

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

Suspensory Effects of Merger Notifications and Gun Jumping - Summaries of Contributions

27 November 2018

This document reproduces summaries of contributions submitted for Item 5 of the 130th meeting of the OECD Competition Committee on 27-28 November 2018.

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

JT03440382

Table of contents

Suspensory Effects of Merger Notifications and Gun Jumping - Summaries of Contributions	3
Australia	4
Austria	5
Belgium*	6
Chile	7
Chinese Taipei.....	9
Costa Rica	10
Czech Republic	11
Denmark.....	12
Estonia	13
EU	14
France*	15
Germany.....	16
Hungary.....	17
India	18
Indonesia	19
Ireland	20
Israel	21
Korea*	22
Japan.....	23
Lithuania	24
New Zealand	25
Portugal*	26
Russian Federation.....	27
Slovak Republic	28
Slovenia.....	29
Spain*	30
Turkey	31
Ukraine.....	33
United Kingdom	35
United States*	36

*Suspensory Effects of Merger Notifications and Gun Jumping
- Summaries of Contributions*

This document contains summaries of the various written contributions received for the discussion on Suspensory Effects of Merger Notifications and Gun Jumping (130th meeting of the Competition Committee meeting, 27-28 November 2018). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Australia

As Australia has a voluntary and non-suspensory merger notification regime, parties are not required to notify the Australian Competition and Consumer Commission (ACCC) of a proposed merger or obtain clearance prior to completion. In practice however, where a proposed merger raises potential competition concerns, merger parties will generally notify the ACCC and wait for the ACCC's informal clearance before completion. If parties complete a merger without waiting for clearance (or they do not seek the ACCC's clearance) the ACCC can bring court proceedings where there is evidence that the merger is anticompetitive.

The ACCC does not have the ability to pursue a technical or procedural contravention in respect of gun-jumping conduct, given the absence of a mandatory pre-merger notification requirement.

However, the ACCC may pursue gun jumping conduct as a substantive contravention by way of:

- cartel conduct
- making and/or giving effect to an anti-competitive agreement, or
- implementing an anti-competitive merger.

Although there have been very few cases where the ACCC has taken action for gun jumping conduct, there have been instances where contractual provisions agreed between the parties in the transaction documents or sharing of competitively sensitive information have raised significant concerns. Other conduct that may raise gun jumping concerns includes situations where integration planning is more akin to integration implementation.

The ACCC is currently taking court action against Cryosite Limited (Cryosite), in which the ACCC alleges Cryosite engaged in cartel conduct which had the effect of the parties engaging in gun jumping.

The ACCC is also currently taking court action against Pacific National Pty Ltd (Pacific National) and Aurizon Holdings Limited (Aurizon) for allegedly reaching an anti-competitive agreement which the ACCC alleges gives Pacific National control of a key Aurizon asset even if Pacific National's proposed acquisition of Aurizon's intermodal terminal in Brisbane does not proceed.

These matters illustrate the ACCC's approach to gun jumping conduct. They also provide examples of the types of conduct which merging parties should avoid in order to ensure their dealings comply with Australian competition laws.

In Australia, only a Court can impose penalties and make other orders in respect of contraventions of the competition law resulting from gun jumping conduct. The consequences for parties engaging in gun jumping conduct can be serious.

Austria

In Austria mergers have to be notified and cleared prior to implementation. There are no derogations to the standstill-obligation. Any infringement of the standstill obligation is to be fined by the Cartel Court.

Since 2002, the Austrian Federal Competition Authority (FCA) has pursued 35 cases of infringement of the standstill obligation. The overall fines amount to EUR 3,96 Mio.

The FCA pursues all cases where it has reasonable grounds for suspecting an infringement of the standstill obligation. Especially when a merger is notified after implementation, the notification will usually already contain all relevant information concerning an infringement without requiring further investigation. In such cases, the FCA has no margin of discretion with regard to the initiation of proceedings and requests the imposition of a fine in all such cases (and not only in particularly serious cases). As the Supreme Cartel Court explicitly held, infringements of the standstill-obligation are not mere “trivial offences” (“Kavaliersdelikt”) and should be sanctioned.

The large majority of cases have been settled, since the relevant facts were usually undisputed and the infringing companies mostly merely overlooked and did not contest the obligation to notify the transaction. The last contentious proceedings took place in 2013 and 2017. The decision practice shows that the courts consider infringements of the standstill obligation a serious offence that should generally be sanctioned even in case of minor negligence, but not in cases of extremely negligible gravity.

In two cases, the parties knowingly refrained from notifying the respective mergers which led to fines amounting to EUR 1,5 Mio and EUR 750.000, in 7 cases the fines ranged between EUR 100.000 and EUR 200.000 and in the remaining cases the fines ranged from EUR 5.000 to EUR 70.000.

Overall, there is an increase of notifications of mergers implemented without clearance by parties themselves without prior investigations by the FCA, which mainly seems to be due to an increased awareness of undertakings about the importance of merger control.

The FCA has not yet dealt with cases involving pre-merger exchange of confidential information.

*Belgium**

In 2015 Cordeel acquired Imtech Belgium in the context of a bankruptcy procedure. The Belgian subsidiary could only be saved if it was taken over without delay. Cordeel failed to notify the transaction to the BCA.

The Minister for the Economy intervened in the hearing. He asked the authority to take into account the fact that Cordeel had been willing to save a company employing 786 persons under high pressure in difficult circumstances. He asked the authority not to impose a fine.

The BCA decided that it would give the wrong signal if it did not impose a fine. But in view of all the specific circumstances the BCA imposed a symbolic fine of 5000 € for gun jumping.

The BCA screens the financial and general press, where significant acquisitions are reported. The BCA thinks therefore that the risk that a really significant deal would remain unnoticed is limited.

Both the infringement of the obligation to notify of the standstill obligation can be sanctioned with a fine. The legal consequences for the transaction depend on the measures the BCA may impose when it decides not to authorize the transaction.

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

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

The BCA provides no standard communication or guidance and has not yet developed a practice with regard to the kind of interactions it considers to be legitimate and illegitimate. It aligns its thinking with the practice of the European Commission. But the BCA provides the opportunity for pre-notification talks.

BCA can waive the obligation to suspend conditionally and partially, and it took two decisions on waivers: in the Cordeel case and in a case where it was particularly important that a transaction could be closed before a certain date. It was already clear that the transaction would be authorized.

The Competition Act provides for an exception to the standstill obligation in case of acquisitions by public bids, provided the transaction is notified without delay and the exercise of voting rights is suspended.

Chile

In 2016, Law No. 20.945 emended the Chilean Competition Act (Decree-Law No. 211), introducing a mandatory merger control system, which came into force in June 2017, which trespassed the merger control system from the Competition Tribunal (“TDLC”) to the National Economic Prosecutor’s Office (“FNE”). As will be explained below, the FNE has only prosecuted one case of gun jumping under the new regime (the *Minerva/JBS* transaction), based on the violation of the standstill obligation.

Under the new merger regulation, gun jumping occurs when parties breach the duty to notify the FNE of a transaction that triggers merger thresholds, according to Article 48 of the Competition Act, and when they complete a merger before receiving clearance from the FNE, breaking the standstill obligation stated in Article 49. Both prohibitions are established in Article 3 bis of the Competition Act (in the hypothesis contained in letters a) and b), respectively). The merger regulation contained in the Competition Act does not provide specific provisions concerning co-ordinate conducts or information exchanges between the parties prior to the FNE’s clearance. Nevertheless, the mentioned conducts could imply infringements to Article 3 of the Competition Act.

Normally, the FNE investigates cases (including gun jumping) using public information, information provided by customers, competitors and/or the parties. The agency has the authority to request the information and records that it may deem necessary from private parties within the context of the investigations that it is conducting.

Infringements of gun jumping provisions may be prosecuted by the FNE before the TDLC. Parties are subject to the measures established in Article 26 of the Competition Act. According to this article, in its decision, the TDLC may: modify or terminate acts, contracts, covenants, systems or agreements; order the modification or dissolution of partnerships, corporations and other legal persons of private law involved in the acts, contracts, covenants, systems or agreements referred to; and/or impose fines. In addition, if the violation consists in failing to notify a transaction, the TDLC may impose a fine for each day of delay. The TDLC has not yet imposed any measure or fine, since the only gun jumping case brought by the FNE ended in a settlement with the parties, which was approved by the TDLC.

As mentioned above, the FNE has only prosecuted one case of gun jumping in the frame of the new mandatory merger regulation in the *Minerva/JBS* transaction in 2018. Minerva and JBS were corporations that participated in the markets of production, processing and commercialization of carnic products abroad, and that operate in Chile through Minerva Foods Chile SpA and JBS Chile Limited, respectively.

On 6 April 2018, the FNE filed a complaint against Minerva and JBS before the TDLC for having infringed the legal prohibition of closing an operation notified to the FNE before receiving due authorization by this entity. According to the complaint brought by FNE, the infringement gave Minerva the possibility to exercise a decisive influence on the administration of JBS’s subsidiaries acquired by the former, in their relations with JBS Chile Limited and the Chilean market.

On 31 August 2018, the TDLC approved the Conciliatory Agreement subscribed between the FNE, Minerva and JBS. At the same time, the TDLC announced that both companies assumed the obligation of paying the unique amount of US\$1.000.000 approximately. It

is worth mentioning that on 10 October 2017 the FNE cleared the operation between Minerva and JBS without remedies, as the transaction did not give rise to competition concerns.

Chinese Taipei

A “pre-notification regime” has been adopted under the Fair Trade Act (FTA) in Chinese Taipei. For any transaction or acquisition falling into one of the merger types defined in the FTA without application of exclusionary types, the merger party(s) involved is required to file the relevant merger to the Fair Trade Commission (FTC) when the merger party(s) meets any of the notification thresholds. Gun jumping constitutes a violation of merger provisions of the FTA, which may trigger the FTC’s investigation.

When tackling with gun jumping cases, the FTC determines fines on a case-by-case basis and takes into consideration all factors set forth in the relevant law and regulations. The FTC will also order infringing enterprises to file relevant mergers. However, there are only few cases touching on gun jumping issues. The important reasons to explain the low number of merger violations may be the high percentage of clearance of reviewed mergers and the FTC’s constant advocacy as well as increasing public awareness of the FTA.

Costa Rica

Costa Rican telecommunications legislation provides that mergers be controlled *ex ante*. In this sense, “*gun jumping*” occurs when the merger control procedure is breached. Transactions that may be considered a merger must mandatorily be notified to SUTEL prior to completion and the breach of duty to notify a merger is typified as a very serious infraction, additionally, the Law provides that, in the case of unauthorized mergers, SUTEL may impose corrective actions such as “*the partial or total deconcentration of whatever was subject to undue concentration.*” In the event of un-notified mergers that have already produced effects and have been pre-sold by SUTEL, the effects of the transaction in the market are not subject to an order of temporary suspension since Costa Rican legislation does not provide for such a figure.

In all the cases that SUTEL have analyzed, they become aware of these transactions in the telecommunications market due to its regulatory functions, under which operators must inform, among others, changes in capital stock, partnerships formed, and the provision of services, among others. With this, SUTEL learns about transactions in the market but which were not notified. None of these cases, though, resulted in sanctions for agreeing to a merger without prior notification of SUTEL, for different reasons. Also, it is important to consider that in none of these cases was the transaction found to have a negative impact that would merit its rejection or condition or call for the dissolution of the merger, and, therefore, the parties were not found to breach the duty of notification, or to unfoundedly disregard the merger authorization procedure. An analysis of the cases yields two reasons for the existence of un-notified mergers in the field of telecommunications. Firstly, the initial unfamiliarity with the norm that mandated subjecting certain transactions to the process of prior control of notifications, especially considering that telecommunications was the first sector in Costa Rica to have a specific rule. And secondly, the divergent views about which transactions were subject to prior merger control.

Therefore, to avoid the occurrence of un-notified mergers and as part of its advocacy efforts, SUTEL has a Guide to the Analysis of Mergers in the Telecommunications Sector. Additionally, in 2017 SUTEL made available competition-related training courses for the telecommunications sector, seeking to broaden knowledge with regards to the application of the Sectorial Regime of Competition in Telecommunications. SUTEL is in active communication with operators during pre-notification phases.

The establishment of a sound relationship of cooperation with the national authorities and those of other jurisdictions is extremely helpful to detect un-notified mergers since some competition authorities and other State authorities may have information on transactions taking place in the market.

Czech Republic

The contribution describes the system of merger control in the Czech Republic. It can be summarized that the merger control is exercised by the Office for the Protection of Competition on the basis of a notification. Gun jumping, that is the implementation of a concentration prior to such notification, has been dealt with in several cases so far. The contribution lists various methods used by the Office to detect gun jumping.

The contribution advances wide range of activities, which can be classified as gun jumping. Usually it takes the form of an early exercise of shareholder's rights within the acquired undertaking, a transfer of management control etc. The list of such activities is stipulated by the Office's soft law based on its decision-making practise.

Gun jumping may be penalized in the Czech Republic by an obligation to cancel the unnotified concentration, but most frequently imposed sanction is a fine. The Office has published guidelines, where the procedure of setting fines is described. According to the guidelines, factors such as value of the sales of the undertaking, gravity of the offence, duration of the offence or various mitigating and aggravating circumstances are taken into account when calculating the amount of fines.

Contribution concludes by arguing that according to the Office's opinion mere disclosure of competitively sensitive information prior to merger clearance shall be deemed as a gun jumping. However Czech competition authority lacks experience with case law on this specific issue, which has never been contested before the Czech courts as well.

Denmark

It is important to ensure that mergers are not implemented before the assessment and approval of the competition authorities, i.e. that the merging parties respect the stand-still obligation.

It was the stand-still obligation that was subject to a proceeding with the Danish Competition and Consumer Authority (“DCCA”). The case regarded two audit companies KPMG Denmark (“KPMG DK”) and Ernst & Young Europe LLP’s (“EY”) that had agreed to enter into a merger agreement. The DCCA ruled that KPMG DK and EY had breached their stand-still obligation by letting KPMG DK terminate its membership agreement with KPMG International before notification and before the approval of the DCCA. The termination of the international network meant that KPMG DK, in the event of a prohibition, would no longer be able to service the large international clients. When considering whether KPMG DK and EY had breached their stand-still obligation, the DCAA considered three criteria. It was considered whether the termination in question was merger-specific, whether the termination was irreversible and whether the termination had inherent potential for market effects. The Danish Competition Council found that all three criteria were met. After the DCCA ruling EY decided to appeal the decision to the Danish Maritime and Commercial High Court, who presented the case to the ECJ as a preliminary reference.

The ECJ was asked to clarify what criteria should be applied when assessing when a conduct or action is prohibited under the stand-still obligation. The ECJ therefore concluded that article 7 (1) of the EUMR must be interpreted as meaning “*that a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking [...]*”¹

The ECJ preliminary ruling gives valuable guidance as to when a provision can be seen as having breached the stand-still obligation however, there are still areas which are not fully clarified by the ruling.

¹ Cf 366/16 para 62

Estonia

According to the Competition Act it is prohibited to implement the concentration before the Competition Authority has issued a clearance decision.

During the years, the Competition Authority has investigated several mergers that were implemented without a clearance decision from the Competition Authority. Most of them have been failures to notify (on time), but also a violation of the standstill obligation has occurred. One of the gun jumping cases, which involved failure to notify on time, led finally to a Supreme Court decision² that has given the Competition Authority a further guidance. The merger (acquisition of control by AS Wõro Kommerts of AS O³) was notified to the Competition Authority, but only after the implementation. In this case therefore the submitted merger notification itself was the source of information about gun jumping. There is not a single source to identify concentrations that should have been notified but were not. It cannot be said that a systematic monitoring is conducted, but media is followed and in case of any doubts the e-Business Register is checked to identify the turnover of the parties and ownership of the shares. There is no possibility to prioritize gun jumping cases – once it has been discovered that a possible gun jumping has occurred, the Competition Authority is obliged to open misdemeanor proceedings.

Enforcement of concentration that is subject to control without permission to concentrate, as well as violation of a prohibition to concentrate or the terms of the permission to concentrate is punishable by a fine of up to 400 000 euros (legal person) or by a fine of up to 1200 euros or detention of up to 30 calendar days (natural person). A fine may be imposed on the party who is obliged to submit the merger notification, for the described violations, and in order to impose a fine, misdemeanor procedure shall be conducted.

The misdemeanor procedure, which is quite an exceptional method in global practice, was initially meant rather for the simple proceeding of minor violations (such as driving without a seat belt). Proceeding of complex economic violations (such as abuse of dominant position and concentrations enforced without a clearance decision) in misdemeanor procedure is sometimes highly complicated and therefore also inefficient, compared to other countries. In misdemeanor procedure, in order to impose a fine to a legal person, the exact natural person who committed the infringement, i.e. enforced the concentration, has to be identified.

² 7 December 2007 in case 3-1-1-84-07, AS Wõro Kommerts vs Konkurentsiamet

³ Full name of the target was not disclosed in the court decision

EU

The EU system of merger control is a system of *ex ante* control, meaning mergers must first be notified to the Commission and approved, before they can be implemented. The twin obligations underpinning this system are the duty to notify (Article 4(1) of the EU Merger Regulation) and the standstill obligation (Article 7(1) of the EU Merger Regulation).

The duty to notify and standstill obligation have been at the heart of several recent cases. In *Electrabel / Compagnie Nationale du Rhône* and in *Marine Harvest / Morpol*, the Commission imposed a fine of EUR 20 million on the acquirer because it had acquired *de facto* control over the target before the deal had been notified or approved by the Commission.

In *Altice / PT Portugal*, the Commission imposed a fine of EUR 124.5 on Altice for breaching the duty to notify and the standstill obligation. The decision found that the share purchase agreement between the acquirer (Altice) and the seller had given Altice far-reaching veto rights that went beyond what was necessary to preserve the value of PT Portugal's business. This had given Altice the possibility to exercise decisive influence over some aspects of PT Portugal's business before notification and clearance. In addition, Altice actually exercised this influence by giving instructions to PT Portugal on a wide range of commercial issues. Altice and PT Portugal had also exchanged commercially sensitive information without any appropriate safeguards. This exchange of information contributed to the Commission's finding that Altice exercised decisive influence over aspects of PT Portugal's business.

The Commission is vigilant about possible violations, investigates potential infringement cases and strives at deterring violations. Information about violations can come from various sources. The Commission can also issue requests for information and conduct inspections at the premises of the merging parties to determine whether gun-jumping has taken place.

The EU Merger Regulation provides for significant penalties – up to 10% of the turnover of the undertakings concerned – for negligent or intentional infringements of the duty to notify and the standstill obligation.

The Merger Regulation contains some limited exceptions to the standstill obligation (Article 7(2)). Furthermore, Article 7(3) allows undertakings to request a derogation from the standstill obligation. These are granted in exceptional circumstances, for instance when the target is in financial distress and early implementation is necessary to preserve its financial or competitive viability.

The decisions mentioned in section 3 provide companies with specific examples of conduct which the Commission considers to constitute gun-jumping. Those decisions contain guidance on what is permissible and what not.

*France**

The French competition law regime foresees an ex ante administrative control of merger transactions, which places companies under an obligation to file a clearance request in accordance with the statutory deadlines, and in the prescribed form and manner.

A suspensory effect applies to the planned transaction while the competent regulatory authority analyses its effects on competition.

The general aim of this system is to guarantee the existence of an efficient and competitive market, the functioning of which is not affected by the creation or strengthening of a dominant position or purchasing power that is likely to harm competition. The Autorité de la Concurrence has imposed fines for failing to notify a merger on three occasions.

In 2014, Altice-Numericable Group notified the Autorité de la concurrence of two merger transactions.

Numericable's acquisition, from Vivendi, of SFR and the acquisition of sole control, through a bid accepted by the shareholders, of the OTL Group. The Autorité found that a number of clues - from competing operators in particular - pointed to possible gun jumping in connection with both acquisitions. Therefore, it conducted dawn raids at the premises of Numericable, SFR and OTL.

Certain practices – the buyer exercising control over the target company's strategic decisions, sharing strategic information – were common to both mergers, while others were specific to one or the other – strengthening business ties during the standstill period, or the appointment of senior executives prior to clearance, and they were found to be in violation with the standstill obligations under French law.

In the Altice-Numericable case, it was a number of different types of behaviours that established in their combination the premature acquisition of de facto control by Altice over SFR and OTL. Taken individually, no one type of behaviour would necessarily be sufficient to constitute gun jumping – nor should it be inferred that the same series of facts must be demonstrated in order to classify the offence as gun jumping.

In light of the fact that, regardless of whether or not assets were transferred, the buyer had acquired decisive influence over the target company, the Autorité found that, in both cases, the merger was implemented during the standstill period.

The Autorité ordered Altice Luxembourg and SFR Group to pay a joint fine of EUR 80 million.

Close attention must be given to all types of behaviour during the standstill period, to ensure that, as a result of either one specific type of behaviour or of a combination of practices, companies do not get into a situation where the buyer prematurely acquires decisive influence over the target company, which would put them at risk of being sanctioned by the competition regulator.

Germany

Recently, a lot of attention has been paid to the topic of gun jumping. This issue has certainly always been on the Bundeskartellamt's enforcement agenda. The authority acknowledges business needs of merging parties, provided that adequate safeguards are adopted and the notification and standstill obligations are complied with. The ruling of the Federal Court of Justice on Edeka/Tengelmann gives valuable guidance on the scope of the standstill obligation in Germany.

Hungary

The standstill obligation, which is enshrined in the Hungarian Competition Act, came into effect on 1 July 2014. As a result of this amendment of the law, a notifiable merger cannot be implemented until the prior approval of the Hungarian Competition Authority (“GVH”) has been attained. If it is proven that the merging parties have implemented the transaction before it has been notified, the Hungarian Competition Act enables the GVH to impose a fine on the parties for violating the standstill obligation.

Since the amendment came into force the GVH has investigated 6 transactions involving the implementation of a concentration before the clearance has been granted. 170 mergers were notified between 2014 and 2017, and in only 4 per cent of these cases the parties were found to have violated the standstill obligation. In all of these cases the transactions were notified to the GVH.

The Competition Act provides derogation from the standstill obligation, pursuant to which the GVH may grant the merging parties permission to implement the concentration before its clearance. So far, in only two cases the parties have requested such derogation.

Regarding uncovering instances of gun jumping, customers or competitors may submit a complaint if they are aware of – an already implemented – concentration that has not been notified. Additionally, the GVH monitors the news to identify transactions that parties may have failed to notify.

The Hungarian Competition Act enables the GVH to carry out dawn raids when it is suspected that the buyer has exercised control rights over the target company before obtaining formal approval of the acquisition.

Notice No. 6/2017 of the President of the GVH and President of the Competition Council on investigating concentrations (“No. 6/2017”) provides guidance on law enforcement issues arising from merger review processes. A section of the guidance deals with enforcement actions relating to the gun jumping prohibition. The notice also provides guidance on the derogation from the standstill obligation, taking into account the previous experiences and cases of the GVH.

As regards to the sharing of information during pre-merger negotiations, the GVH has held that merging parties should not partake in unreasonable exchanges of information that facilitate coordination between the parties and endanger competition on the market. Notice No. 6/2017 states that if the merging parties co-ordinate their competitive conduct before clearance is granted, this behaviour falls under the scope of the prohibition of agreements restricting economic competition.

India

The Competition Act, 2002 [Act] in terms of Section 5 states that the following transactions are combinations if the parties meet the asset or turnover threshold mentioned therein.

- Acquisition of control, shares, voting rights or assets of an enterprise, and
- Merger or Amalgamation between enterprises.

The Act, as enacted in 2003, envisaged voluntary merger notification regime. However, with the amendment to the Act in 2007, mandatory pre-merger notification was introduced in India. To enforce the same, Competition Commission of India [CCI] has also been empowered to penalize parties who fail to give notice. The Act requires parties to a combination to give prior notice to CCI and the combination shall not come into effect for a period of 210 days or earlier approval by CCI. If no decision is taken by CCI within the said time period, the proposed combination would be deemed approved. These contemplate a standstill obligation on the parties not to affect their merger proposal in whole or parts without the approval of the same under the Act.

The extant regulatory framework envisages *ex ante* regulation of combinations with an opportunity to CCI to evaluate the likely effects of the proposed combination on competition and regulate them appropriately. If parties to the combination forfeit this statutory opportunity provided to CCI, the same would render them liable to be proceeded against under Section 43A of the Act.

Section 43A gives discretion to CCI to impose penalty in case a person or enterprise fails to, give notice or observe the standstill obligation. This penalty can extend up to 1% of the total turnover or the assets of such a combination, whichever is higher. While exercising this discretion, CCI considers the conduct of the parties and the circumstances under which the parties failed to give notice or to observe the standstill obligation.

The expression “gun-jumping” has not been defined anywhere in the Act or Regulations framed thereunder but includes the instances relating to: (i) failure to notify and (ii) violation of the standstill obligation. Till date, the CCI has found violations of Section 43A of the Act in 38 out of the 599 combinations reviewed by the CCI.

CCI has always endeavored to clarify its views and fundamental principles governing the determination of gun jumping through its reasoned orders and by bringing in appropriate changes to the Regulations governing the procedure relating to notification of combinations. It has also endeavored to be lenient in imposition of penalties when the violation is not deliberate or arising out of interpretational issues.

Indonesia

Based on Law No. 5 Year 1999, competition law in Indonesia adheres to a post-notification merger system where business actors are obligated to report the M&A transaction to KPPU after such M&A is legally effective. However, Government Regulation No. 57 Year 2010 has opened the opportunity for business actors to voluntarily consult KPPU with regard to the M&A plan to be made. The objective of such consultation is to know whether or not the said M&A plan has a potential of violating Law No. 5 Year 1999. Although business actors have conducted consultation, yet it does not do away with the obligation of business actors to give a notification after the M&A transaction is legally effective.

Competition law in Indonesia does not recognize the term Gun Jumping since merger pre-notification in Indonesia is voluntary in nature and the opinion of KPPU with regard to the M&A plan is not an approval or a rejection. Nevertheless, KPPU may impose a sanction in the form of administrative penalty if business actors do not discharge the obligation to give a notification after an M&A is legally effective.

Currently, people's representatives holding seats at the House of Representatives in cooperation with the Government are holding a discussion to amend Law No. 5 Year 1999. One of the important points of such amendment is to change the M&A supervision regime from a post notification system to a pre-notification system. If such amendment is approved, then business actors may not settle the M&A transaction before obtaining a clearance from KPPU. However, in order to prevent gun jumping from taking place, KPPU must cooperate with several government institutions and other regulators. A synergy between KPPU and government institutions as well as other regulators may reduce or prevent business actors from conducting a gun jumping.

Ireland

In Ireland, Part 3 of the Competition Act 2002, as amended (“the 2002 Act”), which was amended by, inter alia, the Competition and Consumer Protection Act 2014 (“the 2014 Act”)⁴, deals specifically with mergers and acquisitions and requires undertakings to notify certain mergers or acquisitions (i.e., those that meet specified financial thresholds in the Irish State and media mergers) to the CCPC.

Section 16 of the 2002 Act sets out what constitutes a merger and/or acquisition. Section 18(1) of the 2002 Act imposes an obligation on the undertakings involved in such a proposed merger or acquisition to notify the CCPC of the proposal to put such merger or acquisition into effect. Pursuant to section 18(1A) of the 2002 Act, such notification shall be made before the proposed merger or acquisition is put into effect. Pursuant to section 18(9) of the 2002 Act, it is a criminal offence for an undertaking or person in control of an undertaking to contravene section 18(1) of the 2002 Act. Section 18(10) of the 2002 Act provides for separate offences for each day the contravention of section 18(1) of the 2002 Act continues. Section 19 of the 2002 Act provides that where a proposed merger or acquisition is put into effect before the CCPC has issued a clearance determination (or before the statutory period for the CCPC to issue a determination has lapsed) the merger is void.

The CCPC considers that the risk of criminal sanctions being imposed for a breach of section 18(1) of the 2002 Act is an important part of the competition enforcement toolkit and ensures that the Irish merger regime continues to function well and is complied with. Recently, the CCPC launched an investigation into an incident of gun-jumping. The matter is currently ongoing and, as such, the CCPC is not in a position to provide further information at this time.

⁴ The CCPC was established on 31 October 2014 after the National Consumer Agency and the Competition Authority were dissolved and amalgamated pursuant to sections 38 and 39 of the 2014 Act. By virtue of section 39 of the 2014 Act, references to the Competition Authority in any Act of the Oireachtas (Irish Parliament) passed before the establishment day of the CCPC, namely 31 October 2014, shall, on and after that day, be construed as references to the CCPC.

Israel

Under the Israeli Antitrust Law 5748-1988 (hereinafter: the "**Law**"), mergers that meet the reporting thresholds set forth under the Law must receive *ex ante* approval from the Director General of the Israel Antitrust Authority (hereinafter: the "**IAA**"). This merger control regime is intended to monitor and prevent structural links between corporations that may create, strengthen or protect market power in a manner that threatens competition in the market as a whole.

Alongside the importance of preventing mergers that may harm competition in the market, the IAA's approach on this issue, is based on the understanding that a large portion of mergers may have positive implications on the market and the economy and lead to benefits and efficiencies.

Accordingly, as shall be discussed in this contribution, the IAA promotes an efficient merger examination process, and has taken a number of steps to expedite its examination process. We will also discuss the pre-notification and stand-still obligations incumbent on merging parties, according to the Law; we will further address the IAA's approach with reference to meeting these obligations, as well as the IAA's views concerning "gun-jumping". In this regard, this contribution will also address "gun-jumping" cases in recent years in which the IAA has taken administrative enforcement measures. In addition, we will describe the IAA's position regarding the concerns that may arise in the course of due diligence procedures preceding mergers. Finally, we will present the steps taken by the IAA in order to insure responsiveness vis-à-vis the public, regarding mergers as well as to help parties to a merger to avoid violating the Law.

*Korea**

The Korea Fair Trade Commission (“KFTC”) imposes administrative fines where merging parties either fail to fulfill the obligation to notify their transactions or where merging parties violate the obligation not to consummate a proposed M&A until clearance has been granted. Between 2016 and 2018, the KFTC imposed administrative fines in 65 cases for violating gun jumping rules. The cases were mostly the result of simple mistakes, miscalculation of notification dates, and negligence of duties, etc.

The KFTC always makes an effort to actively monitor for non-notified transactions where notification is mandatory through the instrument of annual general inspections.

Administrative fines are calculated in four steps. First, a base amount of the fine is derived from the merging parties’ total assets or turnover.

Second, an amount equivalent to 0.5% of the base amount per day shall be added from the day following the date on which the deadline date passes.

Third, a discretionarily adjusted amount shall be computed, and as step four, after aggregating the standard amount and the discretionarily adjusted amount, when determining the final amount of the fine, the KFTC takes into account the violating entrepreneur’s actual ability to pay, nature and circumstances of the violation, etc.

In order to actively detect the violation of the M&A notification obligation, the KFTC conducts general inspections every year.

The KFTC detected 1 case of violation in 2018, 3 cases in 2017 and 2 cases in 2016 through the general inspection. The cases detected through the general inspection were all related to the violation of the notification obligation.

One of the 2 cases detected in 2016 in violation of the notification obligation was related to a share acquisition and the other was related to interlocking directorates; the cases detected in 2017 and 2018 in violation of the notification obligation were all related to interlocking directorates.

Japan

M&A transactions such as share acquisitions are under the obligation of prior notification in Japan. However, there is no clear definition of so-called gun jumping or guidance for legitimate/illegitimate pre-merger communication or integration between merging parties in Japanese competition law (the Antimonopoly Act; AMA) or its guidelines.

Substantive gun jumping, which means exchange of important information in terms of competition between merging companies before JFTC clears the merger, is regulated by substantive provisions of the AMA.

Procedural gun jumping, which means a violation of procedural merger control provisions such as failure to file a prior notification or breach of standstill obligation, is subject to criminal fines of not more than two million JPY.

JFTC has never taken any legal measures against gun jumping as a violation of the AMA. This would be the fruit of JFTC's more than 70 years' history of advocacy activities of merger control regime for companies and lawyers, such as holding seminars and lecture meetings across the country.

At the same time, however, JFTC observed a "potential" violation of procedural provisions in 2016 and cautioned the party not to repeat the same action in the future.

JFTC will address gun jumping case appropriately in its merger review.

Lithuania

Under the Lithuanian competition law, concentrations, which meet the turnover thresholds stipulated in the Law on Competition, have to be notified to the Lithuanian Competition Council prior to their implementation. However, throughout the years, the national competition authority has dealt with several gun jumping cases, mostly concerning the failure to notify. Following the judgements of the Supreme Administrative Court of Lithuania, the implementation of the notifiable concentration without obtaining the permission from the Lithuanian Competition Council is regarded as a serious infringement. Thereby, non-compliance with this obligation may result in fines reaching up to 10 percent of the overall annual income of the undertaking concerned, which can be increased or decreased depending on the presence of aggravating or mitigating circumstances.

New Zealand

New Zealand is relatively unique in that it has a voluntary merger notification regime. Because notification is voluntary, there is no obligation to notify the Commerce Commission (Commission) of any mergers and nor is there a standstill obligation. As such, there are no offences relating to procedural gun jumping under the New Zealand mergers regime.

However, any pre-merger arrangements between merging firms may be assessed under the Commerce Act's coordinated conduct (section 27) and cartel (section 30) prohibitions. These could arise during planning or negotiations, as an in-principle agreement, or as part of the transaction documentation. This type of pre-merger coordination is what the Commission would assess as substantive gun jumping.

Additionally, while merging firms have no obligation to notify the Commission of a merger, the Commission may bring proceedings under section 47 of the Commerce Act if it considers a completed merger would be likely to substantially lessen competition (SLC). Section 47 prohibits acquisitions that are likely to SLC, and remedies for a breach of the provision include unwinding the transaction and pecuniary penalties. The Commission is currently litigating an alleged breach of section 47, its first merger enforcement proceedings since its successful case in 2006 against NZ Bus for its acquisition of Mana Coach Services. The Commission has also recently carried out investigations into two non-notified mergers which resulted in the businesses offering remedies to address the Commission concerns. In one case, this followed the Commission filing proceedings to prevent the merger from proceeding.

The Commission has to date taken one enforcement proceeding in relation to pre-merger co-ordination. The case involved a moratorium on competition between two providers of community pathology testing services in anticipation of a later merger between the two (which did not eventuate). After the parties admitted the conduct, the High Court imposed an agreed penalty of \$100,000. In reaching its view on the appropriate penalty, the Court endorsed the Commission's submission that parties who propose to take steps towards merger must not in the meantime enter into anti-competitive arrangements or understandings. The Court noted it was no answer that an eventual merger might well involve significant countervailing benefits.

The Commission has detected other instances of potential pre-merger coordination. In one particular merger, there was evidence that, prior to completion, the acquirer had already received the target's customer lists and that the target had been encouraging its customers to shift to the acquirer. While in this case the Commission focused its investigation on whether the completed merger had breached section 47, the Commission views substantive gun jumping as a potentially serious breach of competition law and is prepared to enforce against such breaches.

*Portugal**

Under Portuguese competition law, the failure to notify a merger or early merger implementation before clearance constitute serious administrative offenses and may lead to fines of up to 10 per cent of the relevant undertakings' turnover.

In line with this, gun jumping is one of the AdC's priorities, head-to-head with the detection and investigation of cartels.

The legal framework for pursuing gun jumping violations typically comprises two complementary procedures: (i) the supervisory procedure, in which the Authority investigates whether there is sufficient evidence that gun jumping occurred; and (ii) the infringement procedure, which follows the supervisory procedure and in which the Authority assesses all relevant factors based on which it may issue a decision imposing fines.

In particular, over the past five years the AdC has imposed fines in two cases against firms. In both cases, the relevant undertakings accepted to settle the case by acknowledging the facts and accepting their liability, leading to the imposition of fines.

In recent years gun jumping has become one of the AdC's main priorities, head-to-head with cartel detection and investigation. Both the Portuguese Competition Act and the AdC's Statutes of 2014 stipulate that the Authority has to publish its priorities for the upcoming year and the topic of gun jumping has been recurrently listed as one of them.

Experience shows that detecting and pursuing gun jumping raises significant challenges. Enhanced co-operation between the AdC and other public bodies, together with an integrated use of different tools represent an important step towards a proactive detection strategy.

Russian Federation

In accordance with the Russian antimonopoly legislation, economic concentration transactions, subject to exceeding certain threshold values, can be carried out after obtaining the relevant approval of the antimonopoly authority.

In the most general form, the execution of a transaction without obtaining the prior consent of the antimonopoly authority is recognized as a violation of the antimonopoly legislation.

Article 34 of the Federal Law dated July 26, 2006 No. 135-FZ “On Protection of Competition” (hereinafter referred to as the Law on Protection of Competition) establishes the consequences of violation of the rules on approval of transactions of economic concentration.

The consequences of this violation can be:

- compulsory liquidation, compulsory reorganization in the form of division or separation;
- recognition of transactions as invalid.

These sanctions are implemented exclusively in court on the suit of the antimonopoly body, sent to the arbitration court.

In the event of filing a lawsuit [for forced liquidation (reorganization) or recognition of an economic concentration transaction as invalid], the antimonopoly authority should prove that the disputed transaction led or could lead to restriction of competition, including as a result of the emergence or strengthening of a dominant position.

Accordingly, transactions carried out in violation of the requirements for their approval by the antimonopoly authority are challengeable before the courts. That is, the transaction may be invalidated on the grounds established by law, by virtue of recognizing it as such by the court (a disputable transaction) (Part 1 of Article 166 of the Civil Code of the Russian Federation).

In addition to the consequences established by Article 34 of the Law on the Protection of Competition, an administrative penalty is imposed for violation of the procedure for approving transactions of economic concentration.

In addition, at present, the FAS Russia monitors global transactions. The source uses foreign media reports (Bloomberg, Harvard Business Review, The Wall Street Journal, etc.) regarding the alleged transactions of transnational corporations. It is planned to make this monitoring perform automatically.

It should also be noted that in the practice of the FAS Russia there is no prioritization or selection of cases for the early closure of transactions. If facts of early closure of transactions are detected, the companies violating the law are brought to administrative responsibility (a formal violation) and if the transaction may lead to restriction of competition, the mechanism for recognizing the completed transaction as invalid is triggered.

Slovak Republic

The AMO SR has strong legal background with regard to duties of undertakings connected with notifiable mergers. The AMO SR is the only responsible body to monitor, investigate and prosecute possible infringements of these obligations.

The contribution is aimed mainly on effective tools used in investigation of these infringements, namely dawn raids and fining policy of AMO SR during last years as well as recent trends and challenges.

During recent years the AMO SR concentrated its effort on apparent and flagrant infringements of merger provisions. In such scenario the particular merger is hidden by its participants and intentionally not notified.

The AMO SR has made a dawn raid three times up to now in connection with merger infringements during last four years. In one case the case has been concluded upon evidence obtained during dawn raid. Observing this experience realizing dawn raid can be helpful in cases in which the merger has not been notified for a long time and all indications show intentional infringement of merger provisions, so we can't much rely on cooperation from undertakings concerned using less invasive tools

As from 2014, July the 1st the AMO SR has the possibility to settle the fine for infringements concerning merger control (gun jumping and failure to notify). The maximum level of reduction is 50 % of the envisaged fine. This instrument has been used widely, out of four cases held in last four years, three ended with settled fine

The possibility to settle the amount of fine in combination with higher fines imposed serve as a strong incentive to admit the infringement and as a useful tool for effective application of competition rules.

Slovenia

Gun jumping can effectively render merger control pointless and is thus prohibited by both EU and Slovenian national legislation. The protection of competition in Slovenia is governed by the Prevention of Restriction of Competition Act (the Act) and the Slovenian Competition Protection Agency (the Agency) is responsible for the implementation of the Act. Due to the serious consequences that the finding of a breach of the legal obligation to notify a concentration may have, it is therefore very important for the Agency to properly assess the situation in which are merging entities, and to consider whether the obligation to notify the concentration occurred. The law specifies only three events, from which the deadline for notification of the concentration begins, i.e. the conclusion of the contract, the publication of a public bid and the acquisition of control, but the finding that one of these events actually occurred, in particular because of the lack of definition of the concept of obtaining control, is not always clear. The Agency acquires information on concentrations and activities on the market in several ways. Most frequently, the Agency obtains information from the concentration's notifying party itself, from obligatory reports on acquisitions and from media.

The acquisition of control can take place on a legal or factual basis, and the acquisition of control can be exclusive or common in particular, it is necessary to consider the possible impact on strategic decisions by minority shareholders. At the same time, it must be borne in mind that the concentration or acquisition of control is already sufficient to exert a decisive influence. If a company fails to notify a concentration that is subordinate to the provisions of the law, it may have serious consequences, such as fine up to 10 % of the annual turnover and a fine for responsible persons of legal entities from 5.000 € to 30.000 €.

Under Slovenian law, competition law fines are imposed in minor offences (MO) proceedings. Slovenian MO law provides for secondary responsibility of the legal persons, which is derived from the responsibility of the responsible natural persons. The suspects in MO proceeding have quasi-criminal law protections, whereby protections afforded to suspects in MO proceedings may be different (higher) than in administrative proceedings. Because the fines for gun jumping are imposed in MO proceedings and because of primary responsibility of natural persons, the Agency occasionally faces difficulties with regard to serving of documents abroad, especially if the companies are registered in the so-called tax havens. The serving authority needs to show a proof that documents were served personally, whereby in case-law it is not certain that serving directly by post necessarily fulfils this condition. The administrative proceedings law provides that persons abroad could be served directly or through diplomatic channels. An additional issue while serving documents abroad is to find the addresses of natural persons.

An amendment to the Slovenian (Competition) Act is now in the process, which may make fining easier. If the amendments will be passed fines shall be imposed in the administrative proceedings (thus not in MO proceedings). This change shall apply only to legal persons, however since we run the vast majority of our cases against legal persons, we do not see this as an important issue. The problem of serving personally abroad shall remain, however, not dealing with natural persons and finding their addresses should ease our work.

*Spain**

The Spanish Competition Act imposes an obligation to notify for mergers that meet the applicable thresholds to the Spanish Competition and Markets Commission (CNMC) before implementing the transaction. Carrying out a merger which is subject to merger review by the CNMC before notifying it or before it has been cleared can be fined with up to 5 % of the undertaking's total turnover.

The CNMC has investigated a number of gun jumping cases, and they mostly resulted from diverging views with regard to the market share threshold. In the CONSENUR/CATHISA case (2017) the notifying party was fined for failing to notify.

In the case of MASMOVIL (2015), the Council took into account that the undertaking had *motu proprio* communicated that the merger could be notifiable and notified it without the CNMC having to request it, when determining the fine.

ORANGE was also fined for not notifying its acquisition of SIMYO. In this case, both the market share and the turnover thresholds were met.

In the GESTAMP/ ESSA BONMOR case the acquisition took place in two stages. The first was the acquisition of a 10 % minority shareholding with veto rights over certain decisions, that in the view of the CNMC established control over the target. In the second stage, an additional 30% was acquired, this time respecting the standstill obligation.

After the merger was cleared, the CNMC found the acquirer to have breached the standstill obligation by granting veto powers to the acquirer. The decision was annulled by the court. First, the Court questioned whether the scope of decisions covered by the veto rights actually affected the strategic decisions or commercial policy and thus amounted to control. Second, the Court considered that any change in control was not lasting as the agreement in the first stage only lasted for 48 days and its existence was linked to the second stage, which in turn did respect the standstill obligation.

The standstill obligation can be fully or partially lifted at the notifying parties' reasoned request, stating the harm the suspension of the execution would cause. The CNMC is flexible in this respect and has applied the provision in a number of occasions.

Turkey

Like in most jurisdictions, Turkey also employs a pre-merger mandatory notification system as a general rule. According to the Article 7 of the Act No: 4054 on the Protection of Competition (Competition Act), Turkish Competition Authority's Board (Board) has the right to issue a communique to declare which types of mergers and acquisitions should be notified to the Turkish Competition Authority (TCA) in order for a merger or an acquisition transactions to become valid. Therefore, we can say that merger and acquisition which is above a certain turnover threshold must get approval from the Board in order to become valid.

The consequence of failure to notify a merger/acquisition which is subject to the Board's authorization is stated in Article 11. According to Article 11, even if the transaction is found not to be creating or strengthening dominant position after the examination, the parties to the merger/acquisition are fined by the Board.

The fine is determined according to the Article 16 of the Competition Act, which states that failing to notify a merger transaction subject to the Board's authorization results in a fine of 0.1 % of annual gross revenues of undertakings involved and in acquisition transactions, failure to notify results in a fine of 0.1 % of annual gross revenue of the acquirer.

TCA also has the power to conduct a dawn raid for merger/acquisition transactions. In the last 20 years, the Board conducted a dawn raid for only 3 cases, 2 of which it took to final investigation stage (Phase II review) and fined the parties of the transaction because of failing to notify the transaction to the Board. The Board authorized the transactions in both of these cases.

The limitation period to open a case against an unnotified merger according to the Law of Misdemeanors is 8 years. The limitation period starts at the time that the control is assumed by the acquirer or the merging entity. In the last 20 years, there have been 9 cases where the Board decided not to issue a fine to the merging parties of a transaction or the acquirer of a transaction because the limitation period had expired.

TCA has issued a total of 3.496.781,39 TL fine for gun jumping in 51 decisions. All of these decisions are approved but the related parties were fined. 43 of these decisions were taken after an application, 2 of them after a complaint, 2 of them after documents found in a dawn raid and 4 of them after a press release.

The number of fines issued for gun jumping has dramatically decreased, even as low as to zero, in the last 7 years. This can be attributed to the increased competition advocacy activities of the TCA and increase in the number of lawyers who have sufficient knowledge of the Competition Act. Therefore, it can be safely stated that Turkey is not among the competition agencies, which have increased their enforcement efforts against gun jumping cases as stated by the background note of the OECD secretariat.

With regard to suspensory effects of merger notifications, under Competition Law, undertakings must remain as distinct entities until the Board clearance. While there might indeed be a trade-off between stand-still obligations and efficient consummation of mergers, in TCA's experience, as almost all of the applications are decided within less than 30 days, it is not a big concern in practice.

Lastly, gun-jumping is seen as a single procedural infringement under Competition Law. However it may also amount to a substantial infringement where an anti-competitive information exchange/agreement between competitors is in place or when an anti-competitive transaction of concentration is consummated. Even though this has never been an issue in an investigation, it does not mean TCA will not open an investigation to the parties of a merger/acquisition which are suspected to have infringed the Article 4 of the Competition Act.

Ukraine

Ukraine requires market players to refrain from any actions that are aimed at closing the transaction until they have obtained merger clearance (where required) from the antitrust authority. The Ukrainian merger control rules are applicable to any transactions that affect or could affect the economic competition in Ukraine. According to the existing practice and adopted approach, if the parties technically meet the thresholds provided for by the law, then prior approval by the AMCU is required even in cases of a pure foreign-to-foreign transaction that has minimal effect on Ukrainian competition. As a result, the Ukrainian merger control rules often capture transactions with no reasonable likelihood of an anti-competitive effect on Ukrainian markets (e.g. a transaction with relatively small revenue generated in Ukraine). A number of global transactions that require Ukrainian merger clearance raise the issue of global closing before Ukrainian approval, i.e. in order to proceed with the scheduled global closing and avoid contractual sanctions for the delay, the parties consider the possibility of carve-out arrangements regarding Ukraine.

However, the parties are not prevented from asking the AMCU for an earlier clearance. In this case, the parties may apply to the authority with a motion justifying the need for an earlier closing (e.g. the global nature of the transaction, received clearances in other jurisdictions, absence of any competition concern in Ukraine, potential financial losses etc.). Notwithstanding that such option is not a common practice for the authority and there is no officially established procedure for submission and consideration of such kind of parties' requests by the AMCU, a well-grounded justification may still influence the terms of approval. Regarding carve-out arrangements, it is worth noting that, based on applicable rules, no completion of the transaction before the AMC approval is allowed (on either a global or local Ukrainian level). Therefore, formally, no carve-out arrangements are provided for by law. This means that, if the AMCU discovers that a global closing of the transaction requires Ukrainian merger clearance, it is very likely that such closing will be treated by the Ukrainian competition authority as a violation even in case of some sort of contractual guarantee regarding Ukraine.

Based on applicable laws, detection of an economic concentration without prior approval may be caused by:

1. notifications of economic entities, citizens, associations, institutions, organizations to the Committee on the commission of a violation in the form of concentration without permit;
2. submissions of bodies of state power, local government, etc.;
3. own initiative of the Antimonopoly Committee of Ukraine if the Committee detects a violation while considering applications for economic concentration permit submitted by economic entities.

In the practice of the Committee, cases of detection of violations in the form of concentrations without permit are also encountered in which the applicant applies for a concentration permit when the concentration is *de facto* implemented. Company "A" acquired shares of company "B", which owns shares of the plant "C" for the purpose of resale. Company "A" abstains from voting in a higher body or other management bodies of company "B" and factory "C", and also refrain from exercising control over company

“B” and factory “C”. Acquisition of shares of “B” was made for the purpose of further reselling to a Ukrainian financial-industrial group (hereinafter referred to as the FIG).

Concentration does not constitute (and therefore does not require the approval of the bodies of the Committee) the acquisition of shares of a business entity by an entity whose main activity is carrying out financial transactions or transactions with securities, if this acquisition is carried out for the purpose of their subsequent resale, provided that the said entity does not vote in a higher body of the entity. According to the results of the investigation in the case, it was confirmed that after the acquisition of company “A” of shares of the company “B”, representatives of the FIG to the supervisory board of the plant “C” were appointed (and constituted the majority of the board) in order to coordinate economic activities of the plant “C”. Consequently, the companies “A” and “B” in the FIG’s interests directly and indirectly controlled the plant “C” and the management of the plant, before obtaining the prior approval of the Committee.

It was proved that company “A” committed a violation in the form of carrying out a concentration by indirectly gaining control over the plant “C” without obtaining the prior approval of the Committee. For the said violation, the fine can be imposed of up to five percent of the entity’s income from the sale of products (goods, works, services) for the year preceding the year of imposition of a fine on the company “A”.

In addition, according to the results of the consideration of the case the analysis was also conducted of the influence of concentration participants’ actions on the relevant commodity market where the concentration is carried out. As the considered concentration did not lead to monopolization or a significant restriction of competition in the commodity market the Committee approved the transaction.

United Kingdom

The UK merger control regime has been voluntary from its inception. This means merging parties are not under any obligation to notify a transaction to the UK Competition and Markets Authority (CMA). Where a merger is voluntarily notified to the CMA, or the CMA decides to open an investigation on its own initiative, there is no automatic standstill obligation preventing the merging parties from closing or implementing the merger.

When the CMA is investigating a merger, it has the ability to take steps to prevent or unwind pre-emptive action by the merging parties, i.e. action that might prejudice the outcome of the CMA's investigation or impede the taking of any remedial action that might ultimately be appropriate. The CMA has the ability to do this by imposing interim measures on the merging parties. These powers were recently strengthened by the UK Government in 2014.

Interim measures require that the merging parties do not – except with the CMA's express prior consent – carry out further integration beyond that which has already taken place. Broadly speaking, this replicates the standstill obligation typically used in mandatory merger control regimes, with the main difference being that pre-existing integration is not usually covered by an interim measure. While interim measures are almost always imposed by the CMA where a merger has completed, they are used in anticipated mergers only in relatively rare cases, such as where the CMA has concerns about the merging parties taking pre-emptive action that is difficult or costly to reverse prior to completion.

Once an interim measure is in place, broadly the same restrictions apply as in a suspensory regime, including in relation to integration, information exchange and preserving the value of the target business. The CMA assesses any actions taken (or requested) by the merging parties using similar principles to competition authorities that have a standstill obligation (such as the European Union).

The CMA recognises that, in some cases, certain actions falling within the scope of an interim measure may need to take place, for example in order to maintain the viability of the target business. To ensure that an interim measure does not lead to a disproportionate burden, the CMA may (on application by the merging parties) grant a derogation, which provides consent to the merging parties to undertake certain actions that would otherwise be prohibited by the interim measure. Therefore, an important dynamic of the UK merger control regime is that merging parties will engage closely with the regulator, first in relation to the imposition of interim measures and then, subsequently, when seeking any derogations. There is, in practice, often close engagement between the CMA and the merging parties in relation to the conduct of the merging parties prior to completion of a merger investigation.

The CMA considers that it is important to monitor the compliance of interim measures to ensure that they are effectively preventing pre-emptive action and to deter breaches by merging parties. Merging parties are required to provide periodic compliance statements to the CMA. Where considered necessary, the CMA can increase its monitoring by appointing an external monitoring trustee to monitor and report on compliance with the interim measures and/or appointing an internal or external hold separate manager to operate the target business separately from the acquirer. In terms of enforcement, the CMA can impose a fine on a party for failing to comply with an interim measure (and has recently done so for the first time).

*United States**

In the United States, Section 7A of the Clayton Act requires companies to maintain separate operations until the expiration of a waiting period following merger notification. The purpose of the statutory waiting period is to allow time to review proposed mergers before the assets become too difficult to unscramble.

Gun-Jumping also may be illegal under Section 1 of the Sherman Act or Section 5 of the Federal Trade Commission Act, which prohibits agreements between competitors that harm competition. It may include merging firms' jointly setting prices or contract terms, or entering market division or customer allocation agreements and sharing competitively sensitive information.

The agencies may discover evidence of gun-jumping during merger review from the parties or third parties.

Firms in violation of Section 7A are liable for civil penalties. To date, the largest civil penalty obtained by either agency for a violation of Section 7A was \$11,000,000. Firms in violation of Section 1 may be liable for equitable remedies, including disgorgement. Pre-merger conduct in mergers that do not meet the Section 7A thresholds or otherwise are not notifiable cannot technically violate Section 7A. However, parties that are not covered by Section 7A still may be liable for violations of Section 1 during the pre-consummation period of their merger.

Gun-jumping occurs when parties to an acquisition prematurely transfer beneficial ownership prior to the end of the required waiting period. A common way is by allowing the buyer to take operational control over the assets that are the subject of the acquisition in the following way: (i) taking control of physical assets such as a plant, inventory, or machinery; (ii) taking control of management functions; (iii) limitations of day-to-day operations through merger contract provisions; (iv) negotiating contracts or settlements on behalf of the other party; (iiv) exchanges of competitively sensitive information.

Exchanges of competitively sensitive information between competitors could lead to violations of Section 1 of the Sherman Act or violations of Section 7A.

Although merging firms need some information during the due diligence and pre-consummation planning periods, they need to be careful about what and to whom they transmit this information. A key question to ask is, if the merger does not go through, would the exchange of information between competitors facilitate collusion or harm competition in another way. If so, the parties should not freely exchange the information. If the information is necessary to the merger process, the merging parties should take care to employ a "clean team" or use other protections to prevent the information from reaching people responsible for the normal operation of the businesses during the waiting period.