

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Suspensory Effects of Merger Notifications and Gun Jumping - Note by the
European Union****27 November 2018**

This document reproduces a written contribution from the European Union submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

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JT03439999

European Union

1. The legal framework: the duty to notify and the standstill obligation

1. The EU Merger Regulation, enacted in 1989 and recast in 2004, put in place a system of *ex ante* control of mergers at the EU level. *Ex ante* means mergers must first be notified to the Commission and approved, before they can be implemented.

2. The **duty to notify** is laid down in Article 4(1) of the EU Merger Regulation. It provides that “concentrations with a Union dimension defined in this Regulation shall be notified to the Commission prior to their implementation (...)”. This duty applies to all concentrations with a Union dimension. A concentration is defined by the Merger Regulation as a change of control on a lasting basis.¹ In turn, control is defined as the possibility of exercising decisive influence on an undertaking.²

3. Concentrations have a Union dimension when they meet the turnover-based thresholds set by the Merger Regulation.³ Concentrations that fall below the thresholds are not subject to the EU Merger Regulation's duty to notify. They may, however, need to be notified to the national competition authorities of the EU's Member States, pursuant to national competition law.

4. The duty to notify is complemented by the so-called **standstill obligation**. This obligation entails that parties may not implement a concentration before the Commission has declared the concentration compatible with the common market, i.e. approved it.

5. The standstill obligation is enshrined in Article 7(1) of the EU Merger Regulation. It provides that concentrations with an EU dimension⁴ “shall not be implemented either before its notification or until it has been declared compatible with the common market (...)”.⁵ The Court of Justice, the EU's highest court, has recently clarified that this Article 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

¹ EU Merger Regulation, Art. 3(1).

² EU Merger Regulation, Art. 3(2).

³ EU Merger Regulation, Art. 1(2)-(3).

⁴ In addition, the standstill obligation laid down in Article 7(1) also applies to concentrations that do not have an EU dimension but are examined by the Commission pursuant to Article 4(5) of the EU Merger Regulation, i.e. are referred to the European Commission before being notified to the relevant national authorities in the Member States. Parties can request a referral of a concentration to the Commission pursuant to Article 4(5) when the concentration would otherwise be reviewed in three or more Member States. If one or more of the competent Member States object to the referral, the concentration will not be referred.

⁵ If the Commission does not issue a decision and the deadline expires, the concentration shall be deemed to have been approved, pursuant to Article 10(6). In that case, the parties could also implement the concentration. In practice, however, the Commission always adopts decisions in its merger investigations.

undertaking.⁶ In doing so, the Court confirmed that both full implementation and partial implementation of a concentration is caught by the standstill obligation.⁷

6. Together, the duty to notify and the standstill obligation ensure that the Commission's control of mergers effectively occurs *ex ante*, i.e. before the merger is implemented. The importance of these twin obligations is reflected by the fact that the EU Merger Regulation provides for significant penalties – up to 10% of the turnover of the undertakings concerned – for negligent or intentional infringements of these obligations.⁸ The EU courts have also acknowledged the importance of these obligations.⁹

7. The duty to notify concentrations before implementing them is important for the EU's system of *ex ante* control because it ensures that concentrations are brought to the Commission's attention. It therefore safeguards the Commission's ability to detect and investigate concentrations. The aim of the standstill obligation is different. It prevents harm to competition from occurring before the Commission has examined the concentration and reached a decision. If undertakings were allowed to implement a concentration before the Commission has reviewed it, the concentration's anticompetitive effects could already materialize before the Commission had a chance to prohibit the concentration or clear it with remedies.

8. In addition, the standstill obligation avoids situations where the Commission would have to separate assets that have already been combined. Such separation measures, sometimes referred to as "unscrambling the eggs", are often very difficult or impossible to implement. Likewise, violations of the standstill obligation make it more difficult for effective remedies to be put in place. For instance, by implementing the concentration before clearance, the acquirer can obtain business secrets, strategic information, personnel, assets or customers from the target's businesses. If that business subsequently needs to be divested as a remedy, its competitive potential may be blunted.

9. A breach of the duty to notify or the standstill obligation is often referred to as "gun-jumping" or "early implementation". However, those terms are not used in the EU Merger Regulation itself.

⁶ Judgment of 31 May 2018, *Ernst & Young P/S v Konkurrencerådet* (C-633/16), EU:C:2018:371, final paragraph.

⁷ Judgment of 31 May 2018, *Ernst & Young P/S v Konkurrencerådet* (C-633/16), EU:C:2018:371, para. 47.

⁸ EU Merger Regulation, Art. 14(2)(a)-(b). See also EU Merger Regulation, recital 34 (mentioning the need for concentrations to be suspended until a final decision of the Commission has been taken), Art. 8(3) (allowing the Commission to take interim measures in case of violations of Article 7) and Art. 8(4) (allowing the Commission to require the parties to dissolve the concentration and take any other appropriate measures if a concentration has already been implemented and it has been prohibited).

⁹ Judgment of 12 December 2012, *Electrabel v Commission* (T-332/09) ECLI:EU:T:2012:672, paras 234-235 and para. 246. Judgment of 26 October 2017, *Marine Harvest ASA v Commission* (T-704/14), EU:T:2017:753, para. 480.

2. Decisions and cases

10. The duty to notify and the standstill obligation were part of EU merger control from its very beginning, when the original Merger Regulation, Regulation 4064/89, was enacted. Under that Regulation, the Commission found violations and imposed fines in two cases: Samsung/AST¹⁰ and A.P. Møller.¹¹

11. Under the current EU Merger Regulation, enacted in 2004, the first decision sanctioning a breach of the standstill obligation was **Electrabel / Compagnie Nationale du Rhône**.¹² Electrabel had notified its acquisition of *de facto* control over Compagnie Nationale du Rhône in 2008.¹³ The acquisition itself did not raise competition concerns and was therefore cleared unconditionally by the Commission that same year. However, in a separate decision issued a year later, the Commission found that Electrabel had already acquired *de facto* control over Compagnie Nationale du Rhône in 2003, prior to the Commission's clearance. It imposed a fine of EUR 20 million. The Commission's decision was upheld on appeal by the General Court¹⁴, which is the EU's court of first instance, and, after a further appeal, by the Court of Justice.¹⁵

12. **Marine Harvest / Morpol**¹⁶ also involved an acquisition of *de facto* control which had not been notified. At the end of 2012, Marine Harvest acquired 48.5% of Morpol's shares. This stake was sufficient to give Marine Harvest a clear majority at shareholders meetings, given attendance rates at past shareholders meetings and the wide dispersion of the remaining shares. Hence, Marine Harvest had acquired *de facto* control. Marine Harvest then made a public offer for the remaining shares, and notified that acquisition to the Commission in August 2013. This acquisition was cleared with remedies. In a separate decision, the Commission imposed a fine of EUR 20 million on Marine Harvest because it had already acquired control when it acquired the 48.5% stake, before the deal had been notified to and approved by the Commission. The Commission's decision was upheld on appeal by the General Court. Marine Harvest brought a further appeal, which was pending before the EU's Court of Justice at the time this contribution was written.

13. In **Altice / PT Portugal**,¹⁷ the Commission fined Altice for breaching the duty to notify and the standstill obligation when it acquired its competitor, the Portuguese telecom operator PT Portugal. The acquisition itself was cleared with remedies.

¹⁰ Commission decision of 18 February 1998 in case M.920, *Samsung / AST*.

¹¹ Commission decision of 10 February 1999 in case M.969, *A.P. Møller*.

¹² Commission decision of 10 June 2009 in case M.4994, *Electrabel / Compagnie Nationale du Rhône*.

¹³ Control can be acquired on a *de jure* basis, for instance when a company acquires the majority of voting rights in a company, but also on a *de facto* basis. An acquisition of *de facto* control occurs for example when a company acquires a minority stake in a company which is highly likely to give the company a majority at the shareholders' meetings. See Commission Consolidated Jurisdictional Notice, para. 59.

¹⁴ Judgment of 12 December 2012, *Electrabel v Commission* (T-332/09), EU:T:2012:672.

¹⁵ Judgment of 3 July 2014, *Electrabel v Commission* (C-84/13 P), EU:C:2014:2040.

¹⁶ Commission decision of 23 July 2014 in case M.7184, *Marine Harvest / Morpol*.

¹⁷ Commission decision of 24 April 2018 in case M.7993, *Altice / PT Portugal*.

14. The Commission found that the share purchase agreement between the acquirer (Altice) and the seller had given Altice far-reaching veto rights, which had given Altice the possibility to exercise decisive influence over some aspects of PT Portugal's business before notification and clearance. These veto rights went beyond what was necessary to preserve the value of PT Portugal and could therefore not be justified on this basis.

15. In addition, the decision found that Altice not only had the possibility of exercising but also actually exercised decisive influence over parts of PT Portugal's business. Altice did so by giving instructions to PT Portugal, for instance regarding the conclusion or renewal of various contracts and one of PT Portugal's promotional campaigns. The Commission also found that Altice and PT Portugal had exchanged commercially sensitive information without any appropriate safeguards. This exchange of information had facilitated Altice's ability to make decisions regarding PT Portugal's activities and contributed to the Commission's finding that Altice exercised decisive influence over aspects of PT Portugal's business.

16. The Commission fined Altice for violating both the duty to notify and the standstill obligation and imposed a fine of EUR 124.5 million. Altice has appealed the decision and, at the time of writing this contribution, this appeal was pending before the EU's General Court.

3. Investigating gun-jumping cases

17. The Commission is vigilant about possible violations, investigates potential infringement cases and strives at deterring violations. Information about violations can come from various sources. Market players, for instance competitors or customers, may inform the Commission of suspected violations. Frequently, violations come to light during the merger review process. In *Altice / PT Portugal*, reports in the Portuguese press about meetings between the executives of the acquirer and the target prompted the Commission to request further information. These then led the Commission to open an investigation, which finally led to a decision finding a violation.

18. The Commission has various tools to investigate cases of gun-jumping. It can issue requests for information¹⁸ which, if necessary, can be accompanied by periodic penalties, i.e. penalties which will accrue for each day of delay in responding.¹⁹ The Commission may also conduct inspections at the premises of the merging parties to determine whether gun-jumping has taken place.²⁰ In 2007, the Commission used these powers to investigate possible gun-jumping during the merger review of INEOS's acquisition of Kerling.²¹ The Commission had obtained information suggesting that the acquiring party had intervened in the management of the target by appointing individuals and giving instructions, and by sharing sensitive commercial information, prior to the Commission's decision. However,

¹⁸ EU Merger Regulation, Article 11(1)-(3).

¹⁹ EU Merger Regulation, Art. 15.

²⁰ EU Merger Regulation, Art. 13.

²¹ European Commission, Press release of 13 December 2017: "Mergers: Commission has carried out inspections in the S PVC sector". The concentration itself was cleared unconditionally (Commission decision of 30 January 2008 in case M.4734, *Ineos / Kerling*).

during the inspections, the Commission did not discover any evidence of the alleged violations. On the contrary, most of the documents uncovered were exculpatory. The Commission therefore concluded that the parties had complied with the standstill obligation and terminated the investigation. Likewise, in 2011, the Commission conducted inspections at Caterpillar and MWM, in order to investigate a possible breach of the standstill obligation in relation to Caterpillar's acquisition of MWM.²² Ultimately, the Commission did not find any violation.

19. When exercising its investigative powers, the Commission must respect the rights of defence. During the investigation, the undertakings concerned have the right to be heard, both in writing and orally, and they invariably make use of this right during gun-jumping investigations. An important juncture in the investigation is the issuance of the so-called statement of objections, by which the Commission informs the undertakings of its preliminary findings. At that time, the undertakings also obtain access to the Commission's file, which contains the evidence that the Commission has collected during the investigation. The undertakings then have the opportunity to respond both in writing and at an oral hearing to the allegations set out in the statement of objections.

20. If the Commission ultimately finds that there is a violation and imposes fines, the addressees of the decision can appeal it and have it reviewed by the EU courts.

4. Legal consequences and fines for gun jumping

21. Violations of the duty to notify and the standstill obligation are subject to **fines**. The sanction for violations of the duty to notify is laid down in Article 14(2)(a), which provides that when undertakings, either intentionally or negligently, fail to notify a concentration prior to its implementation, the Commission may impose fines of up to 10% of the aggregate turnover of the undertakings concerned. The equivalent provision for violations of the standstill obligation is Article 14(2)(b), which likewise allows the Commission to impose fines of up to 10% of the aggregate turnover of the undertakings concerned.

22. In fixing the amount of the fine, the Commission must have regard to the nature, gravity and duration of the infringement.²³ Infringements of the duty to notify and the standstill obligation are, by nature, serious infringements²⁴ but their gravity may differ based on the specific facts of the case. An infringement that was committed intentionally has a greater degree of gravity than one that was committed negligently. Likewise, infringements in relation to concentrations that raise competition problems carry a higher degree of gravity than infringements in the context of unproblematic concentrations.²⁵ In the *Marine Harvest / Morpol* and *Altice / PT Portugal* decisions, for instance, the fact that

²² Commission decision of 19 October 2011 in case M.6106, *Caterpillar / MWM*, para. 14.

²³ EU Merger Regulation, Art. 14(3).

²⁴ Judgment of 12 December 2012, *Electrabel v Commission* (T-332/09), EU:T:2012:672, para 235; Judgment of 26 October 2017, *Marine Harvest ASA v Commission* (T-704/14), EU:T:2017:753, para. 480.

²⁵ Judgment of 26 October 2017, *Marine Harvest ASA v Commission* (T-704/14), EU:T:2017:753, para. 500-501.

the concentration was problematic and required remedies, was taken into account as factor contributing to the gravity of the infringement.²⁶

23. The EU's General Court has noted that a violation of the duty to notify before implementation, laid down in Article 4(1), will automatically entail a breach of the obligation not to implement the concentration before notification and authorization, laid down in Article 7(1).²⁷ This means that early implementation of a concentration may simultaneously attract fines under two provisions: the provision sanctioning violations of the duty to notify and the provision sanctioning violations of the standstill obligation.²⁸ In *Marine Harvest/Morpol* and *Altice/PT Portugal*, the Commission accordingly imposed fines for violations of both the duty to notify and the standstill obligation. By contrast, in the *Electrabel* case, the Commission only imposed fines for the breach of the standstill obligation, as the breach of the duty to notify was time-barred.²⁹

24. Decisions finding a violation and imposing fines are subject to judicial review. Undertakings can appeal both the factual and legal grounds of the decision to the General Court. The General Court also has full jurisdiction to review the amount of the fine, meaning it can cancel, reduce or increase the fine. A further appeal, on points of law only, can be brought before the Court of Justice.

25. Apart from fines, the EU Merger Regulation also empowers the Commission to take interim measures in relation to a breach of the standstill obligation. More specifically, the Commission can take measures to restore or maintain conditions of effective competition when a concentration has already been implemented but not yet approved by the Commission.³⁰ Finally, when a concentration has been implemented before the Commission has approved it and the Commission subsequently prohibits the concentration, it can order the dissolution of the concentration.³¹

²⁶ Commission decision of 23 July 2014 in case M.7184, *Marine Harvest / Morpol*, paras. 150-158; Commission decision of 24 April 2018 in case M.7993, *Altice / PT Portugal*, paras. 587-594.

²⁷ Judgment of 26 October 2017, *Marine Harvest ASA v Commission* (T-704/14), EU:T:2017:753, paras 294 and 303.

²⁸ In its judgment in the *Marine Harvest / Morpol* case, the General Court found that the possibility of two sanctions being imposed for the same conduct in a single decision violates neither the principle of *ne bis in idem*, nor the principle of "apparent" or "false concurrence". Judgment of 26 October 2017, *Marine Harvest ASA v Commission* (T-704/14), EU:T:2017:753, paras. 292-374.

²⁹ The duty to notify is an instantaneous infringement which is committed by failing to notify a concentration before notification. It is subject to a limitation period of three years. By contrast, the standstill obligation is a continuous infringement, which remains on-going for as long as the transaction is not approved in accordance with the Merger Regulation. It is subject to a five year limitation period. The limitation periods are set in Council Regulation No 2988/74 of 26 November 1974 concerning limitation period in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition.

³⁰ EU Merger Regulation, Art. 8(5).

³¹ EU Merger Regulation, Art. 8(4).

5. Exceptions and derogations

26. The Merger Regulation contains some limited exceptions to the standstill obligation. Article 7(2) of the EU Merger Regulation provides that the standstill obligation does not prevent two types of transactions: (1) a public bid, and (2) a "series of transactions in securities, including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control is acquired from various sellers." However, these exceptions are subject to two conditions. First, the concentration must be notified to the Commission without delay. Second, the acquirer may not exercise the voting rights attached to the securities in question or may only do so to maintain the full value of its investments based on a derogation granted by the Commission.

27. Furthermore, Article 7(3) allows undertakings to request a derogation from the standstill obligation. In considering whether to grant such a request, the Commission must take into account, *inter alia*, the effects of the suspension on the undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration.

28. A review of past derogation decisions shows that the Commission has granted derogations only in exceptional circumstances, such as when the target is in financial distress and early implementation is necessary to preserve its financial or competitive viability.

29. The requirement to take into account the threat to competition posed by the concentration implies that the Commission must make a preliminary assessment of the concentration's likely competitive impact. In principle, if the concentration is likely to raise competition concerns, a derogation will not be granted. The Commission may also make a derogation subject to conditions and obligations, for instance to ensure that the measures taken under the derogation decision do not go beyond what is necessary to avoid the financial deterioration of the target.

6. Guidance

30. The Commission has not issued formal guidance on gun-jumping. However, the decisions mentioned in section 3 provide undertakings with specific examples of conduct which the Commission considers to constitute infringements of the duty to notify and the standstill obligation. Those decisions also contain guidance on what is permissible and what not.

31. *Electrabel / Compagnie Nationale du Rhône* and *Marine Harvest / Morpol* provide guidance on when an acquisition of *de facto* control occurs and on the fact that it triggers the duty to notify and the standstill obligation. Further guidance on what constitutes an acquisition of *de facto* control is contained in Commission decisions and in the Commission's Consolidated Jurisdictional Notice.

32. *Altice / PT Portugal* provides guidance on several types of conduct that can take place between signing and closing of a transaction. For instance, the decision acknowledges that clauses in M&A agreements determining the conduct of a target between signing and closing in order to preserve the target's value are both common and appropriate.³² At the

³² Commission decision of 24 April 2018 in case M.7993, *Altice / PT Portugal*, para. 50.

same time, the decision makes clear that the M&A agreement should not give the acquirer the possibility to exercise decisive influence over the target. Provisions requiring the acquirer's agreement on, for example, the conclusion of certain contracts or the appointment of senior management, can only be justified to the extent they are necessary to preserve the value of the target.³³ Likewise, matters falling within a target's ordinary course of business are unlikely to be relevant to preserving the value of the target's business.³⁴

33. The *Altice / PT Portugal* decision also addresses the circumstances in which business-related information can be exchanged between parties to a concentration. For instance, it makes clear that the exchange of business-related information between a potential acquirer and a vendor is legitimate if properly conducted (e.g. using a clean team) and if the nature and purpose of such exchanges are directly related to the potential acquirer's need to assess the value of the business.³⁵

³³ Commission decision of 24 April 2018 in case M.7993, *Altice / PT Portugal*, paras. 50, 70-71, 75-76.

³⁴ Commission decision of 24 April 2018 in case M.7993, *Altice / PT Portugal*, para. 89.

³⁵ Commission decision of 24 April 2018 in case M.7993, *Altice / PT Portugal*, para. 437.