

Unclassified**English - Or. English**

21 October 2019

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Executive Summary of the Roundtable on Suspensory Effects of Merger
Notifications and Gun Jumping****Annex to the summary record of the 130 Meeting of the Competition Committee held on
27-28 November 2018**

27 November 2018

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during the 130th Meeting of the Competition Committee on 27 November 2018.

More information related to this discussion can be found at
www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

Please contact Mr. Antonio Capobianco if you have any questions regarding this document.
[Antonio.Capobianco@oecd.org]

JT03453174

Executive Summary

By the Secretariat*

The OECD Competition Committee held a Roundtable on the subject of the suspensory effects of merger notifications and gun jumping in November 2018. Based on the background paper prepared by the Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged:

1. Violations of the obligation to notify and of the standstill obligations are considered as serious offences. These obligations are at the very core of mandatory pre-notification regimes, and safeguard their effectiveness.

Pre-merger notification or ex-ante merger control is the standard in the vast majority of OECD member countries, typically coupled with a standstill obligation – i.e. an obligation not to put a merger into effect until it is cleared. The rationale is to ensure that the merging parties remain independent actors on the markets until agencies had an opportunity to review the merger. This ensures that potentially anti-competitive 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. Therefore, agencies pay strong attention, and often prioritise enforcement against violations of the merger rules.

At the same time, many competition agencies recognise that the rules might be at times difficult to interpret or follow in specific cases, and they engage in pre-notification talks, and discuss derogations, when necessary.

2. The enforcement against failure to notify a transaction has increased significantly in the last decade, on a global scale.

Compared to the first decade of the century, enforcement against gun jumping, and in particular failure to notify, has increased strongly. This proves two major points; (i) the number of competition regimes with an *ex ante* merger control has increased and matured, and (ii) competition agencies will ensure that their *ex ante* merger regimes are respected, for the reasons explained above.

3. Standstill obligations play an important role in all merger regimes. Competition agencies will put a stop to integration activities when they decide to investigate a merger, and expect the merging parties to take this seriously.

The United Kingdom, Australia and New Zealand are the only OECD jurisdictions with purely voluntary notification systems. At the same time, the authorities have a broad mandate to review any merger regardless of whether it was (voluntarily) notified or not, and irrespective of whether the parties have consummated it or not. When they decide to investigate a merger, they will customarily request the merging parties to stop the implementation process, or to unwind integration that has already occurred. This can take the form of written undertakings, interim orders or hold-separate orders until the merger

review is completed. The aim is yet again to ensure that no irreversible action happens until the agencies had an opportunity for a thorough review.

4. Violations of the standstill obligation can be prosecuted not only for a breach of merger rules, but also for a breach of the rules on anti-competitive conduct, if they entail anti-competitive agreements or information exchanges between competitors. At the same time, it is recognised that merging parties can engage in a broad range of contacts and information exchanges when preparing a merger, provided they apply adequate safeguards.

Competition agencies are particularly wary of behaviours like the exchange of competitively sensitive information, and the exchange of (or even an agreement on) pricing or terms of business, customer allocation, and future business strategies between competitors. Outside the merger context, these behaviours will be considered as a *per se* or *by object* infringement of the rules on anti-competitive agreements in most jurisdictions. In a merger process, some co-operation and information exchange is accepted by competition agencies as ancillary to a merger agreement, and the kind and amount of information that can be exchanged may vary in the different stages of the merger process, and for the different purposes.

Exceptions will be made for due diligence purposes, the preservation of the asset value of the target, and integration planning. However, adequate safeguards have to be applied by the merging parties, such as data rooms, strict confidentiality agreements, access limited to staff not involved in operations, or the use of third party advisors. The exchanges have to be limited to the necessary minimum. Actions such as exchanges of competitively sensitive information without safeguards, the buyer influencing pricing policies, co-ordinated action in public bid procedures, or joint marketing are likely to be qualified as competition law violations. Purchaser and buyer are expected to remain fully independent actors on the market until the transaction was cleared and closed.

In case of violations, these practices will be prosecuted. The US will routinely apply Section 1 Sherman Act, in addition to the HSR merger rules, and Australia and New Zealand follow similar approaches. Other jurisdictions widely agree that the rules on anti-competitive agreements are applicable. However, for example in Europe, these violations were usually prosecuted only as a breach of the standstill obligation under the merger provisions. Future cases might see the application of Art. 101 TFEU and its national equivalents, in the light of the recent jurisprudence by the Court of Justice.

5. Violations of the merger or anti-competitive conduct rules will be prosecuted and fined, and OECD countries show an increasing determination to put an end to gun jumping infringements, to send a clear message through the fines they impose.

Agencies make an active effort to detect and fine incidents of gun jumping. Sources for detection reach from systematic media monitoring to tip-offs by third parties and competitors, and investigations may well include dawn raids. Fines vary, but seem to have increased significantly on a global scale. Many agencies will consider voluntary disclosures and co-operation in the investigation as mitigating factors, while the length of the violation and the impact on the market will be considered as aggravating factors. Apart from fines, legal consequences of the violation of gun jumping rules can be invalidity of the transaction, interim measures, remedies, or eventually dissolution.

6. The prevention of violations is high on the agenda of competition agencies and businesses alike, and many OECD countries engage in strong advocacy efforts. Some

merger regimes might benefit from clearer rules on what constitutes a transaction, and of thresholds that trigger notifications.

Most firms undertake strong efforts to comply with the merger rules, and to ensure that no violations happen during the merger process. Competition agencies support these efforts, and are willing to engage in pre-merger notification talks and a wider communication with the business community as part of their advocacy activities, to familiarise all actors with the requirements of the competition laws. Some agencies have also issued general guidance.

Representatives of the business community pointed out that pre-merger discussions are only useful when they happen within very short timelines. In general, they remarked that jurisdictions should make an effort to make merger thresholds clear, objective and tailored to a review of mergers that have a sufficient probability of leading to anti-competitive outcomes.