in particular shows that they adopt a broadly similar approach.

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1. Introduction

1. Most OECD jurisdictions require the pre-notification of mergers that meet certain thresholds ('mandatory pre-merger notification' or 'ex-ante merger control'). This duty is typically coupled with a standstill obligation – i.e. an obligation not to put a merger into effect until it is cleared ('standstill obligation'). Violations of the obligation to notify a merger and of the standstill obligations are commonly called “gun jumping”, and can be subject to heavy fines.

2. The rationale behind mandatory pre-merger notification is to ensure that the merging parties remain independent actors on the markets until agencies had a sufficient chance to review a merger. This ensures that mergers do not have a negative effect on market structures in the interim. If a transaction gives rise to competition concerns, it can be subject to remedies or prohibited *ex ante*. This not only precludes anticompetitive effects from occurring, it also avoids the potentially difficult untangling of assets and business relationships, or irreversible insights into sensitive competitor information.

3. This note will look at mandatory pre-merger notification systems and standstill obligations, and in particular at how they are implemented across OECD jurisdictions. It will also seek to glean some insights regarding the appropriate balance between the interests of merger control agencies and merging parties while merger clearance is pending. The note is structured as follows:

- **Section 2** reviews the main characteristics of mandatory pre-notification regimes, and seeks to identify the main sources of uncertainty that could lead to unintentional gun jumping. It also discusses costs related to these uncertainties and to the suspension of the merger implementation.
- **Section 3** provides an overview of different categories of gun jumping – failure to notify, premature implementation of the concentration during the standstill periods, and exchanges of competitively sensitive information or co-ordination of competitive behaviour before closing. This includes sections on derogations from standstill provisions, and on detection of and fines for gun jumping.
- **Section 4** looks at the available agency guidance for merging parties' conduct in the due diligence stage, in the pre-closing stage and for pre-closing integration planning.
- **Section 5** concludes and outlines topic for future discussion.

2. Mandatory pre-notification of mergers

4. Some form of merger control currently exists in more than 90 jurisdictions (Sokol and Blumenthal, 2012, p. 319^[1]). Most regimes adopt *ex ante* merger control,¹ typically coupled with standstill obligations i.e. the merging parties need to obtain regulatory clearance or approval before they can close the deal and integrate their businesses (OECD, 2015^[2]).²

5. The rationale for adopting *ex ante* merger control is to prevent competition problems before they arise, because this may be more effective than fixing them after a merger has been put into effect. This not only precludes anticompetitive effects from occurring, it also avoids the potentially difficult untangling of assets and business relationships, or irreversible insights into sensitive competitor information.

6. *Ex ante* merger control regimes typically contain a number of elements, which we will quickly review.

2.1. Definition of transaction and notification thresholds

7. In a mandatory pre-notification merger control regime, it is essential that the criteria that trigger a notification requirement are sufficiently clear and objective (OECD, 2005^[3]).³ Any uncertainties in the definition of what constitutes a notifiable transaction or how to calculate a threshold increase the risk for merging firms to violate merger control laws and to implement a merger prematurely. They also increase the burden on competition authorities, which having to spend resources on determining whether a merger should or should not have been notified.

8. The definition of a *merger transaction* seeks to identify those transactions that are “suitable” for merger review, i.e., transactions that result in a more durable combination of previously independent assets and have a reasonable likelihood of outcomes that conflict with the policy goals of a competition law regime (OECD, 2013, p. 5^[4]). Definitions of what constitutes a ‘merger transaction’ can be based either on ‘objective’ or on ‘economic’ criteria.

9. Most jurisdictions have opted for more ‘economic’ criteria, alone or in parallel with ‘objective’ thresholds. More ‘economic’ criteria try to capture the essence of a transaction by focusing on the *de facto* influence that a company acquires over another, instead of just on nominal stakeholding. The most commonly used ‘economic’ threshold is control – i.e. whether the transaction leads to the acquisition by a company of single or joint control over another. A number of jurisdictions extend their review to transactions that lead to minority influences that stay below control or a decisive influence and use notions of material or competitively significant influence.⁴ Compared to ‘economic’ criteria, which leave room for interpretation and thus diverging assessments,⁵ ‘objective’ criteria, such as a certain shareholding in the target firm, are relatively easy to assess, and thus leave little room for unintentionally failing to notify.⁶

10. In addition to ‘economic’ or ‘objective’ criteria, certain transaction types are often used to establish jurisdiction, such as acquisitions in the form of full or partial asset acquisitions (OECD, 2013, pp. 26-30^[4]) and joint ventures (OECD, 2013, pp. 30-33^[4]). The definition of what constitutes a full or partial asset acquisition or a notifiable joint venture can again lead to disputes and uncertainty, increasing the likelihood of gun jumping.

11. *Notification thresholds* are used to identify the transactions that have sufficient material weight and nexus to a given jurisdiction and should be notified for merger control. Commonly used criteria are turnover and/or asset based thresholds, along with the value of the transaction and market share thresholds (OECD, 2016^[5]). Additional criteria are sometimes adopted.⁷

12. Of the criteria mentioned, turnover and asset based thresholds provide the highest degree of objectivity, as they are easy to calculate, leave little room for interpretation and do not require subjective evaluation by the merging firms. Nonetheless, some difficulties may arise – e.g. as regards the treatment of value added tax, intra-group turnover, or their suitability for certain industries such as finance or insurance. Additional guidance on this is often provided in the law and/or agency guidelines.⁸

13. This is unlike thresholds that focus on market power, such as market shares or dominance. Such thresholds require analyses that are usually reserved for the substantive

evaluation of a merger – e.g. market definition. Market definition requires not only an often sophisticated and detailed analysis (OECD, 2012^[6]), it also leaves ample room for diverging outcomes. Reasons why these thresholds are not international best practice include that they increase the risk of involuntary gun jumping, and impose burdens on competition agencies in the form of pre-notification consultations and gun jumping investigations (OECD, 2016^[5]) (ICN, 2017, p. 6; Sec. E^[7]).

14. Some mergers that meet the definition of *notifiable transaction* and the *notification thresholds* can be exempt from merger review and notification requirements,⁹ particularly when they are unlikely to lead to changes in the competitive landscape. Common exemptions are acquisitions by financial institutions such as banks and insurance companies, which purchase shares for resale within a limited time period¹⁰ or, as in the US, minority acquisitions purely for investment, without exercising voting rights (OECD, 2013, pp. 24-25^[4]).¹¹

15. The difficulties that businesses face when trying to ascertain their (pre-)merger notification duties are amplified by the fact that, even though similar concepts for transactions, thresholds and turnover calculation and exemptions will be used in most jurisdictions, there are still significant variations in the legal rules and in their application between jurisdictions. The same transaction can be considered an asset acquisition in one jurisdiction, but not in another,¹² or as a reportable minority stake, but not a change in control. Similarly, the concept of “staggered”, “creeping”, or “serial” transactions exists in various jurisdictions, but experiences different treatment.¹³ This may trigger different notification requirements in different jurisdictions for international transactions, increasing the costs of compliance.

2.2. Suspensory effects of merger notifications

16. Once it is established that a transaction is subject to mandatory notification for pre-merger control,¹⁴ a standstill obligation will very often be triggered. Gun jumping can refer to infringements of both these legal obligations – the obligation to notify and the standstill obligation.

17. As such, the concept of gun jumping may lead to confusion inasmuch as it refers to different infringements. The scope of the concept of gun jumping flows from the fact that, in line with the underlying rationale of an *ex ante* merger control regime, most jurisdictions that adopt mandatory notification also impose a standstill obligation or waiting period on the merging parties, during which no implementation of the transaction is permissible.

Box 1. Suspensory effects

US: Sec 7A HSR imposes the obligation to notify, and prescribes a waiting period of 30 days which can be extended by another 30 days through a “Second Request” by the agencies (Liebeskind, 2003, pp. 2-3[8]).^{*1} During this waiting period, the merging parties are prohibited from shifting beneficial ownership over the target to the acquiring party. This affects only mergers for which HSR notification is mandatory and the prohibition to implement the merger expires with the statutory waiting periods.

EU: The EC Merger Regulation (ECMR) imposes a standstill obligation on the merging parties in Art. 7 (1): “*A concentration shall not be implemented either before its notification or until it has been declared compatible with the common market ...*”. Unless the Commission clears the merger unconditionally or subject to conditions or does not issue a decision within the prescribed time limits (Art. 10 (6) ECMR), the merging parties must not implement whole or parts of the transaction. The time limits in phase one are 25 working days and in phase two 90 working days.^{*2} Other EU jurisdictions have very similar provisions and timelines, for example Austria^{*3}, Denmark^{*4}, France^{*5} or Germany^{*6}.

Japan:^{*7} The Japanese Anti-Monopoly Act requires prior notification of merger plans above a certain turnover threshold, including minority acquisitions. Notifying enterprises are prohibited from implementing mergers until a period of 30 days has elapsed from the day when notification is received by the JFTC. After the 30-day waiting period, the transaction can be closed legally, even if the FTC has not completed its review.

Canada:^{*8} According to the Canadian Competition Act, mandatory pre-notification of mergers above specified thresholds is required. A merger cannot be completed until the expiry of a statutory waiting period, which is initially 30 days. If a supplementary information request is issued during the first waiting period, the proposed transaction cannot be completed until the expiry of a second 30-day waiting period that commences when the Commissioner has received a complete response. In complex cases, reviews may extend beyond the waiting periods. In those cases, the Bureau may apply for an injunction to extend the waiting period by another 30 and extendable to a maximum of 60 days.

Brazil:^{*9} Mandatory pre-merger notification for mergers above certain thresholds was introduced in 2012. The merger cannot be consummated until CADE renders a final decision. This has to be done within 240 days after the merger notification with a possible extension of 90 days maximum.

^{*1} The waiting period of 30 days triggered by a “Second Request” starts upon the delivery of the requested information by the merging parties.

^{*2} Various extensions are possible and stop-the-clock provisions may apply, Art. 9 ECMR.

^{*3} § 15 KartG 2005 and §§ 11, 14 KartG (one month + five months examination period).

^{*4} § 12d Danish Competition Act.

^{*5} Artt. L430-8 (1,2), L430-5(1) and L430-7(1) FCC.

^{*6} § 41(1) and 40 (1) and 40 (2) Act Against Restraints of Competition.

^{*7} Japanese contribution to (OECD, 2014[10]), [DAF/COMP/WP3/WD\(2014\)9](https://gettingthedealthrough.com/area/20/jurisdiction/36/merger-control-japan/); Getting the Deal Through – Merger Control Japan, <https://gettingthedealthrough.com/area/20/jurisdiction/36/merger-control-japan/>, last accessed 20 August 2018.

^{*8} Canadian contribution to (OECD, 2014[8]), [DAF/COMP/WP3/WD\(2014\)10](https://gettingthedealthrough.com/area/20/jurisdiction/7/merger-control-2018-canada/); Getting the Deal Through – Merger Control Canada, <https://gettingthedealthrough.com/area/20/jurisdiction/7/merger-control-2018-canada/>, last accessed 20 August 2018.

^{*9} Brazilian contribution to (OECD, 2014[8]), [DAF/COMP/WP3/WD\(2014\)5](https://gettingthedealthrough.com/area/20/jurisdiction/5/merger-control-brazil/)

18. There are common characteristics to standstill obligations around the world. Most agencies can ask merging parties to stop the implementation process for the waiting period or until a merger clearance has been granted, apply for court injunctions or impose interim measures. No implementing acts that put the intended concentration into effect must be executed. For the US this means that elements of beneficial ownership over the target such as exercising management functions, joint decision making or integrating operations would violate the HSR Act (Baer, 1999^[9]). In the EU an implementation would consist of any *de jure* or *de facto* acquisition of the ability to exercise decisive influence or the actual exercise of such an influence.¹⁵

19. While mandatory pre-notification and parallel standstill obligations for (most of) the time of the merger review are the approach most jurisdictions follow, there are exceptions.

20. Some jurisdictions have mandatory pre-merger notification, but no standstill obligations. Italy and Latvia¹⁶ are examples. In Italy, pre-merger notification obligations do not trigger a suspension of the merger, which can be implemented prior to clearance. When second phase proceedings are opened, the Italian Competition Agency may issue an order not to implement, if the transaction raises serious competition concerns.¹⁷ Mexican law does not prohibit the implementation of a merger unless COFECE issues a “non-execution order” within ten days of the merger notification. In such cases the merger has to be on hold until COFECE issues its resolution.¹⁸

21. It is possible for standstill obligations to arise even if no mandatory notification obligation exists. The UK, Australia and New Zealand are the only OECD jurisdictions with purely voluntary notification systems (OECD, 2014, p. 5^[8]).¹⁹ These systems rest on a broad mandate to the competition authority to review any merger regardless of whether it was (voluntarily) notified or not, and irrespective of whether the parties have consummated it or not. As notification is voluntary, no standstill obligations and sanctions for closing before a clearance apply.

22. Nonetheless, the Australian ACCC can ask the merging parties for a written undertaking not to complete the acquisition during an informal merger review process. Alternatively, it may seek a court injunction to stop the implementation process until the merger review has been concluded.²⁰ In New Zealand it seems that, despite there not being a mandatory pre-notification, a de-facto open ended standstill obligation until clearance applies.²¹ The UK CMA will impose initial enforcement orders as a matter of course in completed mergers, to prevent further integration and to un-wind integration that has already occurred. During a merger investigation, the CMA can also prohibit the completion of an anticipated merger by imposing a holds-separate order that will remain in force for the duration of the investigation.²² A breach of such an interim order can be subject to fines (Box 8).

2.3. Costs of ex-ante merger control and the suspension of transactions

23. Merger activity is mostly beneficial, as is made clear by the vast majority of mergers which are approved without conditions everywhere in the world.²³ Mergers are a means for companies to compete and to realise welfare-enhancing efficiencies. Delaying merger implementation thus imposes costs not only on merging parties, but to society more generally. This concern underpins criticisms of standstill obligations and mandatory notification systems,²⁴ and why some jurisdictions adopted *ex post* voluntary regimes instead.

24. Additional costs are created by uncertainty with regard to notification requirements:

- Uncertainty about how to determine whether a transaction is notifiable creates costs for businesses which need to commit resources to research the issue and, if in doubt, engage in pre-merger contacts with the competition agency or even notify. It also creates costs to competition agencies that need to devote resources to addressing mostly formal questions, and may face increased notification levels without net benefit to competition enforcement.
- Uncertainty about what amounts to gun jumping may delay the implementation of mostly pro-competitive transactions, raises transaction costs, and creates incentives for businesses to test the limits of gun jumping prohibitions and circumvent standstill rules. This will, in turn, force competition agencies to devote resources to the monitoring and prosecution of mostly procedural matters with a dubious impact on pro-competitive outcomes.

25. These costs need to be balanced against the benefits of ex-ante merger control and of delaying merger implementation for the duration of a standstill obligation – the system most jurisdictions have agreed on to ensure effective merger control. The remainder of this note focuses on the cost side. It will explore different types of gun jumping and typical behaviours associated with it. This paper will look for common approaches and differences between jurisdictions, and on what guidance is available to businesses. While doing so, it should be borne in mind that gun jumping is not a widespread practice, at least taking into account the percentage of mergers that give rise to gun jumping cases.²⁵

3. Gun jumping in merger control

26. As noted above, gun jumping is a concept that covers a number of different infringements to merger control-related obligations. There is a long list of actions and behaviours that have been considered gun jumping by competition authorities around the world, which can be categorised broadly into: (1) implementation of a transaction without prior notification where notification is mandatory (also sometimes referred to as “procedural gun jumping”) and (2) pre-closing conduct in violation of relevant standstill obligations by partly or fully putting a merger into effect before the end of the standstill period.

27. In addition, if parties engage in unilateral or bilateral information exchange of competitively sensitive information or co-ordinate their competitive conduct on the market before a merger notification or in the standstill period, this can also amount to (3) a violation of prohibitions of horizontal anti-competitive agreements (also sometimes referred to as “substantive gun jumping”) (Lemmonier, 2018^[10]) (Dionnet and Giroux, 2017^[11]). Depending on the regime and circumstances, such an exchange of information may amount to an infringement of antitrust or of gun jumping rules, or both.

3.1. Failure to notify

28. The violation of the obligation to notify a concentration is the most straightforward gun jumping offense. As outlined above, a failure to notify will infringe pre-merger notification duties which are a natural element of *ex ante* merger control regime. The reasons for such an oversight could be:

- A mandatory notification is simply overlooked or forgotten, e.g. as a result of negligence on the part of the merging parties and omission of any analysis of the competition law implications of a concentration;
- Failures to identify a duty to notify. This may result from mistakes in the calculation of threshold values or the identification of what transactions constitute a notifiable concentration;
- Intentional lack of notification, in order to speed up the merger process or avoid competition scrutiny. This will usually only occur when it is expected that a competition agency will never find out and/or bother to impose sanctions, or when the merger control agency is seen as lacking effective enforcement powers.

29. The extent of the problem, as the reasons for it, can only be guessed. Just as for illegal cartels, it is impossible to produce a reliable estimate of incidents of failure to notify based on the number of detected and publicly prosecuted cases. In addition, many agencies, in an effort to prioritise their enforcement work, may decide to give lenient treatment to first-time offenders and to abstain from prosecuting in a number of cases. This may in particular relate to cases of pure negligence without any relevant effects on competition.

30. In some cases, uncertainty with regard to notification thresholds or the definition of transaction will have been at least part of the reason for the failure to notify.²⁶ Box 2 and Box 3 illustrate some of the cases.

Box 2. Disputes on whether a transaction amounted to a notifiable merger

Electrabel had notified the EC of an acquisition of de facto sole control over Compagnie Nationale du Rhône (CNR) in 2008. It had, however, already increased its share from 16.88 to 47.92 % of the voting rights in 2003. While the merger was cleared, the EC imposed in a separate decision a fine of EUR 20 million on Electrabel for violation of the standstill obligation.^{*1} The EC found that Electrabel had acquired de-facto control over CNR in 2003 even with a minority shareholding, because it was the largest shareholder and the voting rights conferred a stable majority in the shareholder meetings, the other shareholdings being dispersed. Electrabel was also the only industrial investor and held a majority in CNR's management board. The decision was confirmed in both appeal stages.^{*2}

Marine Harvest acquired 48.5 % in Morpol in December 2012 and subsequently launched a public offer and acquired 87.1 % of Morpol's shares in March 2013. The case was notified to the EC in August 2013. Marine Harvest did not exercise its voting rights in Morpol. The merger was cleared with divestment commitments. The EC imposed a fine of EUR 20 million on Marine Harvest for failure to notify and violation of the standstill obligation.^{*3} It found that Marine Harvest had already in the first step acquired de-facto control over Morpol, as the minority share of 48.5 % granted a stable majority in the shareholder meetings where the remaining shares were widely dispersed. The EC's decision was confirmed by the General Court^{*4} and is now pending at the Court of Justice.^{*5}

German former **HRR** Stahlschrott- und Metallrecycling GmbH & Co. KG, Henningsdorf, made use of its option to raise its share in fm Beteiligungsgesellschaft from 40% to 49% in December 2008. At the same time the partnership agreement of fm Beteiligungsgesellschaft was altered to the effect that important decisions could only be made with HRR's approval. This acquisition of control was not notified as required under the merger control regulations before it was put into effect although the Bundeskartellamt had informed the companies of the obligation to do so in a previous merger control proceeding. The Bundeskartellamt imposed a fine of EUR 206.000 on the legal successor Interseroh. The case was settled.^{*6}

^{*1} [Commission Decision of 10.6.2009; Case COMP/M.4994 Electrabel/Compagnie Nationale du Rhône](#); The failure to notify was presumably not fined separately as this infringement was time barred at the time of the decision.

^{*2} [Case T-332/09 - Electrabel v Commission - Judgment of the General Court of 12 December 2012](#); and [Case C-84/13 P - Electrabel v Commission - Judgement of the Court of 3 July 2014](#).

^{*3} [Commission Decision of 23.7.2014; Case M.7184 – Marine Harvest / Morpol](#).

^{*4} [Case T-704/14. Judgement of the General Court of 26 October 2017 Marine Harvest ASA v European Commission](#).

^{*5} [Case C-10/18 P – Marine Harvest ASA vs the European Commission](#).

^{*6} [Bundeskartellamt Press Release, 10.5.2011](#).

Box 3. Disputes on whether the notification thresholds were met

In the case of **Essilor**, (a French company), and **Polycore** (Singapore company), the Spanish CNMC imposed a fine of EUR 5,065 in 2014.^{*1} The notification was made seven months after the execution of the merger. The CNMC accepted Essilor's explanation that the failure to notify was due to a miscalculation regarding the market share. Under Spanish Law the market share threshold is established in cases in which the transaction results in the acquisition of more than 30% in market share in Spain or in the defined market. The CNMC established that the market for ophthalmic lenses manufacturing was global, while the market for distribution of lenses is national. This market definition triggered Essilor's obligation to notify.

In the **A.P. Møller** case, three cases of failure to notify were subject to a fine of a total of EUR 219,000 by the European Commission.^{*2} A.P. Møller had discussed the calculation rule for consolidated group turnover in another transaction with the European Commission and argued that, according to Danish law, A.P. Møller had never been obliged to establish consolidated accounts for the whole group, so it should not be required to include the turnover of group companies in the consolidated turnover for the purpose of EU merger notification. The European Commission did not agree and A.P. Møller subsequently notified three merger cases from the past.

In the case of **Chelsea** and **Trans-Asia**, the Philippine Competition Commission imposed a fine of approximately EUR 352,000 in 2018.^{*3} Under Philippine Law, the parties to a merger have to notify, with respect to a proposed acquisition of voting shares of a corporation, if either the aggregate value of the assets or the gross revenue from sales in, into or from the Philippines of the acquired corporation exceeds PhP 1 billion. Chelsea did not notify because they considered the value of the transaction to be the purchase price of acquired shares of the target which was lower than PhP 1 billion.

^{*1} https://www.cnmc.es/sites/default/files/486759_3.pdf.

^{*2} EU Case A.P. Møller No IV/M.969, Decision of 10.2.1999.

^{*3} https://phcc.gov.ph/wp-content/uploads/2018/07/Udenna-Chelsea-TransAsia_PCC_CommissionDecision_28June2018.pdf

31. Enforcement action that is visible and transparent will help decrease compliance costs to businesses and enforcement costs to competition authorities. Press releases and agency interventions at conferences can provide additional clarity. If an agency finds frequent violations of the obligation to notify, it may additionally consider to publish detailed guidance, and to review and compare its legal provisions with international best practice.

3.1.1. Cases with competition concerns

32. Competition agencies will obviously be most concerned with concentrations that have harmful effects on competition and were not notified. Table 1 provides examples for cases that were not notified, but raised competition concerns. In one of the cases the prosecuting agency pointed out that the failure to notify was intentional and the merging parties feared that the transaction would raise competition concerns.²⁷ In all of these cases, the competitive concerns were remedied with divestitures or dissolution of the unlawful concentration.

Table 1. Failure to notify – cases with competition concerns

	Violation	Result of comp. assessment	Outcome	Fine in EUR million
EC Case No COMP/M.7184 – Marine Harvest/ Morpol	Acquisition of de-facto sole control with minority shareholding	Clearance with remedies	Compliance with divestiture commitments	20
Germany ZG Raiffeisen/Wurth ^{*1}	Asset acquisition	Notification withdrawn due to competitive concerns	Sale of assets to third party	0.4
Germany - Marienhaus/Barmherzige Brüder Trier ^{*2}	Multiple majority acquisitions	Prohibition	Withdrawal of controlling stakeholder - dissolution	-
US Mahle/Metal Leve	Acquisition of control	Clearance with remedies	Divestiture of target's US piston business	4.93
US Sara Lee Corporation/Shoe-Care Product	Acquisition of control	Clearance with remedies	Divestiture of several brands	2.37

Notes:

^{*1} Bundeskartellamt Tätigkeitsbericht 2009/10, p. 68.

^{*2} Bundeskartellamt Fallbericht B3-32/11 and B3-49/12; 16 April 2013.

Source: OECD Secretariat research

3.2. Pre-closing conduct in violation of the standstill obligation

33. This section focuses on cases where mergers were duly notified, but some form of premature implementation took place during the mandatory waiting period in breach of the standstill obligation (2.2).²⁸ This is a tricky issue, as the concept of implementation is fuzzy: after all, some conduct that is ancillary to merger negotiations and preparations will be permissible in this context, even as it could normally be in breach of antitrust rules. Difficulties arise as regards matters such as lawful conduct in the due diligence phase, permissible provisions in sale and purchase agreements to protect the asset value of the target, post-merger implementation planning, and the parameters of the overall relationship between the parties to the concentration during the standstill period.²⁹

34. Recent prominent enforcement action in the EU – the EC³⁰ and the French³¹ Altice cases – have sparked a renewed interest in what actually constitutes a violation of the standstill obligation.³² The fines of EUR 124 and 80 million that were imposed in these cases show that the stakes are high. According to the case law, a violation of the standstill obligation requires that the challenged conduct prematurely puts the notified transaction partly or fully into effect.

35. Below we will pursue a short overview of this type of gun jumping infringements. This overview will start with the EU and its member states, before looking at US practice.³³

3.2.1. The EU approach

36. The EC has very limited enforcement of cases that were mainly based on Art. 7(1) ECMR, the violation of the standstill obligation.³⁴ The first was the 1997 Kirch/Bertelsmann/Premiere Case,³⁵ followed by the 2018 decision in Altice/PT Portugal³⁶. The only relevant jurisprudence to date is the 2018 preliminary ruling by the Court of Justice of the EU in the Ernst & Young case.³⁷ One case, Canon/Toshiba, is still ongoing.³⁸

Box 4. EC cases – violation of the standstill obligation

1997 Bertelsmann/Kirch/Premiere ^{*1}

The EC considered the use and marketing of Kirch's d-box by Premiere to be a partial implementation of the notified concentration. The action was inseparably linked with the intended concentration, as it appeared that Premiere's decision to adopt the d-box was the immediate result of the agreement between Bertelsmann and Kirch to merge their digital activities – implemented even before the notification was made. As the parties stopped their behaviour, no fine was imposed.

2018 Altice/PT Portugal ^{*2}

In July 2017 the EC imposed a fine of EUR 124.5 million on Altice for implementing its acquisition of the Portuguese telecommunications operator PT Portugal before notification or approval by the Commission.

In particular, the Commission concluded that Altice violated Artt. 4 (1) and 7 (1) ECMR:

“certain provisions of the purchase agreement resulted in Altice acquiring the legal right to exercise decisive influence over PT Portugal, for example by granting Altice veto rights over decisions concerning PT Portugal's ordinary business;

In certain cases, Altice actually exercised decisive influence over aspects of PT Portugal's business, for example by giving PT Portugal instructions on how to carry out a marketing campaign and by seeking and receiving detailed commercially sensitive information about PT Portugal outside the framework of any confidentiality agreement.”^{*3}

The EC outlines, that a breach of the standstill violation can result from obtaining the ability to exercise decisive influence or the actual exercise of decisive influence, and within this framework, control “can be acquired on a de jure and/or de facto basis; control can be explicitly conferred by way of the existence of a legal right, for example by rights included in the transaction documentation, or can be determined on the basis of the actual practice of exercising control”.^{*4}

An interesting aspect of the case is the close analysis of the purchase agreement and the conclusions on what constitutes veto rights concerning PT Portugal's ordinary business – constituting the ability to exercise control. While the EC fully acknowledges that “clauses determining the conduct of a target between signing a transaction agreement and closing the transaction in order to preserve its value are both common and appropriate in commercial transactions”, it concluded in the present case that the rights obtained extended beyond what was necessary for value preservation.

The calculation of the fine took into consideration no aggravating or mitigating circumstances and the duration of the infringement was given as 4 months 11 days. The EC expressly noted that Altice was a large player with sufficient experience in merger control proceedings and should have known that even the mere possibility of exercising decisive influence could constitute a violation of the relevant rules. The fine was significantly below the maximum 10 % of the aggregated turnover.

Altice has appealed the decision.

^{*1} EC [Press release of 1. December 1997](#), Bertelsmann/Kirch/Premiere.

^{*2} [EC Case M.7993 Altice – PT Portugal](#).

^{*3} [EC Press release Altice/PT Portugal, 24. April 2018](#)

^{*4} [Case M.7993 Altice – PT Portugal, paras 42, 43.](#)

37. The European Court of Justice (ECJ) has ruled on the interpretation of Art. 7 (1) ECMR for the first time in May 2018, in a preliminary ruling.³⁹ In the case at hand, the Danish competition authority had found KPMG to be in violation of the standstill obligation under Danish competition law. The reviewing Danish Court asked the Court of Justice of the EU for a preliminary ruling regarding the interpretation of Art. 7 (1) ECMR, which is essentially identical to the relevant Danish provision.⁴⁰

38. Ernst & Young and KPMG DK had concluded and signed a merger agreement on 18 November 2013. KPMG DK then terminated its co-operation with KPMG International as of 30 September 2014, on the day it signed the merger agreement and in accordance with it. The merger was notified to the Danish competition agency on 13 December 2013. The merger was cleared, but the Danish competition agency decided that KPMG had violated the standstill obligation and that the termination of the co-operation agreement was merger specific, irreversible and likely to have market effects.

39. The ECJ found that the main criterion relevant to the interpretation of the reach of Art. 7 (1) is if a transaction will contribute in whole or in part, in fact or in law, to the implementation of a concentration and thus to a lasting change of control. While the ECJ acknowledged that any partial implementation falls within the scope of the gun jumping prohibition, it held that not all transactions in the context of a concentration necessarily achieve a change in control. Even though the termination of the co-operation agreement was linked to the transaction, it was an ancillary and preparatory act which did not contribute to the change of control of the target undertaking, even if it produced market effects. As such, the termination of the co-operation agreement did not amount to gun jumping.⁴¹

40. The ruling contains another interesting aspect. The ECJ points out that applying the merger control provisions to actions that do not contribute to a change of control but are nevertheless capable of leading to co-ordination could fall under the scope of the antitrust rules such as Art. 101 TFEU when they do not fall within the scope of merger control rules.

41. The EC and Denmark are not the only European agencies to prosecute violations of the standstill obligation (Annex A. Case overview of violations of the standstill obligation). The French competition agency had a very similar recent case as the EC, also involving Altice⁴², and the German competition agency had a recent case on joint purchasing and central payment regulation services, Edeka/Tengelmann.⁴³ It should be noted that the German Federal Court of Justice's decision (Box 6) in the Edeka case was taken before the ECJ's preliminary ruling.

Box 5. France - Altice/SFR, Altice/OTL*

On 8 November 2016 the French Competition Authority (“FCA”) imposed a fine of EUR 80 million on Altice for having implemented two mergers before receiving clearance. Both concentrations were cleared by the FCA, subject to commitments. The exchange of commercially sensitive information between the parties, and the intervention of Altice in SFR’s and OTL’s operational management prior to the clearance of the transactions were found to infringe the standstill obligation.

The FCA specifies that a violation of the standstill obligation occurs when “ownership” is transferred, and when decisive influence is taken over a significant part of the target. To this purpose it looked at the nature of economic relations, information exchanged between the parties during the period of suspension and finally, the scope of the eventual integration.

Behaviour that indicates that decisive influence was acquired was implied from Altice’s involvement in SFR’s operational management, where Altice gave prior validation to the terms of participation of SFR in a public bid; to the renegotiation of a mobile network sharing agreement; and to SFR’s pricing policy and suspensions of a promotional offer. Altice and SFR also co-ordinated their actions during the take-over of OTL and exchanged large quantities of detailed commercially sensitive information. With regard to OTL, the FCA found that the Memorandum of Understanding between the parties contained provisions which would limit the commercial freedom of OTL during the suspensory period: a number of strategic decisions were approved by Altice; OTL’s general director was nominated to the executive committee of Altice and participated in meetings relating to his future position. A weekly reporting mechanism allowed Altice to keep track of OTL’s commercial performance and to obtain sensitive commercial information on a regular basis.

In setting the fines, the FCA took into account the duration of the infringement, the nature of the infringement and the extent/significance of the part of the target companies over which control was exercised. The FCA also looked at the effects of the decisions which were taken prior to clearance by the acquirer, and whether they constituted a risk factor for competition.

* Décision n° 16-D-24 du 8 novembre 2016 relative à la situation du groupe Altice au regard du II de l’article L. 430-8 du code de commerce.

Box 6. Germany – Edeka/Kaiser’s Tengelmann^{*1}

With the prohibition of the merger Edeka/Kaiser’s Tengelmann,^{*2} the Bundeskartellamt had imposed conditions on the merging parties not to proceed with an agreement that foresaw that Tengelmann would enter into a framework agreement with Edeka to join its purchasing organisation and payment clearance system. These conditions aimed at preventing a foreseeable breach of the standstill obligation that was still in force after the prohibition.

The Federal Court of Justice, as the last stage of appeal, confirmed that the Bundeskartellamt was within its rights when it imposed this condition in order to secure that the parties would not violate the standstill obligation in § 41 Act Against Restraints of Competition (ARC).

The Court held that the standstill obligation does not only apply to conduct that would implement one of the notifiable transactions in § 37 (1) ARC, but that it applied “to all measures and behaviours, that, in and by themselves, would not be considered a notifiable transaction, stand in a connection with the intended concentration and would be suitable to at least partly implement the effects of the concentration.” (OECD translation) The Court adds that if the measure leads to a conduct that would otherwise not be expected by an independent undertaking, this could be considered to be relevant to the assessment of a violation of the standstill obligation.

The Court is silent on the relationship between the merger control provisions and the provisions on anti-competitive agreements.

^{*1} [Judgement of the Federal Court of Justice, 14 November 2017, KVR 57/16](#), paras 55, 61.

^{*2} Following the [Bundeskartellamt’s prohibition decision](#), the Federal Ministry for Economic Affairs and Energy granted a [ministerial authorisation, Art. 42 ARC](#). The ruling of the Federal Court of Justice related to a “Fortsetzungsfeststellungsbeschwerde”, an appeal relating to legal questions raised by the case, after the main proceedings were closed.

3.2.2. The US approach

42. In the US, Sec. 7A HSR, a violation of the standstill obligation is any act through which the buyer effectively gains beneficial ownership of the seller prior or close to the transaction (Federal Trade Commission, US, 2018^[12]). However, any merger agreement will start by shifting some beneficial ownership aspects right from the beginning, without this being necessarily problematic under Sec. 7A HSR. The difficulty is to determine at which point the shift is sufficiently pronounced that effective beneficial ownership has been acquired. This needs to be ascertained by reference to indicia such as influence on the target’s management decisions or designation of its management (Blumenthal, 2005, pp. 8-9^[13]).

43. Similar to the EU, a breach of a standstill obligation hinges on the premature implementation of a concentration. The identification of shifts in beneficial ownership seems to focus on whether there have been *de jure* and *de facto* changes in control of the merging parties, in whole or in part. Most cases target situations where a buyer acquired a level of influence over the target during the standstill period that should only have been available to it once the standstill obligation came to an end.

Box 7. US case practice – 7A HSR^{*1}

Titan Wheel and **Pirelli Armstrong** had agreed in 1994 on the sale of one plant to Titan Wheel. On the same day, Titan Wheel took control of the plant, inventory, equipment, and machinery. In addition, it took control of customer and supplier lists and assumed critical management functions. The action happened three days before the merger notification to the US authorities. Titan Wheel settled with the FTC to pay the maximum civil penalty under Sec. 7A HSR of USD 130,000.^{*2}

In 1998, **Input/Output Inc.**, entered into a merger agreement with Laitram Corp. to purchase DigiCOURSE. During the standstill period, the executives of DigiCOURSE managed the combined business of the two companies and began running a division of Input/Output. At the end of the standstill period, a civil penalty of USD 225,000 (settlement) was imposed on each party.^{*3}

A similar transfer of beneficial ownership was the subject matter in 2006 merger between **Qualcomm** and **Flarion** Technologies. The merger agreement necessitated Qualcomm's written consent on important decisions of Flarion, such as the licensing of its intellectual property, entering into any material contract, or hiring any employees outside the ordinary course of business. According to the U.S. DOJ, Qualcomm substituted its business interests and judgement for those of Flarion and exercised operational control over Flarion's business. These restrictions were sufficient to arrive at a conclusion that beneficial ownership had been transferred prior to merger clearance, and that, consequently, Section 7A HSR had been infringed. Qualcomm settled the case for USD 1.8 million.^{*4}

In 2010, the U.S. DOJ complained that prior to receiving HSR clearance, **Premium Standard** sought **Smithfield Foods'** consent for Premium Standard's decisions relating to its ongoing business, following a merger in 2006. The U.S. DOJ and Smithfield Foods settled the case for USD 900,000.^{*5}

*1 (OECD, 2014^[8]), Box 2; U.S. DOJ and FTC press releases and competitive impact statements.

*2 <https://www.ftc.gov/enforcement/cases-proceedings/941-0110/titan-wheel-international-inc>.

*3 <https://www.justice.gov/atr/case-document/complaint-civil-penalties-violation-premerger-reporting-requirements-hart-scott>.

*4 <https://www.justice.gov/atr/case-document/complaint-civil-penalties-violation-premerger-reporting-requirements-hart-scott-0>.

*5 <https://www.justice.gov/opa/pr/smithfield-foods-and-premium-standard-farms-charged-illegal-premerger-coordination>.

44. The differences between the US and the European enforcement practice against violations of the standstill obligation are not pronounced. The cases seem to imply a rather similar approach, one focusing on the premature establishment of beneficial ownership and one on the premature implementation of control. One major difference is certainly the so far very different approach to a parallel application of the rules on anti-competitive agreements (see Sec. 3.3).

3.2.3. Cases with competition concerns

45. As for failure to notify cases (Table 1), competition agencies will be particularly vigilant with regard to violations of the standstill violation in cases that raise competition concerns. Table 2 provides examples for such cases. In all of these cases, the competitive

concerns were remedied with behavioural remedies, divestitures or the dissolution of the unlawful concentration.

Table 2. Violation standstill obligation – cases with competition concerns

	Violation	Result of comp. assessment	Outcome	Fine in EUR million
Bulgaria - Boyana Film EAD/New Image	Appointment of managing director and exercise of control	Clearance with remedies	Behavioural remedies	-
Denmark – KPMG/E&Y	Termination of affiliation with KPMG Intl.	Clearance with remedies	Release of staff from non-solicitation agreements. Case pending re violation of standstill obligation.	-
EC – Altice/PT Portugal	Exercise of de-facto control over ordinary course business	Clearance with remedies	Divestment of Altice Portugal business. Case pending re violation of standstill obligation.	124.5
EC - Bertelsmann/Kirch/Premiere	Joint decoder marketing	Prohibition	Behaviour stopped before clearance.	-
France – Altice/SFR & OTL	Exercise of de-facto control over ordinary course business	Clearance with remedies	Divestiture and access commitments	80
Germany – Mars/Nutro	Transfer of assets and IP rights before clearance	Withdrawal of notification after statement of objections	Dissolution	4.5
UK - Electro Rent	Lease termination while under interim standstill order	Clearance with remedies	Divestiture of UK division. Case pending re violation of standstill violation.	0.11
US - Computer Associates/Platinum	Approval of contracts, installation of a manager at target	Consent decree	Divestiture of Platinum assets	0.72
US Insilco – Lingemann	Exchange of price and customer related information and on future strategies	Consent decree	Divestiture of aluminium tube business	-

Source: OECD Secretariat research - Annex A

3.2.4. Regimes without mandatory pre-merger notification and standstill periods

46. A violation of a standstill obligation can also occur in merger regimes that do not foresee a mandatory pre-merger notification or a standstill period in the first place (paras 20, 21). As outlined above, these jurisdictions can order measures to interrupt ongoing company integration or to impose barriers on further implementation and co-ordination. Agencies in voluntary notification systems start investigating a merger because they find it possible that the merger will pose competition issues. These orders therefore make sense to protect competition, safeguard the independence and autonomy of the merging parties, and to facilitate an eventual break-up that may be ordered at the end of the merger review process.

Box 8. UK Electro Rent case*

The CMA imposed a fine of GBP 100,000 on Electro Rent in June 2018 for failure to comply with the requirements imposed by an Interim Order in the investigation of the completed merger of Electro Rent and Microlease. Electro Rent and its subsidiary, Electro Rent Europe NV, had terminated the lease over the only premises they had in the UK. The CMA considered the act to be “... *a flagrant breach and was committed in large part by the senior management of Electro Rent*”.

It was the first time that the CMA has imposed a fine for a breach of the requirements relating to an interim order.

Electro Rent has appealed the penalty and the case is pending.

The merger itself raised competitive concerns and was cleared subject to remedies.

* CMA Notice of penalty, https://assets.publishing.service.gov.uk/media/5b1fb924e5274a18e8bf5230/Decision_on_Penalty.pdf; CMA Final undertakings https://assets.publishing.service.gov.uk/media/5b5ae933e5274a3ff594d162/Final_Undertakings.pdf.

3.3. Anti-competitive agreements between merging parties

47. Of particular concern to competition agencies are behaviours like the exchange of competitively sensitive information, and the exchange or even agreement on pricing or terms of business, customer allocation, and future business strategies between competitors. Such behaviour will be considered as a *per se* or *by object* infringement of the rules on anti-competitive agreements in most jurisdictions.

48. There seems to be a strong incentive to exchange this kind of information or to agree on future strategies in the merger process, for example in the due diligence stage, but also for purposes of the preservation of the asset value of the target and for post-merger integration planning.

49. At the same time, it is fully recognised that some co-operation and information exchange is ancillary to a merger agreement (Blumenthal, 2005, p. 7_[13])⁴⁴ (see also Sec. 4.1), there is the expectation by the competition agencies that the merging parties continue to operate as independent actors and safeguard their competitively sensitive information, to preserve competition in the short run, but also in the longer term, in case the merger does not happen in the end (Federal Trade Commission, US, 2018_[12]). The EC⁴⁵ and the FCA (De Silva, 2018, p. 65_[14]) also expressly recognised the legitimacy of some of the above mentioned conduct, provided appropriate safeguards are applied. Nevertheless, exchanges of competitively sensitive information between the merging parties, the buyer influencing pricing policies, co-ordinated action in a public bid procedure, and joint decoder marketing were qualified as violations of standstill obligation, for example in the French Altice case (see Box 5), or the EC cases (see Box 4).

50. It is easy to see that these exchanges or agreements may not only amount to a violation of the standstill obligation, but could also or exclusively infringe the laws on anti-competitive horizontal agreements, in particular if the merging parties are competitors. The US agencies have consequently based their infringement findings in some cases on both, HSR merger rules and Sec. 1 Sherman Act (see Box 9).

Box 9. US case practice – 7A HSR and Sec. 1 Sherman Act^{*1}

In 2002, **Computer Associates International (CA)** and **Platinum Technology** signed a merger agreement which required CA's written approval for discounts, variations to standard form contracts and offers of consumer consulting services. In that context, CA received commercially sensitive information about Platinum's customers including prices, discounts and contract terms offered. CA installed an employee at Platinum's offices for review and approval purposes. The U.S. DOJ considered that parties had effectively closed the merger before clearance and that the exercise of control over pricing decisions constituted a price-fixing in violation of the Sherman Act. The penalty imposed was USD 638,000 (settlement) with undertakings not to exchange this type of information in future merger cases.^{*2}

In 2003, the merger between **Gemstar** and **TV Guide** was subject to a seven-month investigation but in the end it was not challenged by the U.S. DOJ. However, the U.S. DOJ contended that the parties had fixed prices, allocated customers, and violated the pre-merger waiting period requirements by effectively merging their interactive programme guide decision making and granting Gemstar significant control over this part of TV Guide's business. The two companies were found to have infringed both the Sherman Act and the HSR Act and were required to pay USD 5.67 million in civil penalties (settlement), i.e. the maximum amount that was available under the HSR Act.^{*3}

In the case of **Flakeboard** and **SierraPine**, Flakeboard had agreed in 2014 to buy three competing plants from SierraPine. The merging parties co-ordinated during the HSR waiting period to close SierraPine's Springfield mill and move the mill's customers to Flakeboard. The mill was permanently shut down months before the waiting period expired. The agreement to close the mill and transfer the customers was considered an output reducing and customer sharing per se violation of Art. 1 Sherman Act. At the same time, a violation of Art. 7A HSR was found, as Flakeboard exercised operational control over SierraPine with regard to the Springfield business. The parties settled with the U.S. DOJ and paid a civil penalty of USD 3.8 million. In addition, Flakeboard settled on a disgorgement of USD 1.15 million of ill-gotten gains.^{*4}

*1 (OECD, 2014^[8]), Box 2; U.S. DOJ and FTC press releases and competitive impact statements.

*2 <https://www.justice.gov/atr/case/united-states-v-computer-associates-international-inc-and-platinum-technology-international-0>.

*3 <https://www.justice.gov/atr/case/us-v-gemstar-tv-guide-international-inc-and-tv-guide-inc>.

*4 <https://www.justice.gov/atr/case/us-v-flakeboard-america-limited-et-al>.

51. Section 1 Sherman Act prohibits anti-competitive agreements between independent firms and applies to all transactions. Its application formally continues until the merger has been consummated, even if this takes longer than the HSR clearance (Blumenthal, 2005, p. 9^[13]). Behaviour covered by Sec. 1 Sherman Act will include pre-merger co-ordination that is not ancillary to the transaction and goes beyond what is reasonably necessary to protect the core transaction. Unless the co-ordination amounts to clear hard-core violations such as price fixing or allocation of accounts between the merging parties in the interim period, which would be treated as per-se violations, a rule of reason analysis applies (Blumenthal, 2005, p. 8^[13]). In contrast, Art. 7 HSR does not require an analysis of competitive effects. However, in all cases so far, the violations of Sec. 1 Sherman Act were qualified as clear *per se* violations – price fixing, customer allocation and output reduction.

52. None of the reviewed European decisions on violations of the standstill obligation has so far been based solely or partly on Art. 101 TFEU, the European equivalent to Sec. 1 Sherman Act. As the EC rules on information exchange between competitors are very strict – already a single exchange of forward looking, customer or price related information falls under the prohibition of Art. 101 TFEU and can establish a *by object* violation⁴⁶ – it seems rather likely that some of the conduct discussed in this section could violate Art. 101 TFEU or its national equivalents.⁴⁷ The fact that the anti-competitive behaviour arises in a merger context cannot protect it from the application of Art. 101 TFEU, and there is widespread agreement that Art. 101 TFEU is generally applicable to anti-competitive pre-merger co-ordination.⁴⁸ In the merger case Ineos/Kerling,⁴⁹ the EC conducted unannounced inspections based also on the suspicion of the two companies sharing sensitive commercial information, which might have constituted an infringement of Article 101 TFEU.⁵⁰ In line with the ECJ's rulings in Ernst & Young⁵¹ and Austria Asphalt⁵², transactions that do not contribute to the implementation of a concentration under the ECMR but amount to unlawful co-ordination or concertation of behaviour of competitors can be subject to the application of Reg. 1/03 and Art. 101 TFEU.⁵³

3.4. Derogations and early termination

53. There are exceptional circumstances where a merger that would normally be subject to standstill obligations is exempt from this obligation.

54. When insolvency of the target is pending or vital assets threaten to deteriorate if the prospective acquirer would not insert cash or enter into obligations of the target, the whole merger might not be feasible after the waiting period set for the standstill obligation. For such cases, many jurisdictions provide the possibility for a derogation from the standstill obligations, to allow merging parties to implement parts of the transaction before the expiration of the waiting period or the clearance. This can be seen as a way to reconcile in exceptional cases the burdens that ex-ante merger control puts on merging firms with the overall pro-competitive effect that mergers will generally have.

55. The ECMR foresees a derogation from the standstill obligation of Art. 7 (1) in Art. 7 (3). The application for it needs to be reasoned and the Commission will look at the likely effects of a continued suspension on the parties to the merger, but also on third parties and the overall effect on competition the merger is likely to have. A derogation can be granted at any time and may be subject to conditions, to avoid negative effects on competition. While the absolute number of derogations is small compared to the total number of merger notifications,⁵⁴ it seems that it is an option available across all sectors under the right circumstances (Pollard and Rende Granata, 2013, p. 55^[15]).

Box 10. EC derogation Lufthansa/certain Air Berlin Assets*

Lufthansa intended to acquire parts of insolvent Air Berlin, NIKI and LGW, which had not entered into insolvency proceedings. Lufthansa asked the EC for an Art. 7 (3) derogation with regard to dry lease contracts and wet lease agreements for aircraft, where Lufthansa would replace Air Berlin and/or enter into lease agreements with NIKI and LGW. The EC decided that these transactions would be subject to the standstill obligation of Art. 7 (1). In case Lufthansa would not be able to take the intended measures, the relevant aircraft were likely to be repossessed by the lessors of the aircraft, which would lead to an immediate cessation of all flights and very likely the insolvency of NIKI and LGW. Neither Lufthansa nor any other possible buyer would in this case be able to acquire NIKI or LGW as going concerns. The insolvency would also have harmful effects on third parties, in particular employees, customers and creditors, while the derogation would not affect other potential bidders negatively.

At the same time, the EC stated that the transaction raised *prima facie* competition concerns. In the balancing of interests, the EC decided that a derogation needed to be subject to conditions that would ensure that no anti-competitive effects or irreversible change in the competitive structure of the affected markets would be brought about. The derogation was granted under conditions that ensured that all aircraft and leases could be taken over or terminated by the final buyer of NIKI and LGW without financial penalties, premiums or compensations.

While Lufthansa's acquisition was cleared subject to conditions in December 2017, Lufthansa has appealed the derogation decision on grounds of i.a. jurisdiction, proportionality, vagueness and procedural grounds. The appeal is pending.

* [EC Decision Case M.8633 – Lufthansa/Certain Air Berlin Assets, 27.10.2017](#); [Case T-1/18, Official Journal, 18.2.2018](#).

56. Similar provisions on derogations exist in the merger laws of many EU countries,⁵⁵ and also for example in Brazil, Switzerland, and Norway.

57. Others will not grant derogations from the standstill provisions, but foresee ways to speed up the merger review process and to reduce the risks and burdens for merging undertakings this way. The US agencies have mechanisms to end the waiting periods that suspend the merging parties' ability to close the transaction. A very commonly used instrument is the "early termination" of the waiting period. Early termination can be granted at any point during the review of the transaction. The agencies generally make early termination determinations within 10 to 15 days of filing when early termination is requested by the parties and the transaction raises little to no competitive concerns. More than half of the notified transactions are "early terminated".⁵⁶ Early termination may still be granted after the agency has opened an investigation or issued a supplemental request but has resolved its competitive concerns. This seems to be rather an expedited review in merger cases without obvious concerns than a derogation from the application of the standstill obligation during the review process or mandatory waiting period. It was also applied for mergers in the aftermath of the financial crisis, where a speedy review that did not exhaust the mandatory waiting periods was the solution to mergers that needed rapid clearance.⁵⁷ Similar rules exist in Canada, Japan, Korea, and Mexico. Many jurisdictions will apply a *de facto* similar approach to the US, even if they have the statutory right to grant a formal derogation from the standstill obligation. In cases without any obvious

competition concerns, it will often be the faster option to just speed up the review process instead of potentially prolonging it with an often difficult derogation decision that is bound to set precedent for other cases.

58. In the light of the existing options for obtaining a derogation from the standstill obligation and/or for speeding up the review process, financial distress of one of the merging parties will not serve as a justification for violating standstill obligations.⁵⁸ It will certainly pay-off to communicate any problems that arise due to respecting the standstill obligation to the competition agency before any implementing actions are carried out.

3.5. Detection and fines

59. The sources for detection of gun jumping violations are manifold. They reach from systematic media monitoring by competition agencies to tip-offs by third parties and competitors (example: French Altice case⁵⁹). Often new notifications show that previous acquisitions had not been notified. Parties will also come forward themselves when they discover in the course of due diligence proceedings or internal reviews that they failed to notify concentrations. Where voluntary disclosure is seen as a mitigating factor for calculating fines, this may be an additional means to promote the detection of gun jumping. Limitation periods can influence the incentives for undertakings to disclose gun jumping voluntarily. When the infringement is considered a continuous one, the only way to stop it, and to avoid fines that increase with the duration of the infringement, is the disclosure of the omission to the competition agency.

Box 11. Limitation periods^{*1}

An interesting procedural aspect with relevance to all competition agencies comes to light when comparing the French and EC procedural frameworks for the prosecution of gun jumping violations with regard to the limitation periods for such violations.

Under French law, Art. L.430-8 FCC does not distinguish between a violation of the obligation to notify and violations of the standstill obligation and treats them as the same violation, subject to a five-year limitation period. The French Competition Authority treats the violation of the standstill obligation as an instantaneous infringement starting on the date when the concentration should have been notified (Honoré and Vatin, 2017, p. 317[17]). Under the ECMR and Council Regulation No 2988/74,^{*2} failure to notify (Art. 4 (1)) is treated as an instantaneous infringement as well, with a limitation period of three years. A violation of the standstill obligation (Art. 7 (1)), however, is a continuous infringement that ends only when the Commission adopts a decision declaring the proposed transaction compatible with the internal market, with a limitation period of five years.

This has drastic effects on the incentives for businesses to come forward and declare that they have violated the merger laws. In a system like the French, it may pay-off for businesses to lie low and wait until the violation is time barred. Under a system like the EC's, where the duration of the infringement is taken into account when calculating the fine and voluntary disclosure of an omission may be treated as a mitigating factor, there is a strong incentive to disclose a violation and to end the infringement. As there is no chance that the violation of the standstill obligation, inherent to every failure to notify, will be time barred, voluntary disclosure can help to reduce potentially high fines.

^{*1} (Honoré and Vatin, 2017^[16]); [Case M.7993 Altice – PT Portugal, paras 565 – 567](#).

^{*2} Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1).

60. At least in Europe, dawn raids have been conducted in the context of gun jumping. This occurred in the French Altice case, in the EC's Ineos/Kerling⁶⁰ and Caterpillar/MWM⁶¹ cases, the Bundeskartellamt's Asklepios Kliniken/Hamburg GmbH/Mariahilf case⁶², and the ongoing Romanian Westgate case⁶³. Another means to investigate are requests for information, formal or informal. The EC Altice case contains a description of the repeated requests and the timelines involved.⁶⁴

61. A concentration that violates mandatory notification requirements or waiting periods can be invalid, and, once detected, subject to interim measures, subject to review under the merger rules, remedies or eventually dissolution, and fines, as shown in the various case examples presented throughout this section.

62. The US can sue any person that fails to comply with the Act's notification and waiting period requirements for a civil penalty of up to USD 41,484 for each day the violation continues.⁶⁵ Section 7 of the Clayton Act gives the agencies the power to review and challenge the underlying transaction. In the EU, transactions carried out in contravention of the standstill obligation are invalid unless declared compatible with the internal market (Art. 7 (4) EUMR). The Commission may also take interim measures and retains the power to review the transactions. Fines are up to 10 % of the aggregate turnover of the undertaking concerned for violating the notification requirement and the standstill obligation. In Mexico, COFECE can impose fines of up to 5 % of the revenues of the firm,

retains full power of review and can impose remedies as well as the dissolution of the concentration.

63. Fines that were actually imposed vary widely. In some cases, no fine will be imposed at all. For violations of the obligation to notify, our analysis found fine ranges between EUR 5,000⁶⁶ and EUR 20 million⁶⁷. For violations of the standstill obligation, the fines that were imposed range between EUR 3,200⁶⁸ and EUR 124.5 million⁶⁹.

64. Agencies will look at various factors when calculating the fine within their respective legal frameworks. The duration of the infringement plays an important role,⁷⁰ as does the presence of actual competition concerns.⁷¹ They will also take into account if the merging parties co-operated in the investigation⁷² and disclosed their violation voluntarily.⁷³ It will also matter if the infringement could have been avoided, because the legal situations was entirely clear,⁷⁴ sufficient legal precedent existed⁷⁵ or the merging parties could be expected to conduct a proper analysis of the competition law implications of their transaction.⁷⁶

4. Gun jumping – how to reconcile business needs with merger laws and practice?

65. Different stages of the merger process require different forms of co-operation between the prospective merging parties and different types of information to be exchanged. The due diligence phase should enable a buyer to determine the value of a target. The sale and purchase agreement specifies the transaction and all necessary steps, often including operating or ordinary course of business covenants to protect the value of the target until closing. Once the agreement is concluded, the parties will also want to start planning the integration post-closing, in order to realise merger related efficiencies as soon as possible and to reduce uncertainty among employees, suppliers and customers to the absolute minimum.

66. These types of cooperation and information exchange would be unusual in a normal relationship between independent firms. Yet, competition agencies fully recognise that these types of co-ordination are often necessary to achieve the legitimate objectives of a merger agreement.⁷⁷ The question to be asked is: which kind of conduct and information exchange is still sufficiently ancillary to concluding a merger agreement, to preserve the asset value of the target and to prepare the post-merger integration of the firms?

4.1. Information exchange during the due diligence stage

67. Pre-signing, information needs to be exchanged in order to assess the value of the target and its strategic fit. Depending on the industry and on the determinants of the value of a target, this may range from general balance sheet information to insights into research and development activities, specific cost, customer and project information. Different buyers will have different information needs to assess the value of the target, while financial investors have different needs than industry competitors.

68. There seems to be widespread agreement that this kind of information can be exchanged, provided that the exchange is proportionate to the intended goals, and that proper safeguards are in place. Common safeguards include:

- Data rooms: an exclusive physical space where the relevant information is stored. Recommendations include prohibitions on downloading or e-mailing of

confidential information by individuals who have access to the room (Federal Trade Commission, US, 2018, p. 3_[12]).

- Clean teams: establishment of clean teams that have exclusive access to the information and data rooms. The team members should not be involved in day-to-day business operations, should be limited in number and bound by confidentiality protocols.⁷⁸
- Confidentiality and non-disclosure agreements: all persons with access to competitively sensitive information should be bound by confidentiality and non-disclosure agreements, and strict protocols should be followed.⁷⁹
- Redacted documents: customer identities can be masked and competitive information can be aggregated, or, wherever possible historic information should be used.⁸⁰ Before competitively sensitive information is passed on from clean team members to management, it should be reviewed and, if needed, redacted by counsel.

4.2. Asset preservation from signing until closing

69. In the time between concluding the merger agreement and closing the merger, the buyer has a widely recognised legitimate interest to preserve the asset value of the target.⁸¹ To this purpose, sale and purchase agreements often include operating or ordinary course of business covenants that require the seller to continue to conduct the business in a normal way and not to incur any asset risks or sell assets outside of what it would do in the normal course of business. Buyers can be granted veto rights regarding certain acts which allow them a certain amount of effective control over the target.

70. What exactly constitutes acts within or without the ordinary course of business and corresponding consultation or veto rights of the buyer is highly case, fact and industry specific. A number of cases presented above regarding the infringement of the standstill obligation hinge on whether specific facts amount to unlawful implementation of a merger or merely legitimate measures to protect an investment (Sec.3.2). The US agencies issue competitive impact statements in their gun jumping cases, and these can be an interesting source of guidance for practitioners.

Box 12. US competitive impact statements

The competitive impact statements issued in US enforcement cases offer interesting guidance, and explicitly outline permitted conduct. While the guidance is always case specific and not necessarily applicable the same way in all cases, merging firms and their advisors can obtain interesting information from it.

For example, *United States v. Computer Associates/Platinum** lists as permitted conduct

- interim covenants to operate the to-be-acquired business in the ordinary course consistent with past practices;
- use of material adverse change provisions that grant the buyer certain rights;
- access to customer bid information for due diligence purposes, applying appropriate non-disclosure agreements and restrictions on employees entitled to obtain the information;
- to enter into certain price agreements or engage in certain joint activities that would have been lawful independent of the merger.

* [Competitive Impact Statement US v. Computer Associates/Platinum](#), Civil No. 01-02062 (GK), 23 April 2002.

71. As a general rule – and probably one of the simplest ones in this regards – it can be said that per-se illegal activities like price fixing and market sharing do not become legitimate in the context of planning a merger or by being included in an operating covenant.⁸²

4.3. Post-merger implementation and transition planning

72. Mergers that have the aim to combine two previously independent units into one joint undertaking will require planning of the integration and transition. This is particularly relevant when synergies in the form of lay-offs, plant or location closures, product developments, investments, supply contracts and buyer relationships can be realised. While there may be overlaps between measures that affect transition planning and asset value preservation, such as identification of key staff to be retained, which may benefit from being considered as ancillary to the merger agreement,⁸³ any actual integration in these matters can affect the competitive relationship between the merging parties and can easily transition into an actual exercise of control or beneficial ownership.

73. Brazil's CADE suggests a procedure for meetings on future integration, the “parlor room”, where executive committee members can meet to discuss future integration. Such meeting should be monitored to ensure that no competitively sensitive information is discussed and should be supervised by an independent agent. The guidelines expressly mention measures that should not be taken as a result of such a meeting: “... *transferring or sharing employees; restrictions to the other party’s activities/enterprise in the market, with its customers or with suppliers, changes in the other party agreements or joint notifications to third parties on behalf of the integrated or organised company.*” (CADE, 2016, p. 13^[17]).

74. Similarly, other agencies, while in principle acknowledging the legitimacy of a certain degree of post-merger integration planning, strongly recommend limiting the

exchange of information during this phase using historic or aggregated information, and using staff not involved in line-business management, to prevent spill-over effects (Blumenthal, 2005, pp. 10-11^[13]). When competitively sensitive information is exchanged in this phase, clean team arrangements, and confidentiality and non-disclosure agreements can again help to alleviate concerns voiced by competition agencies.⁸⁴

75. Private practitioners' advice mirrors the competition agency concerns and advocates similar safeguards for the exchange of competitively sensitive information that cannot be deferred until after the closing of the transaction, including the use of third party consultants. Behaviours they consider to be on the safe side are planning relating to back end activities, such as the integration of IT, identification of employees to be retained, employee benefits, or the HR department (Naughton, 2006, p. 13^[18]) and (Dionnet and Giroux, 2017^[11]).

4.4. Main takeaways

76. Merging parties certainly have room to satisfy information and co-ordination needs which are justifiable in the context of a transaction. Such acts may need to be accompanied by appropriate safeguards in order to avoid gun jumping.

77. The remaining uncertainty on how to distinguish forms of information exchange, value preservation and post-merger planning that amount to gun jumping from those that are lawful seems inevitable. The relevant case law can give valuable guidance, but any prohibition or permission of a certain conduct is to be understood within the legal and factual framework of the case at issue. While certain provisions in agreements and covenants and the safeguards applied may be considered ancillary, justifiable and sufficient in one case, this might not be true in another case.

5. Conclusions

5.1. Is there a trend?

78. Gun jumping has always been on the enforcement agenda of competition agencies, and nowadays it seems to be subject to higher fines in more areas of the world than just the US. An explanation for a more pronounced enforcement could be a stronger prioritisation of violations of notification requirements and standstill obligations by competition agencies in an overall effort to strengthen the effectiveness of their merger control regimes. At the same time, compared to the total level of merger and merger review activity on a global scale, the agency intervention rate cannot be considered to be high and agencies seem to apply a very measured approach, often not even imposing fines.

5.2. Has enforcement contributed to legal certainty or increased insecurity?

79. Case law shows little if any disagreement that acts that implement a transaction during mandatory waiting periods, and acts leading to actual co-ordination of the merging parties' behaviour before clearance, will be unlawful, regardless of whether they infringe merger control rules or rules on collusive practices. However, agencies also agree that some of these actions can be considered ancillary to a transaction, and can thus be permissible under appropriate legal safeguards. The challenge is how to distinguish legal from illegal behaviour in the specific circumstances of each individual merger case, and the specific

factual context will always make it difficult to provide bright line rules. The agency decisions already provide case specific guidance – see for example the US Competitive Impact Statements,⁸⁵ the French⁸⁶ and EC⁸⁷ Altice decisions. Furthermore, the agencies can be seen to be making conscious efforts to explain their enforcement actions in case related communication⁸⁸ and to provide additional guidance, like the US FTC⁸⁹ and Brazil's CADE⁹⁰.

5.3. Future work

80. Some uncertainty with regard to permissible pre-closing conduct will always remain, due to the case specific context of the applicable rules on gun jumping. As outlined in the beginning, this creates costs for merging businesses and to societies alike (see 2.3). However, so far there does not seem to be convincing evidence that these costs outweigh the benefits that the overwhelming majority of jurisdictions attribute to mandatory pre-merger notification regimes.⁹¹ Consequently, it is unlikely that there would be an appetite for a fundamental discussion of changes to these rules.

81. Therefore, it might be more effective to continue discussions on ways to further reduce uncertainties related to merger control proceedings. More work could be done:

- To make jurisdictional thresholds clear, objective and tailored to a review of mergers that have a sufficient probability of leading to anti-competitive outcomes; and
- To further clarify the rules that apply to pre-notification and during mandatory suspension periods in each jurisdiction; for example by providing detailed guidance in published decisions, through agency guidelines and interventions in public discussions, and through an openness by competition agencies to provide case specific advice to merging companies.

Endnotes

¹ See (OECD, 2014, pp. 4-5^[8]) for a more detailed typology of the various forms of pre- and post-merger mandatory or voluntary merger notification regimes or hybrid systems.

² Of the 55 OECD countries, Associates and Participants to the Competition Committee, 54 have merger control regimes. The only exception is Luxemburg, which is covered, however, by the EU merger rules. Almost all (47) have mandatory pre-merger notification regimes. Only three OECD countries have a pure voluntary notification system: Australia, the United Kingdom, and New Zealand. According to information from the [International Competition Network \(ICN\) Merger Notification and Procedures Template](#), of the 67 jurisdictions that provided information on their merger system to the ICN, 57 have mandatory pre-merger notification systems.

³ See also (ICN, 2017^[7]).

⁴ Germany, UK, US, India (OECD, 2016, pp. 22-25^[5])

⁵ The length of some of the guidance provided in order to assess control and decisive influence for merger notification purposes proves the point, see for example the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF>, pp 5-23.

⁶ For a detailed discussion of various transaction thresholds and their advantages and disadvantages as well as their use in different jurisdictions, please refer to the OECD Roundtable on Definition of Transaction for the Purpose of Merger Review (OECD, 2013^[4]).

⁷ For a detailed discussion of the various jurisdictional thresholds used, their advantages and disadvantages and examples of the practice of various jurisdictions, please refer to the OECD Roundtable on Local Nexus and Jurisdictional Thresholds in Merger Control (OECD, 2016^[5]). The Roundtable materials also include a table with a summary overview of the practice in a large number of jurisdictions <http://www.oecd.org/competition/jurisdictional-nexus-in-merger-control-regimes.htm>.

⁸ See for example: Art. 5 EU Merger Regulation (<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004R0139>) and the Commission Notice on calculation of turnover ([https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998Y0302\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998Y0302(04)&from=EN)); US Code of Federal Regulations 16 C.F.R. 80, Subchapter H (<https://www.gpo.gov/fdsys/granule/CFR-2002-title16-vol1/CFR-2002-title16-vol1-part801>) and Hart-Scott-Rodino Premerger Notification Program Part II (<https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide2.pdf>); § 38 German Act Against Restraints of Competition (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?__blob=publicationFile&v=6).

⁹ The distinction between merger control requirements and exemptions is not always clear-cut – e.g. the US exemption on minority acquisitions purely for investment would normally not meet the ‘acquisition of control’ threshold in the EU.

¹⁰ The EU exemption for financial institutions - Art. 3 para 5 (a) ECMR provides that “credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition;...” Similar rules exist for example in Germany, Spain, Albania, Pakistan.

¹¹ The US “solely for investment” exemption Section 7(3) of the Clayton Act provides that “[t]his section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about the substantive lessening of competition.” The “investment exemption” in Section 7(3), which has no cap on the percentage of stock that can be owned “passively,” can eliminate certain types of minority shareholdings from the scope of U.S. merger review law. A transaction will be considered “solely for investment” only if the acquirer does not gain influence over the actions and business conduct of the target and does not use some mechanism to bring about a substantial lessening of competition. Excluded from Section 7(3) are situations where the shareholder gains active control over the target, the ability to influence the actions of the target by means other than control, or gains access to commercially sensitive information.

¹² While the EU and UK, for example, require assets to meet a certain substantiality threshold, the US cast a wider net and Section 7 Clayton Act includes “any kind of assets”, which can encompass very small partial asset acquisitions (OECD, 2013, pp. 26-27^[4]).

¹³ The concept can include consecutive acquisitions of interest that would not trigger notification requirements individually, but aggregated over time, or of small business units in an industry sector suffering from concentration problems, or by dominant undertakings (OECD, 2014, pp. 15-17^[8]).

¹⁴ In the EU, for example, the applicable rule is Art. 4 (1) EUMR, for the US this is codified in Sec 7A Clayton Act, 15 U.S.C. § 18a, also known as Hart-Scott-Rodino Antitrust Improvements Act (HSR).

¹⁵ [Commission Decision Case M.7993 Altice – PT Portugal](#), 24.04.2018, paras 42, 43.

¹⁶ Latvian contribution to (OECD, 2014_[8]), [DAF/COMP/WP3/WD\(2014\)22](#)

¹⁷ Getting the Deal Through – Merger Control Italy, <https://gettingthedealthrough.com/area/20/jurisdiction/15/merger-control-2018-italy/>, last accessed 20. August 2018.

¹⁸ Mexican contribution to (OECD, 2014_[8]); [DAF/COMP/WP3/WD\(2014\)4](#)

¹⁹ Chile has introduced a mandatory pre-merger notification regime in June 2017 and thus no longer belongs to this group of countries.

²⁰ Getting the Deal Through – Merger Control in Australia, <https://gettingthedealthrough.com/area/20/jurisdiction/5/merger-control-2016-australia/>, last accessed 20. August 2018.

²¹ Getting the Deal Through – Merger Control in New Zealand, <https://gettingthedealthrough.com/area/20/jurisdiction/1/merger-control-new-zealand/>, last accessed 20. August 2018.

²² UK contribution to (OECD, 2014_[8]), [DAF/COMP/WP3/WD\(2014\)7](#)

²³ According to statistics, more than 95% of notified mergers in Europe and the US are approved at first phase (Choe and Shekar, 2009_[37]) and (Gorecki, 2011_[38])

²⁴ See for example (International Chamber of Commerce, 2015, pp. 13-14_[40]).

²⁵ Secretariat research has produced a total of 116 gun jumping cases for all OECD countries, and Associate and Participant countries to the Competition Committee since 1991. This research is bound to be incomplete, as many older cases and decisions may not be accessible online. Even if this is not the complete number of cases, one may assume that in relation to total merger control activity in this period, the percentage of gun jumping cases would be insignificant. The EC alone had more than 7,000 merger notifications since 1990 (<http://ec.europa.eu/competition/mergers/statistics.pdf>).

²⁶ It is difficult to assess the problem dimension based on the publicly available cases. On the one hand, if the jurisdictional thresholds offer a large margin of discretion or at least reasonable room for different results, agencies will in many cases use their discretion and decide not to prosecute a violation – cases are not public or never opened. On the other hand, if merging parties claim to have misinterpreted jurisdictional thresholds this may also be a defence strategy to hide an intentional or at least accepted breach of law – overstating the problem.

²⁷ FTC Case File No. 921 0023US; Sara Lee Corporation; <https://www.ftc.gov/news-events/press-releases/1996/02/sara-lee-agrees-pay-record-civil-penalty-settle-charges-over-shoe>.

²⁸ Many cases that involve failures to notify will also violate the standstill obligations, inasmuch as implementing acts can be elements of both failures to notify and standstill obligations – these cases were addressed in the previous subsection on breaches of the obligation of mandatory notification. Furthermore, in some cases, such as [EC Case Altice/PT Portugal, Case M.7993](#), there may be distinct violations of the mandatory notification duty and the standstill obligation, as some of the conduct deemed inadmissible already happened before the notification. In such cases, they may be treated as distinct violations (Sec 5 of the decision).

²⁹ Strictly speaking, conduct post-clearance but pre-closing could also raise concerns, in particular with regard to competitor co-ordination, as the parties are expected to act as separate, competing entities until the concentration was put fully into effect (see for example (Blumenthal, 2005, p. 9_[13]), (Liebeskind, 2003, p. 1_[19])). This may, however, be lower on the priority list of competition agencies.

³⁰ [EC Case Altice/PT Portugal, Case M.7993](#).

³¹ [Décision n° 16-D-24 du 8 novembre 2016](#) relative à la situation du groupe Altice au regard du II de l'article L. 430-8 du code de commerce.

³² See for example: (Dionnet and Giroux, 2017^[12]), (Honoré and Vatin, 2017^[17]) (Hull and Gordley, 2018^[21]) (Lemmonier, 2018^[11]) (Modrall, 2017^[20]) (Ysewyn, Whiteford and Kahmann, 2018^[29]).

³³ A clear majority of enforcement action against violations of the standstill obligation that was found during the Secretariat research originates in Europe and the US, and only four cases from outside these regions were found – Brazil, Chile, Israel and South Africa, see also Annex A.

³⁴ Note that the EU, while treating Art. 4 (1) (failure to notify) and Art. 7 (1) (violation standstill obligation) as distinct violations, can and has based fines in cases of failure to notify on Art. 7 (1), as the actual implementation is naturally included in all consummated and not notified merger cases, see Electrabel and Marine Harvest, Box 3. The EU cases that were triggered by a failure to notify are not the ones relevant for this section.

³⁵ [Case M.993, Bertelsmann/Kirch/Premiere](#), see also [press release of 1. January 1997](#).

³⁶ [Case M.7993 Altice – PT Portugal](#), 24. April 2018.

³⁷ [Court of Justice of the EU, Case C-633/16](#), Ernst & Young P/S v Konkurrenserådet, 31. May 2018.

³⁸ Case M.8179, a statement of objections was issued, [see press release of 6. July 2017](#).

³⁹ Art. 267 TFEU, any court of an EU member state can request a preliminary ruling by the European Court on, i.a., the interpretation of the Treaties. This provision is intended to ensure the uniform application of EU competition law.

⁴⁰ One interesting aspect of the case was the question of jurisdiction. As the merger control laws within the EU are not harmonised, unlike the provisions on restrictive agreements, and the Danish law does not explicitly refer to Art. 7 (1) ECMR, the EC had raised doubts as to the jurisdiction of the Court. However, given that Denmark had adopted the same approach as that provided for under EC law, the Court decided that there was an interest that the EC law should be interpreted uniformly, and affirmed its jurisdiction. As most EU member states have similar provisions in their national laws, the interpretation of Art. 7 (1) of the Court will have wider relevance.

⁴¹ [European Court of Justice, Judgement of 31 May 2018, Case C-633/16, Ernst & Young P/S v Konkurrenserådet](#).

⁴² Décision n° 16-D-24 du 8 novembre 2016 relative à la situation du groupe Altice au regard du II de l'article L. 430-8 du code de commerce, accessed on the 29 June 2018 at: <http://www.autoritedelaconcurrence.fr/pdf/avis/16d24.pdf>.

⁴³ [Decision of 31 March 2015, B2-96/14](#).

⁴⁴ See also the competitive impact statements by the US agencies in the merger cases referred to in Box 12. They include detailed guidance on action that is deemed permissible in the individual cases.

⁴⁵ [Case M.7993 Altice – PT Portugal](#), paras 50, 70, 422.

⁴⁶ See: [European Court of Justice, Case C-8/08, T-Mobile Netherlands and Others, 4.6.09](#); [Case C-286/13 P, Dole Food and Dole Fresh Fruit Europe/Commission, 19 March 2015](#).

⁴⁷ As within the EU the rules on horizontal anti-competitive agreements are widely harmonised, this applies to the EC and its member states.

⁴⁸ (Modrall, 2017^[20]), (Holzwarth, 2014, pp. 106-114^[30]) (Court of Justice of the EU, 2018^[24]), .

⁴⁹ [EC Case COMP/M.4734 – Ineos/Kerling](#); (OECD, 2014^[8]) - contribution of the EC.

⁵⁰ The suspicions were not confirmed in this case.

⁵¹ [Court of Justice of the EU, Case C-633/16](#), Ernst & Young P/S v Konkurrenserådet, 31 May 2018.

⁵² [Judgement of 7 September 2017, Austria Asphalt, C-248/16, EU:C:2017:643](#), paragraph 31.

⁵³ It should be noted that agencies will need to distinguish between transactions that violate Art. 7(1) ECMR and Art. 101 TFEU, as one and the same transaction cannot be caught by both provisions in parallel, as outlined in the referenced judgements.

⁵⁴ Between Sep 1990 and 31 July 2018, the EC has received a total of 7,037 merger notifications and 124 applications for an Art. 7 (3) derogation (<http://ec.europa.eu/competition/mergers/statistics.pdf>); in the past 10 years (2008-2017), the EC granted derogations in 25 cases (Arnold&Porter, 2018, p. 23^[33]).

⁵⁵ For example France, Germany, Lithuania, Portugal, Romania – acc. to [ICN Merger Templates](#).

⁵⁶ See: US contribution to (OECD, 2016^[27]), <https://www.justice.gov/atr/file/872376/download>.

⁵⁷ See: US contributions to (OECD, 2009^[32]).

⁵⁸ Such arguments were refused for example in the EC [Case M.7993 Altice – PT Portugal, para 116](#); and [Case T-704/14 - Judgement of the General Court of 26 October 2017 in Marine Harvest](#), paras 216-223. The General Court outlined that the risk of upward manipulation of share prices in public bid cases is a realistic one, but that it cannot excuse a premature implementation as EC precedent in Case COMP/M.3709 — Orkla/Elkem showed that Art. 7 (3) ECMR can apply to such situations.

⁵⁹ [Décision n° 16-D-24 du 8 novembre 2016 relative à la situation du groupe Altice](#) au regard du II de l'article L. 430-8 du code de commerce.

⁶⁰ [EC Case COMP/M.4734 – Ineos/Kerling](#); (OECD, 2014^[8]) -contribution of the EC.

⁶¹ (Hull and Gordley, 2018, p. 9^[21])

⁶² [Bundeskartellamt Activity Report 2007/2008, pp 147, 148](#).

⁶³ [Press Release Romanian Competition Council, May 2018](#).

⁶⁴ EC [Case M.7993 Altice – PT Portugal, pp 105 – 112](#).

⁶⁵ 7A(g)(1) of the Act, 15 U.S.C. § 18a(g)(1).

⁶⁶ Italy - [Decision no. 26186, Case C12049 - Banca per lo Sviluppo della Cooperazione di Credito/Banca Romagna Cooperativa-Credito Cooperativo Romagna Centro e Macerone](#).

⁶⁷ EC cases [Commission Decision of 10.6.2009](#); [Case COMP/M.4994 Electrabel/Compagnie Nationale du Rhône](#) and [Commission Decision of 23.7.2014](#); [Case M.7184 – Marine Harvest / Morpol](#).

⁶⁸ [Vj/145/2015 - CEE Holding Group Limited, Olympic International Holdings Limited, Normeston Group Cyprus Limited, Normeston Trading Limited](#).

⁶⁹ EC [Case M.7993 Altice – PT Portugal](#).

⁷⁰ For example: [US Mahle/Metal Leve SA](#); [EC Case No IV/M.920- SAMSUNG/AST](#), [EC Case No IV/M.969 – A.P. Møller](#); [US Qualcomm/Flarion](#); [Belgium 15-CC-79, Cordeel/Imtech](#);

⁷¹ For example: [EC Case No IV/M.920- SAMSUNG/AST](#); [EC Case No IV/M.969 – A.P. Møller](#); [Germany Interseroh](#); [France Castel-Frères/Patriarche, case n ° 13-D-22](#); [Spain SNC/DC/0035/14, Essilor/Polycore Optical](#); [US Case No. 3:14-cv-04949-VC – Flakeboard/SierraPine](#); [Spain SNC/0037/15 GRIFOLS](#); [Spain SNC/0037/15 GRIFOLS](#);

⁷² See for example: [France Castel-Frères/Patriarche, case n ° 13-D-22](#); [Spain SNC/DC/0035/14, Essilor/Polycore Optical](#); [US Case No. 3:14-cv-04949-VC – Flakeboard/SierraPine](#);

⁷³ For example: [EC Case No IV/M.920- SAMSUNG/AST](#); [EC Case No IV/M.969 – A.P. Møller](#); [India Tesco/Trent No. C-2014/03/162](#); [Denmark NVE/Syd Energi](#);

⁷⁴ For example: [EC Case No IV/M.920- SAMSUNG/AST](#);

⁷⁵ See for example: [EC Case No COMP/M.7184 – Marine Harvest/ Morpol](#);

⁷⁶ For example: [EC Case No IV/M.920- SAMSUNG/AST](#); [EC Case No IV/M.969 – A.P. Møller; France Castel-Frères/Patriarche, case n ° 13-D-22](#); [EC Case No COMP/M.7184 – Marine Harvest/Morpol](#);

⁷⁷ “...we are mindful that many forms of premerger coordination are reasonable and even necessary and that care needs to be taken not unduly to jeopardise the ability of merging firms to implement the transaction and achieve available efficiencies.” (Blumenthal, 2005, p. 3_[13]). The EC concedes that: “...clauses determining the conduct of a target between signing a transaction agreement and closing the transaction in order to preserve its value are both common and appropriate in commercial transactions.” ([Case M.7993 Altice – PT Portugal, para 50](#)).

⁷⁸ The EC defines clean teams: “Clean team generally refers to a restricted group of individuals from the business that are not involved in the day-to-day commercial operation of the business who receive confidential information from the counter party to the transaction and are bound by strict confidentiality protocols with regard to that information. The aim of the clean team arrangements is therefore to ensure that the information provided for the purposes of the Transaction is provided on a need-to-know basis and in an aggregated manner to a limited number of relevant employees of the Buyer and its advisors, who are bound to confidentiality by the clean team agreement that they sign prior to receiving the information.” [Case M.7993 Altice – PT Portugal, para 422, footnote 220](#); also (CADE, 2016, p. 10_[17]); (Federal Trade Commission, US, 2018, p. 3_[12]); (Dionnet and Giroux, 2017_[11]).

⁷⁹ [Case M.7993 Altice – PT Portugal, para 422](#), also (Modrall, 2003_[26]).

⁸⁰ See (CADE, 2016_[17]) and (Federal Trade Commission, US, 2018_[12]), also (Naughton, 2006, p. 10_[18]).

⁸¹ [Case M.7993 Altice – PT Portugal, para 70](#); (Blumenthal, 2005, p. 10_[13]); (De Silva, 2018, p. 61_[14]).

⁸² (Blumenthal, 2005, p. 8_[13]); (Naughton, 2006, p. 12_[18]); EC [Case M.7993 Altice – PT Portugal, para 149](#).

⁸³ The EC states in [Case M.7993 Altice – PT Portugal, para 75](#): “The Commission considers that having a degree of oversight regarding the personnel of a target may be justified in order to preserve the value of the business between signing and closing, in respect of, for example, the retention of certain key employees who are integral to the value of the business, or in order to prevent material changes to the cost base of the business.”

⁸⁴ The EC criticised the lack of any safeguards for the exchange of information that took place between various PT Portugal and Altice executives ([Case M.7993 Altice – PT Portugal, para 53](#)). The French competition authority also acknowledges the legitimacy of integration planning, provided appropriate safeguards such as clean teams and confidentiality agreements are in place (De Silva, 2018, p. 62_[14]).

⁸⁵ As referenced throughout the text, see also Box 7 and Box 9.

⁸⁶ [Décision n° 16-D-24 du 8 novembre 2016 relative à la situation du groupe Altice](#) au regard du II de l’article L. 430-8 du code de commerce.

⁸⁷ [Case M.7993 Altice – PT Portugal](#).

⁸⁸ (De Silva, 2018_[14]); (De Silva, 2017_[35]); (Vestager, 2018_[41])

⁸⁹ (Federal Trade Commission, US, 2018_[12]).

⁹⁰ (CADE, 2016_[17]).

⁹¹ The evidence on the actual cost of a deferred implementation of mergers is sparse and patchy at best. A review of business consulting literature submitted at a 2002 FTC-DOJ workshop (Pautler, 2003_[34]) concluded that the majority of mergers are not successful. The review also showed a broad consensus that early planning and fast-paced integration would improve merger outcomes

(Blumenthal, 2005, pp. 4-5[14]) with success factors being frequent and tailored communication and use of transition teams (*ibid.*, p. 6). At the same time, the studies referenced in the review list a multitude of factors that are not timing related and contribute to success or failure, such as wrong assessment of the strategic fit, cultural clashes, lack of an integration strategy, lack of designated planning and transition teams, and lack of communication. While limitations through regulatory review are mentioned, they are nowhere identified as a primary source of concern.

*Annex A. Case overview of violations of the standstill obligation**

Jurisdiction	Year	Case	Fine for violation of standstill obligation in EUR thsd.	Description of Violation	Case Outcome	Links
1 Brazil	2016	Cisco Systems Inc/Technicolor S/A, No.08700.009018/2015-86	7,000	The Parties notified, and then published a press release about (1) the integration of the Cisco assets starting immediately (2) the strategic collaboration agreement moving into the implementation stage, and (3) entered into a carve out agreement to maintain the competitive conditions unchanged in Brazil.	n/a	Press release

* This table was prepared by the OECD Secretariat, based on literature and internet research conducted August – September 2018. It does not claim to be complete. Earlier cases may be missing because of the lack of online accessibility. A case was categorised as being in violation of the standstill obligation if the infringement happened to a large extent after the notification of the merger case, during the mandatory waiting period. Some cases may additionally have been fined partly on the basis of violations of the obligation to notify.

Jurisdiction	Year	Case	Fine for violation of standstill obligation in EUR thsd.	Description of Violation	Case Outcome	Links
2 Bulgaria	2006	Decision nr 116 - Boyana Film EAD/New Image Inc	0	Appointment of the managing director by the Bulgarian government (Boyana was previously owned by the Bulgarian government) of New Image as an executive of Boyana amounted to the establishment of joint control over Boyana.	Conditional clearance	Article
3 Chile	2018	ROL FNE F-88-2017, Minerva S.A /JBS S.A	0,003	Exchange of sensitive information (exported product quantities); Suggestions relating to the sales price of a product in a Chilean market; strategic and sensitive commercial information about the target was obtained by the acquirer.	Clearance	Decision
4 Denmark	2014	KPMG Denmark and EY	Pending	The parties' merger agreement of November 2013 stipulated that KPMG DK should immediately initiate the termination of its affiliation with the international KPMG-network. KPMG DK therefore sent notice to the international KPMG-network on the same day as the merger agreement was signed.	Conditional clearance	Decision

	Jurisdiction	Year	Case	Fine for violation of standstill obligation in EUR thsd.	Description of Violation	Case Outcome	Links
5	EC	1998	Bertelsmann/Kirch/Premiere Case IV/M.993	0	Joint marketing of target's digital decoder.	Prohibition	Decision
6	EC	2018	Case COMP/M.7993 - Altice/PT Portugal	124,500 (under appeal)	Certain provisions of the purchase agreement resulted in Altice acquiring the legal right to exercise decisive influence over PT Portugal, eg by granting Altice veto rights over decisions concerning PT Portugal's ordinary business. Altice actually exercised decisive influence over aspects of PT Portugal's business, eg by giving PT Portugal instructions on how to carry out a marketing campaign and by seeking and receiving detailed commercially sensitive information about PT Portugal outside the framework of any confidentiality agreement.	Conditional clearance	Press Release
7	France	2016	16-D-24 Altice/SFR, Altice/OTL	80,000	1) Altice actively intervened in the definition of SFR's commercial policy; 2) the parties globally reinforced their commercial relations and, among other things, co-managed an important project concerning very high speed wholesale offers (the "marque blanche")	Conditional clearance	Decision

Jurisdiction	Year	Case	Fine for violation of standstill obligation in EUR thsd.	Description of Violation	Case Outcome	Links
				project); 3) key managers were prematurely appointed and started acting in their new position before the closing; 4) the parties frequently exchanged sensitive information, among others during regularly organised pre-integration meetings.		
8 Germany	2008	Mars, Nutro Products	4,500	After clearance in the US, but before approval by the German authority and the Austrian regulator, Mars and Nutro closed the transaction and transferred the main assets such as production sites and certain IP rights from Nutro to Mars.	Notification withdrawn	Press Release
9 Germany	2014	Edeka/Kaisers Tengelmann	0	Prohibition to put a framework agreement for joint purchasing and payment systems into effect.	Prohibition with subsequent ministerial authorisation	Judgement
10 Hungary	2016	Vj/145/2015 - CEE Holding Group Limited, Olympic/Normeston Limited	0,03	Registration of ownership rights of shares establishing management rights, and the exercise of those rights.	Clearance	Article

Jurisdiction	Year	Case	Fine for violation of standstill obligation in EUR thsd.	Description of Violation	Case Outcome	Links
11 Ireland	2013	M/12/031 – Top Snacks Limited/KP Snacks business from United Biscuits (UK) Limited	0	Parties had partly implemented the transaction prior to its clearance. Certain direct supply arrangements were implemented.	Clearance	Determination
12 Israel	2015	Yehuda Berman / Michlol	0,020	Berman lent the sum equivalent to the minimum payment for the first year of the agreement, which was ordered for all goods from suppliers and paid for it, and received at least part of the proceeds of the stores.	Clearance	Decision
13 Norway	2009	RS Platou ASA/Glitnir Securities AS	0,017	RS Platou ASA breached the suspension obligation in connection with its takeover of Glitnir Securities AS.	n/a	Article and press release
14 Norway	2014	NorgesGruppen/ICA	2,900	NorgesGruppen took over the leases of 13 former ICA-Maxi premises.	n/a	Annual Report
15 Romania	2018	Westgate	ongoing	Indications concerning the implementation of the operation by Westgate before clearance.	n/a	Press release
16 UK	2018	ME/6676-17 - Electro Rent Corporation	0,112 (under appeal)	Electro Rent terminated the lease over its only premises in the UK in contravention of an interim order and prior to a decision.	Conditional clearance	Decision

Jurisdiction	Year	Case	Fine for violation of standstill obligation in EUR thsd.	Description of Violation	Case Outcome	Links
17 US	1991	US Atlantic Richfield Company, Arco, Union Carbide	1,421.6	Non-refundable payment of purchase price, full transfer of business risk from target to purchaser.	Clearance	Final Judgement and Complaint
18 <u>US</u>	1998	Insilco Corporation/ Lingemann No. C-3783	0	Target provided accounts of prior customer negotiations, detailed customer-by-customer price quotes, current pricing policies and strategies, and detailed, customer-by-customer, future pricing strategies etc.	Conditional clearance	Decisions
19 US	1998	Commonwealth Land Title Insurance Company	0	The transaction had not been required an HSR notification, however the conduct was viewed as analogous to gun-jumping because the firms effectively combined their efforts prior to consummating their joint venture.	Dissolution	Decision
20 US	1999	Input/Output Inc. and Laitram Corporation No. 99 0912	0,414	Ten days after signing the acquisition agreement – four days before filing the requisite pre-merger notifications – Input/Output began to integrate its operations and personnel with those of DigiCOURSE, a Laitram subsidiary.	Clearance	Final decision
21 US	2002	Computer Associates/Platinum	0,717	Merger agreement required approval by CA to all Platinum contracts offering customers: more than a 20% discount; non-standard terms; services for more	Conditional clearance	Decisions united states district court

Jurisdiction	Year	Case	Fine for violation of standstill obligation in EUR thsd.	Description of Violation	Case Outcome	Links
				than 30 days at a fixed or capped price; reviewing and approving customer contracts and undertaking other management activities.		
22 US	2003	Gemstar/TV Guide International 2003	5,020	The merger was consummated in July 12, 2000. The parties agreed to "slow roll" two large service providers; to allocate markets, customers and other responsibilities between the two firms; and to fix the prices and contract terms offered to customers. Further, they effectively merged most of their IPG operations prior to the expiration of the statutory waiting period.	Clearance	Final judgement
23 <u>US</u>	2006	Qualcomm/Flarion	1,485	Flarion ceded to QUALCOMM control of much of its management and operations, including customer proposals, price discounts, licensing strategies, and personnel decisions.	Clearance	Final decision
24 US	2010	Smithfield Foods Inc. and Premium Standard Farms LLC	770	Smithfield exercised operational control over a significant segment of Premium. Premium Standard stopped exercising its independent business judgement with respect to hog procurement. Instead, it sought Smithfield's consent for all of the	Clearance	Judgement

Jurisdiction	Year	Case	Fine for violation of standstill obligation in EUR thsd.	Description of Violation	Case Outcome	Links
25 US	2014	Flakeboard/SierraPine, No. 3:14-cv-04949-VC	4,700	<p>hog procurement contracts that arose during the waiting period.</p> <p>After announcing the proposed acquisition on Jan. 14, 2014, and before the expiration of the HSR Act's mandatory premerger waiting period, Flakeboard, Arauco, and SierraPine illegally coordinated to close SierraPine's particleboard mill in Springfield, Oregon, and moved the mill's customers to Flakeboard.</p>	Withdrawn	Decision

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