

Unclassified**English - Or. English****21 October 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Summary of discussion 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
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This document prepared by the OECD Secretariat is a detailed summary of 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 <https://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm>.

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Summary of Discussion of the Roundtable on Suspensory Effects of Merger Notifications and Gun Jumping

By the Secretariat

On 27 November 2018, the Competition Committee held a roundtable on suspensory effects of merger notifications and gun jumping chaired by Professor Frédéric Jenny.

The **Chair** noted that, although it is not a new topic, the Committee did not have a discussion on gun jumping yet. Recent decisions in Europe had sparked a renewed interest in the enforcement of gun jumping.

The chair then introduced the four points of discussion. (1) The failure to notify mergers, (2) the violations of standstill obligations before the authority has rendered its decision, (3) agency guidance and advocacy, and (4) the prosecution of gun jumping offences and fining policies. The fact that the Secretariat had received a large number of contributions from countries reflected the great interest in the topic.

The expert speakers in the panel were Charlesa Ceres, associate general counsel of antitrust and competition law at United Technologies Corporation, United States; Jay Modrall, partner at Norton Rose Fulbright, Brussels, and Professor Richard Whish, professor emeritus at Kings College, London.

The **Secretariat** introduced the different types of violations, namely failure to notify a merger when pre-notification is mandatory, the violation of the standstill obligation in the form of premature implementation of the merger, and anti-competitive agreements between competitors before closing a deal. As gun jumping actions are case specific, and it is hard to draw general lines, the business community seeks for guidance, legal certainty and clarity to know which steps they can take in preparing a merger. So far, only a few jurisdictions have issued such guidelines. However, the thirty-one contributions that the Secretariat has received provide a good overview of the latest cases and the enforcement practices of the countries.

The Chair then invited the first speaker, Jay Modrall, to introduce the first discussion point, failure to notify.

1. Failure to notify

Jay Modrall introduced the topic of procedural gun jumping, defined as implementation of a notifiable transaction without observing mandatory waiting periods or clearance requirements. He identified several reasons for failure to notify, starting with misunderstandings or ambiguity about the kind of transactions that constitute a merger. Classic EU gun jumping cases resulted from confusion of what constitutes control or how to apply the rules to joint ventures. Another category of cases, sometimes found outside the EU and the United States, is the application of merger control to commercial agreements not giving rise to a structural change in the market, such as exclusive distribution agreements or the acquisition of assets not amounting to a going concern. Merger thresholds and the definition of the group of companies whose turnover needs to be included raise other difficulties. Finally, companies have sometimes been found to have mistakenly relied on local carve-outs to satisfy suspensory obligations. He pointed out that

avoiding gun jumping can be problematic in particular for companies that operate on a global scale. Since more and more merger regimes require mandatory notification, many global transactions trigger 10-15 notifications, leading to longer merger review periods and creating challenges for the companies.

Some measures were highlighted that jurisdictions could consider to reduce gun jumping:

- Using clear definitions of the trigger events and harmonizing common concepts, like “control”, as well as applying merger control only to transactions that result in a structural market change;
- Using clear, understandable and objectively quantifiable notification thresholds, and aligning the interpretation of thresholds with comparable accounting/tax concepts; and
- Clarifying exemptions, local nexus and carve-out rules, the rules that govern procedural violations, and conduct which is actually subject to review under antitrust statutes.

The Chair thanked Jay Modrall and noted that in some countries the thresholds are not based on turnover, but on market shares or some other indicator, among them Spain where turnover and market share thresholds are used in parallel.

Spain explained that both the turnover threshold and the market share threshold trigger the obligation to notify a merger. Prior to the submission of a notification, and in order to provide certainty, the merging parties can consult with the agency on the threshold. Additionally, extensive case law is easily accessible on the webpage. However, Spain agreed that guidelines could be useful in addition.

Hungary noted that it introduced a secondary threshold in 2016. This additional threshold requires notifications also in cases where the traditional thresholds are not met, but the total net turnover of the undertakings concerned exceeds EUR 15 million, and the concentration might significantly reduce competition in the relevant market. If such a transaction is not notified, there will not be any legal consequences, such as fines. This means that this threshold can be interpreted as a voluntary threshold, and the respective mergers are not subject to the standstill obligation. The implementation of the transaction only has consequences if the agency, during the merger investigation, finds that the merger will significantly reduce competition in the relevant market, and thus prohibits it.

Since the secondary merger investigation threshold came into force, the authority has investigated ex-officio one merger based on the second threshold, and found that the merger would not significantly reduce competition. Hungary confirmed that it would be difficult for the parties to comply with the determination of the threshold if it were not voluntary.

Portugal pointed out that gun jumping is one of its top enforcement priorities. Portugal, similar to Spain, also applies a market share threshold. The authority has made a huge advocacy effort to explain how the regime works. The authority also encourages companies to come for pre-notification meetings for clarification. The pre-notification, similarly to Spain, is a free and very fast process.

Jay Modrall noted that, from a business point of view, long pre-filing consultations, which can take a long time to decide whether one has to notify at all, are not practical. He also pointed out that the constant changes in the portfolio companies controlled by private equity firms creates challenges for such firms in calculating turnover for purposes of applying merger control thresholds.

The **Slovak Republic** elaborated on the detection of gun jumping. The policy recently shifted towards a more intensive control of possible infringements of gun jumping. Dawn raids as an investigative tool can contribute to the effective enforcement of merger control provisions. The agency used dawn raids in cases where it suspected that a merger had been implemented without notification. This concerned mergers that were hidden, and where the infringement was intentional. Three dawn raids were conducted in the last four years. In the most recent successful investigation, the agency found evidence of the infringement, and the parties admitted the infringement after the statement of objections, and agreed to a settlement. Although the fine was reduced by 50%, it was still the highest fine ever, more than half a million euros. In the particular case, the agency had obtained information from public services, and carried out a quick market research among competitors, which supported the suspicion.

2. Violations of the standstill obligation and provisions on anti-competitive agreements

Richard Wish opened the second part of the discussion, recognising the increasing number of gun jumping cases and the importance of the timing of this discussion in the light of two major gun jumping cases, the Court of Justice's judgement in *Ernst & Young* and the European Commission's (EC) decision in *Altice*.

To further clarify terminology, Professor Wish explained the difference between procedural and substantive gun jumping. Procedural gun jumping is simply a failure to notify, as discussed previously. Substantive gun jumping happens when the parties begin to implement the concentration prior to a required clearance decision by a competition authority. The EU Merger Regulation (EUMR)¹ contains two different provisions. Article 4 prescribes the notification of concentrations prior to their implementation, and Article 7 imposes a standstill obligation prior to notification and clearance (for example, in the *Altice* case, fines were imposed for violations of the two provisions). While Article 101 TFEU prohibits agreements and concerted practices (e.g. information exchanges), concentrations are, according to Article 21(1) EUMR, solely governed by the EUMR. Consequently, Art. 101 TFEU would not be applicable to any concentrative, substantive gun jumping violations. Contrary to this, US law has no equivalent to Art. 21(1) of the EU merger regulation, and the HRS and Sherman Act are applied in parallel.

He then outlined the two recent European cases. *KPMG Denmark* and *Ernst & Young* had notified a merger to the Danish Competition Authority, which granted an unconditional clearance. On the day of signing the merger agreement (prior to notification), *KPMG Denmark* terminated its co-operation agreement with *KPMG International*. The Danish Competition Authority considered this a violation of the standstill obligation. The Court of Justice, in its preliminary ruling, held that a concentration is a lasting change of control. Acts that do not contribute to a change of control are not caught by Article 7(1), even if they are ancillary to the concentration. Their implementation is not, in principle, likely to undermine the efficiency of the control of concentrations. Such actions might, however, be covered by Art. 101 TFEU, and the application of Art. 101 TFEU should not be reduced by a too wide application of Art. 7 (1) EUMR.

In the *Altice* decision, the Commission imposed two fines: one for infringing Article 4(1) and the other for infringing Article 7(1) EUMR. The case is on appeal. *Altice* had

¹Council Regulation, *No 139/2004, Control of Concentrations Between Undertakings (EC Merger Regulation)*, 20 January 2004, Official Journal L 24, 29.01.2004, p. 1-22

implemented the transaction before clearance in different ways: (i) the merger agreement included veto rights, which enabled Altice to influence the target, (ii) Altice had exercised actual influence over the target, and (iii) there had been exchanges of information that were interpreted as acts of influence.

Professor Whish noted that different fines and procedures apply for infringements of Article 101 TFEU and the EUMR. This makes it very important to know which regime is applicable. As the Commission's Altice decision was adopted prior to the Ernst & Young judgment, the General Court will hopefully bring further clarity on the application of the different regimes to different actions in a merger process.

Charlesa Ceres then outlined the business perspective. She emphasised that companies want to follow rules, and want to avoid gun jumping; however, it can be challenging especially when there are complicated or unique triggering events or thresholds, burdensome processes, or very long review periods.

It can be challenging to determine filing requirements when transactions are less straightforward, such as minority investments with veto rights. Another challenge are over-inclusive or unclear notification thresholds, especially market share thresholds. While it may be obvious that certain large transactions require antitrust approvals, the rules may be less clear for acquisitions of businesses with a relatively small amount of sales. Even if, at times, a business has a general sense that its market share is low, there may be very little evidence of this. Such rules can thus have a chilling effect on non-problematic transactions, since sometimes businesses may decide that it is not worth it to engage in a filing process for a small investment they would otherwise make.

Internal compliance measures include training for employees on filing obligations, and businesses may review all transactions centrally to ensure a consistent approach. Consultation with agencies can help if it is a reasonable option. For instance, in the United States, anonymous questions can be submitted to the agency to see whether they agree with the submitted analysis. Most importantly, pre-consultations must be a short check-in without a lengthy procedure.

Charlesa Ceres recommended having sufficiently high thresholds, so that insignificant transactions will not be caught. It is also helpful when jurisdictions provide information on exceptions or less burdensome processes for transactions without overlap, or private equity transactions. Notification requirements should be based on objective criteria that provide certainty when a filing is required. Additionally, filing obligations should only be triggered when there is a sufficient local nexus to the transaction, and shorter, more definite review periods could also help companies to avoid substantive gun jumping.

Additional challenges are the handling of existing or potential agreements between the parties, because often the buyer and seller already have ties. Dealing with customers and suppliers can be another difficulty. Once a transaction is announced, a company will start getting requests from its customers, including for joint meetings with the parties to understand what this transaction means for them. The biggest challenge though are the employees of the companies involved, especially if the employees are the most valuable asset of the target company. Clear guidelines from the agencies for due diligence and integration planning activities would help compliance, also the application of safe harbours for issues like human resources discussions or communication with employees. Moreover, penalties should be more focussed on whether the conduct was likely to cause competitive harm and should be rarer (e.g. there should not be penalties for just technical violations).

France started the discussion by establishing that the ex-ante merger review is very important, and that the rules must be respected, not only for the credibility of the system, but because gun jumping can really undermine competition in a market. When France made the decision in its Altice case, the authority looked at the European, US and other decision-making practice. In the Altice case, there were no particular difficulties like multi-notification requirements, and there were no long review periods. While conducts that aim to preserve the target company's value can be legitimate, it is very important that these conducts are not excessive and do not influence the everyday management of the target. In the Altice case, these conducts were disproportionate. France recognises the importance of guidance, and the French authority organised several meetings with the private sector, published articles on the topic to answer the questions, and to help to overcome the difficulties related to the prevention of gun jumping.

The United Kingdom explained that it has a voluntary regime, therefore, if the CMA opens an investigation, either because the parties voluntarily notify, or the CMA commences it, there is no automatic standstill obligation. However, the CMA can impose interim measures that replicate the standstill obligation, and in some ways, they can go further. Interim measures will prohibit the parties from conducting any further integration, or doing anything which could impair the ability of the target business to compete independently with the acquirer. They will also prevent any further transfer of control or ownership of the target business to the acquirer. The CMA almost always imposes interim measures when it starts the investigation of a merger. In these procedures, there is often a close engagement between the CMA and the merging parties on permitted conduct under an interim measure, as the scope of the interim measure is quite broad. Recognising that interim measures can impose a burden on merging parties, there exists a derogation process, under which the parties can apply to the CMA to undertake actions, which would otherwise be prohibited by the interim enforcement order. Usually the CMA grants derogations in situations where they do not seem to have an impact on revenues, or when necessary to safeguard the value of the target business.

The CMA has published extensive guidance on when an interim measure will be put in place, and when the CMA is likely or not likely to grant a derogation. The practice of the last three years will be reflected in an updated guidance that has just gone through a public consultation, and is due to be published shortly.

Belgium started by noting that the authority offers pre-notification meetings for the parties, where issues like gun jumping and derogations from the standstill obligation can be discussed. The president of the authority can waive the obligation to suspend the transaction anytime during the investigation, or even before the notification, moreover it can be only a partial derogation. The obligation was waived twice so far, and one case was Cordeel/Imtech. Cordeel is a company active in the construction sector, where Imtech was a key subcontractor for the company. Cordeel could be saved by the transaction only if there was no delay. The transaction did not seem to raise serious competition concerns, so the president waived the obligation.

BIAC pointed out that one of the main rationales for mergers are increased efficiencies that improve welfare. These efficiency benefits could be delayed and put at risk if firms are overly restricted in their activities during the standstill period. Efficiencies also play an increased role in the analysis of the agencies, and the burden is on businesses to provide information on and proof of efficiencies. The agencies request more and more detailed analyses. This necessitates the exchange of some information between the parties to prove and demonstrate the claimed efficiencies.

Concrete guidance can be helpful to avoid legal uncertainty that can jeopardise not only the adequate substantiation of efficiencies, but also a successful implementation of a merger. There are quite well-established safeguards, like the creation of data rooms, the establishment of clean teams, and confidentiality agreements. However, sometimes the information needed to substantiate efficiencies goes beyond what is needed for assessing/preserving the value of a business. Guidance is always welcome, and competition authorities should clarify what exchanges are permissible and what are the appropriate safeguards. Unclear notions and rules and grey areas have contributed to legal uncertainty, and raise costs and concerns for the involved parties.

The European Commission confirmed that the Altice/PT Portugal case displayed similarities with the French Altice decision. The European decision is based essentially on three elements. First, there was a clause in the agreement between the seller and Altice, which gave Altice such far-reaching veto rights that it acquired the possibility to exercise decisive influence over parts of PT Portugal's business. Second, Altice actually exercised influence on various commercial aspects (e.g. promotional campaigns, important contracts). Finally, the third leg was the information exchange.

The European Commission noted that the Ernst & Young judgment is very carefully worded. The Danish court had asked the European Court of Justice (ECJ) if it is required that a transaction forms part of a change of control. The ECJ rephrased it in its answer by using different terminology. It said, "what is required is that a transaction contributes in whole or in part, in fact or in law, to the change of control." This shows that partial implementations are also considered by the court as violations of the standstill obligation.

Germany outlined a recent case that involved the number one food retailer in Germany, Edeka, which acquired its competitor Tengelmann. The Bundeskartellamt decided that a partial implementation of a concentration before clearance can violate the standstill obligation. Before notifying the merger, both retailers had already concluded a far-reaching framework agreement on co-operation. This agreement included concrete measures on the joint purchasing and invoicing of goods, and quite a few core business activities. The decision of the Bundeskartellamt that these measures constituted a partial implementation of the merger was confirmed by the Federal Court of Justice, after the Ernst & Young ruling of the European Court of Justice.

The German Federal Court of Justice applied two criteria. The first was whether a pre-closing conduct would be suitable to at least partly implement the effects of a transaction. The second was a comparison to the behaviour of independent companies. A conduct that would otherwise not be expected of an independent undertaking could be considered relevant in the assessment of the violation of a standstill obligation. Since merger control in Europe is not fully harmonised, Germany has concentration types, which are below the level of control, and this enabled the Federal Court of Justice to interpret those rules in a different manner than the European Court of Justice. Even against the backdrop of latest court rulings, the merging parties still have room to satisfy information and co-ordination needs that are justifiable in the context of a transaction. Some uncertainty will always remain, but the recent judgment has not increased uncertainty for the parties.

Denmark explained that it decided to prosecute Ernst & Young as the first case because the companies needed guidance on gun jumping, and because the facts of the case are very simple and easy to understand. Now there is more guidance on gun jumping, however some uncertainty remains about partial implementation. Denmark also noted that an Article 101 TFEU case is different from the violation of the standstill obligation. In an Art. 101 case,

agencies have to start looking whether it would be an object or an effect case. Additionally, difficulties can arise in vertical mergers.

The **United States** described that in addition to the HSR Act, gun jumping can be illegal under Section 1 of the Sherman Act and Section 5 of the FTC Act, which prohibits unfair methods of competition. Section 1 of the Sherman Act prohibits agreements between competitors that harm competition, which may include merging firms jointly setting prices or contract terms, or entering into market division or customer allocation agreements. During the pre-consummation period, the exchange and use of sensitive information may also constitute the violation of Section 1. Firms in violation of the HSR Act are liable for civil penalties, which are set per day, per company and may be liable for equitable remedies, including disgorgement of illegally obtained profits.

In practice, a common way in which parties prematurely transfer beneficial ownership is often by allowing the buyer to take operational control over the assets that are subject of the acquisition. In the Flakeboard/Sierra Pine case, the parties entered into an illegal pre-merger agreement to close the Sierra Pine mill, and divert the customers to Flakeboard products. The case is also an example in which in addition to agreeing to a civil penalty, the parties agreed to a settlement that provided for disgorgement, which was over USD one million. Another example of gun jumping is taking control of management functions, for example ad hoc decision making, but there can also be formalised agreements in merger contracts (e.g. Gemstar-TV Guide International). Gun jumping cases do not depend on the violation of Section 7 of the Clayton Act. Gemstar-TV Guide merger was not challenged by the antitrust agencies. Despite this, all parties were still liable for violations during the waiting period. The delegation added that the US agencies have been trying to address this particular issue for decades through multiple channels. In addition to enforcement examples and cases, the agencies have issued detailed competitive impact statements, and a number of speeches of agency officials focused on gun jumping issues, in particular one by William Blumenthal when he was General Counsel of the U.S. FTC.

Jay Modrall commented on the United States contribution. He noted that while William Blumenthal's speech is still very helpful, more formal and up-to-date guidance would be welcome. He also noted that, while Flakeboard makes a distinction between the Sherman Act remedy and the Clayton Act remedy, it does not discuss the different elements of these violations in detail. Some older cases like Gemstar, he believed, did not make the distinction at all. Flakeboard may represent an evolving practice but further clarification would be welcome.

Charlesa Ceres pointed out that a guidance that provides some safe harbours, where companies can know that they are operating in a way that the competition agencies approve of and find acceptable would be helpful.

The Chair then gave the floor to Australia and highlighted some interesting facts. Firstly, the ACCC is very keen to make sure that there is no co-ordination between the parties before the merger is cleared. Secondly, the agency applies cartel provisions for gun jumping violations. Thirdly, the agency suspends the merger notification examination during the gun jumping investigation.

Australia explained that it currently has two cases before the Australian Federal Court, in which competitors engaged in co-ordinated conduct for an anticompetitive purpose, and one of the cases involves allegations of cartel conduct. The previous case in this area was 22 years ago, in 1996. One of the cases worth mentioning involved parties active in the market of storing cord blood and tissues from babies. The parties were the only two

suppliers of that service in Australia. They agreed to merge without seeking ACCC approval, and the ACCC launched an investigation. The agency discovered that, as part of the arrangements, the seller had agreed to refer all customer inquiries to the purchaser, and the seller of the business had stopped supplying services to new customers. This was likely to be a cartel arrangement and fell outside the anti-overlap provision. Now the case is pending in court. This case sends a clear message of the view of the ACCC that parties should not engage in pre-merger co-ordination, and that cases like this must be notified. If the ACCC determines that there has been cartel action, the parties are not going to get the benefit of the merger approval process. The agency will move straight into a cartel enforcement action.

New Zealand mentioned a case of co-ordination between suppliers of community pathology testing services, which came to light during another merger review process involving one of the parties. The case involved pre-merger co-ordination between two community pathology providers. Once the parties became aware that the agency was investigating this conduct, they stopped it. They also stopped the merger negotiations once the agency had prohibited the second merger that had given rise to the first investigation, and they co-operated with the agency. The proceedings led to a conviction by consent. There was a very modest fine of NZL 100 000, split between the two parties. The case was not prosecuted as a cartel, since at the time the cartel provisions were limited to price fixing violations. The agency prosecuted it under Section 27 of the Commerce Act, an agreement with the purpose or effect of substantially lessening competition.

Israel started by noting that they shortened the time of the review of mergers, giving clearance within 3-5 days. This resulted in companies being more likely to notify any merger, even in case of doubts, since the process is quick and not burdensome. The authority also has a guideline on whether to file or not to file a merger, and what exchange of information is allowed during the period between the signing and closing. In cases where there are bankrupt companies, and payment injections are needed to protect the target company, the authority expects companies to come forward and to co-ordinate with the it.

Charlesa Ceres noted that the Israeli system is helpful, because parties need to provide more information when certain criteria are met, but less if there are fewer issues.

Chile stated that up to 2017, it had a voluntary merger system, and since then there was only one gun jumping case with a violation of the standstill obligation. In this case, after filing the notification, the parties explained that they needed to close the deal before clearance due to other legal obligations. The parties put together a carve-out agreement to eliminate the effect of the transaction on the Chilean market. The authority opened an investigation for the violation of standstill obligation, which ended in a settlement with the parties. This was the first gun jumping case within the first months of the new merger system. The authority concluded that a well-built or elaborated and effective carve-out could serve as a defence, or to mitigate liability. Responding to the Chair, Chile explained that the authority settled because it was better to have a first precedent that shows that the parties were willing to pay a fine, without the explanation of why they did it.

3. Agency guidance and advocacy

The third part was opened by **Japan**, which explained that due to their huge advocacy efforts, there was a high awareness of competition law and the merger control regime. The JFTC provides clear-cut information and an easy-to-understand explanation on their

website about trigger events, thresholds and the merger system. The JFTC provides advice in prior consultations. Additionally, the JFTC holds seminars and workshops about eight times a year.

Turkey explained that in the last years, the number of gun jumping cases has decreased, with no cases at all in some of the recent years. This can be attributed to increased competition advocacy activities of the Turkish competition authority and an increase in the number of lawyers that have sufficient knowledge of the competition act. In the last 10 years, the number of law faculties teaching Turkish competition law has increased, and therefore the number of lawyers who have knowledge about the competition act has increased as well.

The **Czech Republic** explained that in spite of the guidance it issued, there are still gun jumping violations. Before the guidance was published, the authority had only had three gun jumping cases. After this, six were found. Since the Competition Act does not specify gun jumping conducts, the Czech competition authority strives to be transparent in its decision-making process, it has published a notice on the prohibition of implementation of concentrations prior to the approval, and on exemptions. The guidelines are available on the office's website and consist of two major parts. The first deals with the possible actions that merging parties should avoid before the clearance. The second recommends steps which merging parties should take when they intend to apply for an exemption of the standstill obligation. Supplementary guidelines are the guidelines on fines for different types of competition violations, including gun jumping, and on alternative resolutions of competition infringements and on the discontinuance of the proceedings.

4. Prosecution and Fining

Jay Modrall led into the discussion on fines and prosecution, referring to the record fines in the Altice cases. Are the fines in these cases outliers, reflecting extreme conduct, or the new normal?

He pointed out a significant increase of gun jumping cases, including cases where, just in the last couple of years, jurisdictions have imposed their first gun jumping fines, some of them quite large. The variation of fine levels is very large, with outsized fines in the EU and in France, and jurisdictions like Turkey, where the fines are very small. Some jurisdictions with very active gun jumping enforcement regimes, such as Austria and Ireland, impose fines that are relatively low. These fine levels seem to be considered sufficiently deterrent, even though they are in the range of EUR 100.000 – 200.000 rather than in the range of EUR 1 - 2 million.

The differences can result from different statutory frameworks. Gun jumping can be a criminal violation, or an administrative violation. Different legal traditions may play a role, but also enforcement philosophy, about which level of fine, if any, is needed to deter a violation. Depending on the regime, sometimes guidance on the fines for general antitrust infringements also applies in the gun jumping context. In the EU, decisions refer to criteria as relevant factors such as negligence, intent, or duration of infringement. He highlighted that from the private sector's point of view, companies would like to have an understanding of these factors.

France then explained its Altice fine. The maximum fine that can be imposed is 5% of the turnover. Since there were two different gun jumping infringements, the ceiling in case of Altice was EUR one billion. In determining the fine, the authority applied a number of

criteria. First, it considered the volume of the transaction that took place between the two major operators on the telecoms market. Second, it took into account the wide variety of gun jumping behaviours observed in the cases. Finally, the authority looked at gun jumping precedent, like the Electrabel case with a fine of EUR 20 million. It concluded that Altice was a much more severe case. The decision can be seen as an advocacy instrument itself. It will support existing compliance efforts, and serves as an example to show that there is a significant risk of sanction in case of infringement.

The European Commission pointed out that its fine in Altice, of close to EUR 125 million, is of course significant in absolute numbers, but for a company the size of Altice, with a turnover of more than EUR 20 billion per year, the amount of the penalty has to be significant in order to deter. One of the factors that increases the gravity of the offence is whether the concentration results in competition problems. As was mentioned from the business side, in cases with long reviews it can be particularly burdensome to respect the standstill obligation. However, usually those are the cases where the standstill obligation is most important, because they are the deals that ultimately might be prohibited or require remedies. Altice was only cleared with remedies.

The European Commission also pointed out that the fining for Art. 7 violations follows similar steps, with a statement of objections, decision and judicial review, as Art. 101 cases. For both infringements, the ceiling for the fines is 10% of the turnover.

Jay Modrall noted that, based on the fines imposed so far, the conduct Altice engaged in was apparently considered a more serious infringement than not filing a notification at all. He further questioned the suggestion that larger fines are more effective in deterring gun jumping, noting that companies and private practitioners invest significant time and effort to avoid gun jumping and any gun jumping incident is viewed very seriously.

Austria explained its prosecutorial system, meaning that the fines are set by the court. Since 2002, 35 fines were set, applying a broad range of criteria, like gravity, duration, degree of responsibility, economic capacity, including the fact of whether the infringement constitutes anticompetitive behaviour, or if it may raise competition concerns. The courts have also held that a quasi-symbolic fine would not suffice, specifically in cases where the parties knowingly refrain from notifying.

Korea stated that the average amount of fine per violation was about EUR 14.000. The violations of the obligation to notify were mostly the result of simple mistakes, miscalculations of dates and thresholds, and negligence of duties. Meanwhile, there was no sign of a decrease in violations for the last three years. The KFTC will continue to review the level of administrative fines in order to deter violations. Advocacy, along with sanctions, may play an important role in decreasing the number of infringements.

Lithuania pointed out that gun jumping violations are considered as a serious competition law infringement. The fine for such conduct is calculated based on two steps: first, setting a base fine, second, specification of the fine, taking into account mitigating or aggravating circumstances. The basic fine is usually set at 1%, then fines are differentiated, with additions in some cases for a deterrent effect, or reductions, leading to different fines for different cases.

Ireland explained that gun jumping is a criminal offense, so the CCPC can investigate gun jumping offences, but it is the director of public prosecutions that will prosecute them. The maximum fine that can be imposed is very small in comparison to other OECD members. The CCPC considers that the risk of criminal sanctions for not notifying a mandatory

transaction is an important part of the competition enforcement toolkit. Since the 2014 amendment, the undertaking is also held liable for the offence, not just the person in control.

In his closing remarks, **Richard Whish** pointed out that in the UK, due to the voluntary system, in a given year 20-30% of the cases that get referred to phase II are completed mergers, in which it has been sometimes very difficult to reverse something that has already taken place. In mandatory systems where gun jumping amounts to an offence there can be difficulties, and competition authorities and firms are still examining precisely where problematic situations may arise. However, these should not be exaggerated. Companies have very sophisticated mechanisms in place to prevent these kinds of problems, and external counsellors are accustomed to advising on them. On the issue of guidance and the important role of advocacy, he queried whether it was appropriate for an authority that has just adopted one decision to write guidance. Guidance is helpful when it's a distillation of a long practise where lots of things were learnt, but less so when based on a decision that was made last year.

The Chair thanked the experts and the delegates for a very fruitful discussion.