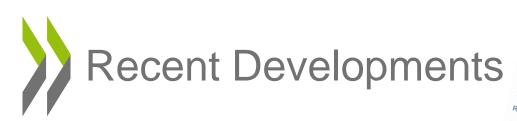


# GUN JUMPING IN MERGER CONTROL – THE OECD DISCUSSIONS

Ruben Maximiano Senior Competition Expert OECD







## Cisco and Technicolor receive record fine for "gun jumping" in Brazil

Mark Briggs 21 January 2016





#### Gazprom and Shell face "unprecedented" gun-jumping proceedings

Tom Madge-Wyld 09 May 2018







Arne Grimme + Folgen



### Critical Stages in the Merger Process

#### Pre-Merger

- Due diligence process
  - Competitively sensitive information

## Standstill period

- Asset value preservation competitively sensitive information, exercise of influence
- Post-merger implementation planning competitively sensitive information, premature acts of integration

#### Preclosure

• Implementation - Joint activities, integration and information exchange



## Types of Violations

- Failure to notify a merger
  - where pre-notification is mandatory
- Violation of standstill obligations
  - mandatory pre-notification regimes <u>and</u>
     voluntary regimes
- Anti-competitive agreements/information exchange before closing
  - all jurisdictions



# Statutory Provisions and Fines Imposed in Practice

- On fines, there is no consistent approach at international level:
  - US: Period penalty of up to USD 41,484 for each day the violation
  - <u>EU</u>: Fines of up to 10% of the aggregate turnover of the undertakings concerned
  - Vietnam: fines of up to 5% of the revenues of the entities (new Act)
  - Mexico: fines of up to 5% of the revenues of the firm
- In practice, fines imposed vary widely and, in some cases, no fine will be imposed at all
  - For violations of the obligation to notify, OECD found fines range between EUR 5,000 and EUR 20 million.
  - For violations of the standstill obligation, OECD found fines range between EUR 3,200 and EUR 124.5 million.



# Relevant Factors for Setting a Fine



- Duration of the infringement
- Presence of actual competition concerns
- Co-operation of the merging parties in the investigation
- Voluntary reporting of the violation
- Infringement could have been avoided:
  - legal situations was entirely clear;
  - sufficient legal precedent existed; or
  - the merging parties could be expected to conduct a proper analysis of the competition law implications.



#### Guidance?

- Mostly cases/some jurisprudence
  - > Case specific
- > Very little general agency guidance available
  - ➤ Brazil, Czech Republic, (US FTC)

#### But:

➤ 25 Member and 6 Participant contributions that outline the approach and case practice of these jurisdictions = unprecedented up to date compilation on <a href="http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm">http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm</a>



- ➤ Parallel/alternative application of Art. 101 or national equivalents to information exchanges/restrictive agreements in the framework of a merger process consequences of the ECJ's prelim. ruling in Ernst & Young?
- ➤ Relevance of Ernst & Young ruling for NCAs?
- > When is a unilateral act a gun jumping offence?
- ➤ What is an adequate level of fine and do higher fines necessitate more/better guidance by competition agencies?