



# **GUN JUMPING IN MERGER CONTROL – THE OECD DISCUSSIONS**

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Posté le 08-11-2016



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Veröffentlicht am 8. Mai 2018



Arne Grimme

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# 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

Pre-  
closure

- **Implementation** - Joint activities, integration and information exchange



# Types of Violations

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



# Statutory Provisions and Fines Imposed in Practice

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- **On fines**, there is **no consistent approach** at international level:
  - US: Period penalty of up to USD 41,484 for each day the violation
  - EU: 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

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- **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?

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- 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 <http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm>



## Future Topics

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- 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?