



Discussion Points

**Presented by the Business at OECD Competition Committee to the
OECD Competition Committee**

Suspensory Effects of Merger Notifications and Gun Jumping

November 27, 2018

Business at OECD appreciates the opportunity to contribute to the timely debate and submit these comments to the OECD Competition Committee for its session on suspensory effects of merger notifications and gun jumping.

I. Introduction

1. Conduct by merging parties between signing a deal and closing—following clearance by a competition authority—has recently been subject to increased enforcement activity. Competition authorities have a valid concern about possible gun jumping issues from an enforcement perspective. They wish the contacts between and planning activities of merging parties to be limited to what is necessary and proportionate to avoid anticompetitive information sharing in case a transaction is not consummated.
2. On the other hand, the main rationale behind mergers is increasing efficiencies that enhance welfare for society.¹ The implementation process and therewith the efficiency benefits from a merger may be delayed and jeopardized if firms are too much restricted in effecting preparatory activities during the standstill period.²
3. In this respect, it is important to note that a balance needs to be struck between the prohibition on gun jumping by unlawful acquisition of control during a standstill period on

¹ OECD, *Suspensory Effects of Merger Notifications and Gun Jumping—Background Note by the Secretariat* 9 (Oct. 4, 2018), available at [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2018\)11&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2018)11&docLanguage=En).

² William Blumenthal, *The Rhetoric of Gun-Jumping*, Address Before the Association of Corporate Counsel 5 (Nov. 10, 2005), available at www.ftc.gov/sites/default/files/documents/public_statements/rhetoric-gun-jumping/20051110gunjumping.pdf (“The consulting literature stresses several factors that are thought to improve the chances that the deal implementation will prove effective. These factors include: early planning for the integration process, setting and communicating clear goals, identifying the responsible managers and providing them with appropriate incentives, moving quickly to define those areas where gains can be achieved, keeping everyone informed with tailored messages including employees and customers, integrating systems quickly, being sensitive to cultural issues, retaining key employees, and retaining sales force activism to avoid the loss of customers to rivals. The importance of these factors may vary from deal to deal as characteristics of the deals change, but the one over-riding factor is the need to plan early for the integration of the new assets. This early planning is intended to allow the combined firms to obtain the merger-related gains quickly and to build an early period of enthusiasm surrounding the transaction.”).

the one hand and, on the other hand, legitimate reasons for the exchange of confidential information (e.g. during due diligence and transition planning), provided of course that due care is taken to avoid coordination of (current) market behaviour of the merging parties.³

4. On the latter point, it is apparent that the preservation of the value of a target business is an essential element in the context of mergers. This is even more important for complex, mergers which are investigated over a lengthy period of time sometimes extending to more than one year. In these cases, a long period of time inevitably lies between the signing of the transaction and the closing, during which period the parties must risk dilution of the value of the transaction due to changes in the market. Also, the parties risk losing the benefit of the efficiencies that increasingly play a role in justifying the merger. Paradoxically, the identification and substantiation of such efficiencies by the merging parties with a view to the strict standard of proof often requires that the parties to the transaction exchange certain information in order to demonstrate that claimed efficiencies are i) merger specific; ii) verifiable; and, most notably, iii) beneficial for consumers.⁴
5. Academics, enforcement authorities, lawyers and corporations try to uncover the right approach for addressing possible unlawful conduct during standstill periods while advancing efficiency claims and preparing for post-merger integration (PMI). With a view to the few mergers which are ultimately blocked, concrete guidance can be helpful to avoid legal uncertainty, which can jeopardize not only the adequate substantiation of efficiencies but also a successful implementation of a merger which sometimes includes achieving available efficiencies as quick as possible.
6. In the past, the European Commission for example investigated possible gun jumping in the context of the *Bertelsmann/Kirch/Premiere* merger in 1997, in which it raised concerns about one party marketing the other party's products prior to approval.⁵ In the *Ineos/Kerling* merger in 2007,⁶ the Commission conducted dawn raids to investigate suspicions that the parties had exchanged competitively sensitive information. However, neither of these cases gave rise to a finding of infringement or fines. The Commission's attention to gun jumping in the past has been more incidental and often focussed on the failure to notify than on the exercise of control or exchange of competitively sensitive information prior to merger approval. This is in contrast to the situation in certain other jurisdictions across the globe,

³ As prohibited under Treaty on the Functioning of the European Union TFEU, 2012 O.J. (C 326) 47, art. 101.

⁴ As is required on the basis of the Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. (C 31) 3 [hereinafter EC Horizontal Merger Guidelines].

⁵ Case No IV.M.993—Bertelsmann/Kirch/Premiere, Comm'n Decision (May 27, 1998), available at http://ec.europa.eu/competition/mergers/cases/decisions/m993_19980527_610_en.pdf.

⁶ Case No COMP/M.4734—Ineos/Kerling, Comm'n Decision (Jan. 31, 2008), available at http://ec.europa.eu/competition/mergers/cases/decisions/m4734_20080130_20682_de.pdf.

where there has been a lot of attention to this topic⁷ and even specific guidance from competition authorities.⁸

7. However, recent matters in the EU may have shed new light on some of the uncertainties surrounding gun jumping risks and have also made clear that significant fines can and will be imposed if the standstill obligation is breached during a merger process. In particular, the preliminary ruling of the Court of Justice in *Ernst & Young/KPMG Denmark*,⁹ the Commission's *Altice/PT Portugal*¹⁰ decision and the French Autorité de la Concurrence's *Altice/SFR & OTL* decision are important developments.¹¹
8. As the *Ernst & Young* ruling makes clear, "gun jumping" issues under EU merger control rules may essentially manifest itself in two ways:
 - Under the EU Merger Regulation (EUMR),¹² by acting either in violation of Article 4(1) by failure to notify a concentration that falls within the scope of Article 1 EUMR or in violation of Article 7(1) EUMR by premature exercise of control over the target company (or part thereof) before merger clearance is obtained; or
 - Under Article 101 TFEU in the context of a merger process by exchanging competitively sensitive information which, particularly in the event of horizontal mergers, may lead to coordination between the buyer and the target company prior to closing and reduce competition between them.¹³ The question how Article 101 TFEU should be applied also manifests itself in the interim period between merger clearance and actual closing when post-merger integration preparation may be particularly pressing (to achieve the synergies which have often been claimed in the merger notification process). While the exchange of competitively sensitive information in such a period legally is not "gun jumping," Article 101 TFEU arguably still applies, and parties must remain careful also in

⁷ Blumenthal, *supra* note 2. See also Holly Vedova, Keitha Clopper & Clarke Edwards, *Avoiding Antitrust pitfalls during pre-merger negotiations and due diligence*, FED. TRADE COMM'N (Mar. 20, 2018), available at www.ftc.gov/news-events/blogs/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger

⁸ ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE), GUIDELINES FOR THE ANALYSIS OF PREVIOUS CONSUMMATION OF MERGER TRANSACTIONS (Sept. 26, 2016), [hereinafter CADE GUN JUMPING GUIDELINES] available at <http://en.cade.gov.br/topics/publications/guidelines/guideline-gun-jumping.pdf>.

⁹ Case C-633/16, *Ernst & Young P/S v. Konkurrenserådet*, May 31, 2018, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=202404&pageIndex=0&doclang=EN&mode=lst&dir=&cc=first&part=1&cid=559546> (Eur. Ct. of Justice).

¹⁰ Case M.7993—*Altice/PT Portugal*, Comm'n Decision (Apr. 24, 2018), [hereinafter EC *Altice* Decision] available at http://ec.europa.eu/competition/mergers/cases/decisions/m7993_849_3.pdf.

¹¹ Decision by the Autorité de la Concurrence relative à la situation du groupe Altice au regard du II de l'article L. 430-8 du code de commerce (Nov. 8, 2016), [hereinafter French *Altice* Decision] available in French at www.autoritedelaconcurrence.fr/pdf/avis/16d24.pdf. See also Press Release, Autorité de la Concurrence, The Autorité de la concurrence fines the Altice group 80 million euros for the premature completion of two mergers notified in 2014 (Nov. 8, 2016), available at www.autoritedelaconcurrence.fr/user/standard.php?lang=en&id_rub=630&id_article=2900.

¹² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004 O.J. (L 24) 1.

¹³ Such exchange of competitively sensitive information may occur in different stages of a merger process, for example, during the due diligence phase, the calculation or assessment of post-merger efficiencies or the preparation of post-merger implementation.

that period. Thus, in practice the application of Article 101 TFEU in the context of mergers is a critical topic during that interim period.

9. In absence of specific guidance, these recent precedents are useful and create more clarity on various issues relating to (the wider notion of) gun jumping and exchange of competitively sensitive information. At the same time, they still leave open several outstanding uncertainties and risks in a “grey” area of antitrust law. A discussion on these topics may prove helpful to provide the business community with more clarity and to unify differing opinions in various jurisdictions.

II. KEY CHALLENGES

CHALLENGE 1: Clarifying the Balance Between Legitimate Business Interests and Merger Regulation Enforcement

10. From a business perspective, it is extremely important, in the context of mergers, to be able to accurately value a target (during the due diligence phase or later, e.g. in relation to a purchase price adjustment, funding or accounting decisions etc.); to preserve the target value during the merger notification procedure; to identify and calculate efficiencies; and finally to be able to adequately plan for the post-merger integration of two separate undertakings (especially in complex transactions). It appears from the recent cases that have been discussed that these interests are recognized (in varying degrees) by the Court of Justice and the Commission, and by foreign antitrust authorities like the U.S. Federal Trade Commission (FTC) and Brazil’s CADE. This is not surprising since it is widely recognised, for example, that early integration planning is a very important factor determining the success of a merger.¹⁴
11. Unclear notions, vague rules, grey areas, and unbalanced enforcement have contributed to legal uncertainty, which raises lot of costs and concerns for parties. Involving external consulting agencies (which are often less able than the business to determine the right scope of possible efficiencies and synergies) and counsel is time-consuming and involves very significant costs.
12. Given the significance of clarity about the boundaries of the standstill obligation and the possibilities to prepare for post-merger integration before approval is obtained, guidance from competition authorities would be very welcome on what is and what is not allowed for the merging parties once they have submitted a notification of their merger in different jurisdictions.
13. There are several points that would benefit from further clarification and/or practical guidance. First, it is unclear to what extent information can be exchanged relating to post-merger integration, i.e. about the future activities of the merged entity and synergies to be realised. In *Altice*, the Commission specifically mentions that the valuation of a business could be a legitimate reason. However, in view of the Commission’s interest in efficiencies in horizontal mergers, it is not surprising that the merging parties will also want to determine the efficiency benefits of the merged entity. Competition authorities should clarify that such

¹⁴ Blumenthal, *supra* note 2.

exchanges are permissible when appropriate safeguards are taken and define such safeguards.

14. Second, it should be further clarified what types of provisions in sale and purchase agreements are permissible to protect the asset value of the target, particularly if a lengthy notification procedure cannot be ruled out. As follows from the *Ernst & Young* and *Altice* cases, various legal practitioners—such as legal counsel and competition authorities, and ultimately the Court of Justice—had diverging views with regard to what types of provisions (or termination agreements) constituted a change of control within the meaning of the EUMR.
15. Third, the extent to which the merging parties can plan reorganisation activities calls for concrete guidance. An explanation of the dividing line between merely preparatory measures (with ancillary information exchange) and implementation of a concentration is necessary in the light of legal certainty.
16. Fourth, it might need further clarification as to what extent it is possible to plan a joint marketing campaign for the launch of new products and services by the merged entity (previous guidance from the FTC and a case from the Commission suggest that joint marketing of new products of the merged entity is permissible, whilst joint marketing of competing products is not).¹⁵ If companies could only start developing new products after clearance, this might delay the merged entity in actually bringing about the efficiency benefits of the merger in a timely manner. It would therefore be helpful, especially in the context of being able to realise merger efficiencies as soon as possible, if the competition authorities provided further guidance on this topic.
17. Finally, it would be helpful to gain further clarification on what is allowed in the period between merger approval and closing. Although the purchaser may legitimately control the target company, it seems that horizontal restrictions under Section 1 of the Sherman Act, Article 101 TFEU or similar statutes may still apply as long as the transaction has not been closed (until which moment buyer and target remain two separate companies). In other words, the buyer may take decisions over the target but cannot receive the information necessary to do so in an informed manner.

CHALLENGE 2: Guidance on Precautionary Compliance Measures to Avoid Gun Jumping Between Notification and Clearance

18. In addition to clarification of the relevant legal notions, it would be helpful to have further guidance on what is expected from merging parties and what (minimum level of) precautionary measures should be taken in terms of compliance measures and clean team arrangements if the exchange of competitively sensitive information is necessary to achieve legitimate goals of post-merger planning and integration for realising efficiencies as soon as possible after clearance of the transaction.

¹⁵ See Blumenthal, *supra* note 2.

19. Whilst competition authorities recognize that certain competitively sensitive information can be exchanged—provided that appropriate safeguards (such as clean teams and confidentiality agreements) are in place—for certain purposes in the context of a merger (for example in the due diligence phase), there is little explicit guidance on the issue of gun jumping from authorities. This is problematic because competition authorities appear to have different views with regard to what constitutes a “clean team.” While the French Autorité de la Concurrence seems to argue that a clean team of in-house lawyers could not qualify as a proper clean team,¹⁶ the Commission in *Altice* describes clean teams as “a restricted group of individuals from the business that are not involved in the day-to-day commercial operation of the business who receive confidential information from the counter party to the transaction and are bound by strict confidentiality protocols with regard to that information.”¹⁷ From the definition used by the Commission, it appears that, for instance, a group of in-house lawyers subject to a strict protocol should be able to be part of a clean team.¹⁸ Such diverging views result in uncertainty, and consequently misguided behaviour.
20. Companies face difficult questions in various stages of a merger (due diligence, synergy assessment, asset preservation from signing until closing, and post-merger implementation and transition planning), which can be especially problematic for horizontal mergers that are subject to Phase II proceedings. As indicated above, it should be noted that clearance of horizontal mergers that enter Phase II proceedings is often dependant on substantiation of efficiency claims. .¹⁹ Such efficiencies may need to be determined and calculated on the basis of competitively sensitive information from the parties in the deal negotiation period.
21. Guidance from competition authorities would therefore be extremely helpful for companies in determining the appropriate lines and acceptable safeguards with respect to pre-closing information exchanges.²⁰ The Commission’s guidance would especially be important in this regard, as that would serve as an example/guidance for other competition authorities within the European Union.

CHALLENGE 3: *Clarifying the Application of Article 101 TFEU in Addition or in Parallel to the Standstill Obligation of Article 7 EUMR*

22. As appears from the *Ernst & Young* and *Altice* cases, exchanges of competitively sensitive information or agreements on future (post-merger) market conduct could either lead to a violation of the standstill obligation or a violation of the ban on anti-competitive horizontal agreements (Article 101 TFEU). It can be inferred from these cases that single instances where commercially sensitive information is exchanged within the context of a merger (and without appropriate safeguards such as clean teams) could amount to a violation of article 101 TFEU, whereas frequent exchanges of competitively sensitive information that result in the acquirer

¹⁶ French *Altice* Decision, *supra* note 11, ¶ 318.

¹⁷ EC *Altice* Decision, *supra* note 10, n.35.

¹⁸ *See id.*, ¶ 422 and n.220-221.

¹⁹ *See* EC Horizontal Merger Guidelines, *supra* note 4, ¶ 78 (“efficiencies have to benefit consumers, be merger-specific and be verifiable”).

²⁰ *See, e.g.*, CADE GUN JUMPING GUIDELINES, *supra* note 8.

achieving a position to exercise decisive influence over the target are caught by the stand-still obligation. Consequently, in *Altice*, the frequent exchanges were considered to be caught by the stand-still obligation rather than article 101 TFEU.

III. CONCLUSIONS

23. Both the *Ernst & Young* case and the *Altice* cases provide some helpful further guidance to the corporate world in relation to what conduct could qualify as gun jumping.
24. However, the Court of Justice in *Ernst & Young* explicitly seems to limit the scope of Article 7 EUMR to the concept of “concentration” as laid down in the EUMR. According to the Court, exchange of competitively sensitive information is caught under Article 7 EUMR only if it results in or contributes to a change of control over (a part of) the target company. Pre-merger coordination and exchange of competitively sensitive information between the parties that does not result in change of control will not violate the standstill obligation but may well be caught under Article 101 TFEU. The suspension obligation and Article 101 TFEU seem to be *complementary* in relation to exchange of competitively sensitive information, as far as the Court of Justice is concerned.
25. The Court’s approach prominently raises the question how Article 101 TFEU should be applied in the context of a merger control process. In particular, the question remains to what extent the specific context of a merger process and the legitimate reasons for parties to exchange information—while avoiding coordination of their pre-merger market behaviour—should be taken into account in the application of Article 101 TFEU.
26. In the *Altice* case, the Commission also seems to focus on the question whether there the exchange of information between the parties resulted in some form of control by Altice over the target company. From a purely legal perspective, the *Altice* case seems to confirm that the Commission will carry out an assessment of a number of circumstances (presence or not of clean teams, frequency and granularity of exchange, etc.) and the points of appeal appear to relate more to the actual implementation of the facts to the law. It does not seem to be specific to the gun jumping prohibition by the Commission.
27. The Commission makes no (direct) reference to Article 101 TFEU as a basis for the decision, other than to point out what is meant by “commercially sensitive” or “strategic” information.²¹ This approach seems in line with *Ernst & Young* where the Court of Justice clarified that the EUMR stand-still obligation is a *lex specialis* to Article 101 TFEU when the action of information exchange contributes to a change of control. This could suggest that if sensitive information is disclosed to the acquirer on one particular instance (outside of a clean team), there could be a violation of Article 101 TFEU (as the information would not yet contribute to a change of control). However, exchanges of competitively sensitive

²¹ EC *Altice* Decision, *supra* note 10, n. 222 (“Altice argued that the Commission did not take into account the merger context and analysed the exchange of information rather in the context of Article 101 TFEU. That is not correct. The Commission has made reference to the Guidelines on the applicability Article 101 to horizontal co-operation agreements simply to point out what is meant by ‘commercially sensitive’ or ‘strategic’ information.”).

information that put the acquirer in a position to exercise decisive influence over the target would (potentially) be caught by the stand-still obligation.

28. From a practical perspective, it is important that a balance needs to be struck between the prohibition on gun jumping by unlawful acquisition of control during a standstill period on the one hand and, on the other hand, legitimate reasons for the exchange of confidential information (e.g. during due diligence and transition planning), provided of course that due care is taken to avoid coordination of (current) market behaviour of the merging parties.
29. The current situation in the EU is perhaps somewhat comparable to what happened in the U.S. a couple of years ago following the adoption of some gun jumping cases. In a well-known speech in 2005, the FTC's then-General Counsel had emphasized—in order to reduce uncertainty in the market that had followed after these cases—that FTC enforcement on the topic of gun jumping was mostly “targeted to particular violators whose objectionable conduct occurred as part of a wider array of activities.”²²
30. Against this background, further guidance on the topic of gun jumping and notably the relationship between the application of general antitrust rules versus specific merger control rules would be welcomed. Given that only few mergers are ultimately blocked, potential guidance should also deal with the particular stage and quality of a given merger control investigation. Finally, such guidance should also i) define what constitutes particularly sensitive information; ii) suggest harmonized mechanisms that can be used to implement the information exchanges that are indispensable to such processes, including the substantiation of efficiencies; and iii) be acceptable to the competition agencies around the world.
31. First and foremost, the cases underscore the importance of putting in place adequate compliance safeguards such as clean teams, secure data rooms, and confidentiality agreements—to minimise the risk of any infringements (and thus possibly fines) when exchanging sensitive information. Also, the frequency of the information exchange, as well as how topical and how granular the exchanges are, are of significant importance and so are limitations on how that confidential information is used or disseminated.

²² See Blumenthal, *supra* note 2, at 6.