

2020 ICN Report on Procedural Infringements of Merger Control Proceedings

Co-authored by the CMA and CNMC

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SUMMARY

1. This paper, co-authored by the UK's Competition and Markets Authority (**CMA**) and Spain's National Commission of Markets and Competition (**CNMC**), presents the initial findings from a new workstream for the ICN Mergers Working Group focusing on approaches to tackling breaches of the procedural rules around merger control proceedings. The paper covers three types of breach: (i) infringements of merger control proceedings, such as failure to comply with information requests (**Procedural Violations**); (ii) failure to comply with mandatory notification and/or standstill obligations prohibiting implementation of a merger before merger clearance (**Gun Jumping**); and (iii) failure by merging parties to comply with the merger clearance conditions imposed by a competition authority (**Remedy Violations**) (together, **Procedural Infringements**). These findings are based on completed surveys by 25 respondent national competition authorities (**NCA**s).
2. An important part of this new work has been to compare and analyse the extent to which **NCA**s are taking enforcement action against Procedural Infringements. The responses to the survey and recent commentary indicate that many **NCA**s can impose financial penalties and that such cases of enforcement are increasingly gaining attention in the context of Procedural Violations and Gun Jumping in particular. The necessity for parties to merger proceedings to be vigilant against making Procedural Infringements – including, through negligence rather than from a wilful intention to mislead – has therefore never been more important. It is an issue that raises significant reputational implications for both the parties and the **NCA**s involved.
3. Key findings from responses to the survey are that:
 - (a) Most **NCA**s have the power to penalise companies and/or individuals for **Procedural Violations** (the majority of which relate either to (i) the

provision of false, incomplete or misleading information, or (ii) the failure to comply with requirements to give evidence or information):

- (i) Penalties are typically brought through administrative (rather than criminal) proceedings and imposed through fines against both merging parties and third parties to merger proceedings. Fines tend to be calculated after consideration of various discretionary factors subject to the specific circumstances of the case (for example, of a given company's willingness to cooperate, and the damage caused by the infringement) as a proportion of a company's turnover or as an absolute figure. In practice, fines tend to fall considerably short of NCAs' maximum limits. Most NCAs can also deploy 'soft' enforcement powers against Procedural Violations by stopping statutory clocks and/or revoking clearance decisions.
 - (ii) Only one NCA – the UK CMA – reported that the total annual number of sanctions it has imposed for Procedural Violations is increasing compared to five years ago. Many NCAs reported either that their level of sanctions had remained constant, or that they were uncertain as to whether there was a change.
- (b) In relation to **Gun Jumping**, the majority of respondent NCAs require a mandatory notification for mergers that meet their jurisdictional thresholds and impose a standstill obligation.
- (i) Jurisdictional thresholds are usually based on objective (eg turnover-based) criteria. While uncertainty over whether these thresholds are met can arise on occasion and result in Gun Jumping breaches, uncertainty over exactly what conduct constitutes implementation of a transaction has been a more common source of what at times, has led to unintentional violations of the standstill obligation.
 - (ii) Similarly to Procedural Violations, penalties typically take the form of fines and are calculated as a proportion of a company's turnover or as an absolute figure after consideration of various discretionary factors.
 - (iii) Perhaps surprisingly given the prevalence of several high-profile cases of enforcement against Gun Jumping in recent years, respondent NCAs largely reported that their level of sanctions imposed against Gun Jumping as compared to five years ago was either constant or uncertain.
- (c) In relation to **Remedy Violations**, all NCAs can impose remedies as a condition to merger clearance and to oversee their fulfilment. Many NCAs contemplate the possibility of sanctioning Remedy Violations; typically,

through (i) fines, (ii) unwinding orders, (iii) the application of new remedies or (iv) the review of the merger decision. However, only four NCAs have imposed any kind of sanction for Remedy Violations in the past five years, making this a less active area of enforcement in Procedural Infringements.

BACKGROUND

Rationale and scope of the Procedural Infringements project

4. The ICN Mergers Working Group considered this to be an opportune time to compare the current practices of NCAs regarding Procedural Infringements. Although the ICN Mergers Working Group has previously provided consolidated guidance on substantive merger analysis (eg on horizontal mergers and in 2018, on vertical mergers), work related to the enforcement of Procedural Infringements has been less common.
5. Enforcement against Procedural Infringements has drawn significant notice in recent years. In 2017, the European Commission prompted significant commentary after issuing a EUR 110 million fine against Facebook for providing it with misleading information during its investigation of Facebook's acquisition of WhatsApp.¹ The UK CMA has also been highly active in taking enforcement action against Procedural Infringements in recent years (as described further in the Case Study sections below) – including recently on Amazon for failing to produce responsive materials to information requests by statutory deadlines during the CMA's investigation into Amazon's investment in Deliveroo.² These cases demonstrate the importance that NCAs place on companies fully complying with their obligations to enable the NCA to conduct well-evidenced, effective merger investigations.
6. Similarly, recent cases of Gun Jumping – including cases with multijurisdictional dimensions in which several NCAs have fined companies for the same conduct – have given this issue greater prominence. In the *Canon/Toshiba*³ case, China's then-Ministry of Commerce, the United States (**US**) agencies and the European Commission all determined that Canon had committed gun jumping in its 2016 'two part' acquisition of Toshiba Medical Systems Corporation.⁴ In

¹ EC Mergers press release, 18 May 2017: [Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover](#)

² CMA Penalty notice under section 110 of the Enterprise Act 2002, 26 August 2020; [Anticipated acquisition by Amazon of certain rights and a minority shareholding in Deliveroo](#).

³ The acquisition by Canon Inc. of Toshiba Medical Systems Corporation in 2016.

⁴ In 2019, this finding resulted in a EUR 28 million fine by the European Commission, an RMB 300,000 fine by the Chinese Ministry of Commerce and a settlement of USD 2.5 million in the US. Although the Japan Fair Trade Commission did not impose a fine on Canon, it issued a public announcement that the arrangements may be in violation of antitrust law. EC Mergers press release, 27 June 2019: [Commission fines Canon €28 million for](#)

November 2018, the OECD Competition Committee held a roundtable discussion on *Gun jumping and suspensory effects of merger notifications* and found that multijurisdictional merger filings could face challenges in reconciling the various rules and requirements of different jurisdictions.⁵ The importance of this issue also led to the first multi-jurisdictional Survey on gun-jumping taken by the Mergers Working Group of the Antitrust Committee of the International Bar Association. The results of this Survey were published as a jurisdictional guide on *Gun Jumping in Merger Control*.⁶

7. By contrast, there has been relatively limited commentary around Remedy Violations. This may reflect the fact that, as discussed further below, cases of sanctions being imposed against Remedy Violations are still rare.

Survey scope

8. The scope of this paper covers the results from a survey of NCAs on whether and how they enforce against Procedural Infringements. The survey received responses from 25 NCAs from the following jurisdictions: Australia, Brazil, Bulgaria, Canada, Colombia, the Czech Republic, Denmark, Estonia, Finland, France, Italy, Japan, Mauritius, New Zealand, Panama, Portugal, Slovenia, South Africa, Spain, Sweden, Taiwan, Turkey, the UK and the US.
9. The survey (as provided in the Annex to this report) was divided into three parts dealing with: (i) Procedural Violations, (ii) Gun Jumping, and (iii) Remedy Violations. Within each of these sections is a summary of the Procedural Infringement in question, the enforcement powers NCAs have against such breaches, case studies of enforcement and statistics on whether these cases have increased or decreased compared to five years ago.

PART 1: PROCEDURAL VIOLATIONS

Types of Conduct / Sanctions

10. Survey responses indicated that for NCAs, Procedural Violations broadly fall into the following categories and entail the following types of sanctions:

partially implementing its acquisition of Toshiba Medical Systems Corporation before notification and merger control approval; US FTC press release, 10 June 2019: [Canon Inc, Toshiba Corporation Agree to Pay \\$5 Million for Violating Federal Antitrust Laws](#). Japan Fair Trade Commission press release, 30 June 2016: [Regarding the proposed acquisition of shares of Toshiba Medical Systems Corporation by Canon Inc](#). Chinese Ministry of Commerce press release (Chinese), 16 December 2016: [Canon / Toshiba Medical Systems](#).

⁵ OECD report, 20 February 2019: [Suspensory Effects of Merger Notifications and Gun Jumping](#).

⁶ International Bar Association, Mergers Working Group of the Antitrust Section: [Gun Jumping in Merger Control](#)

- (a) **Provision of false, incomplete or misleading information.** The sanctions for these are typically fines. However, for some NCAs, such as the Australian Competition and Consumer Commission (**ACCC**) and UK CMA, recklessly and knowingly providing false or misleading information is a criminal offence.
- (b) **Failure to comply with requirements to give evidence (eg internal documents) including, within a mandated deadline.** Some NCAs such as the ACCC, the Turkish Competition Authority, Spain's CNMC, the UK CMA, and the US agencies have formal powers under the respective legislation to impose a statutory obligation on parties to merger control proceedings to provide information and documents by mandated deadlines. If companies fail to provide documents and/or information requested under these powers by the mandated deadline, with or without reasonable excuse, they are liable to pay administrative penalties.
- (c) **Obstruction of compliance with requirements to give evidence.** Such obstructions may take the form of obstructing or otherwise hindering, for example through intimidation or coercion, other parties to a merger investigation (eg third parties) from complying with requests from the NCA. They may also be attempts to unduly influence, for example through incentives, other parties who are involved in the NCA's investigation. In some jurisdictions, such as Australia and the US, attempts to obstruct other parties' ability to comply may constitute a criminal offence.
- (d) **Failure to comply with summons (eg to attend compulsory interview).** As part of their formal powers to gather information, some NCAs can order an individual to provide information, for example in the form of a compulsory interview. Some NCAs, such as the ACCC and the UK CMA can issue the summons themselves under the relevant provisions of the legal codes they enforce. Other NCAs, such as the US agencies and the Competition Bureau of Canada, can obtain court orders compelling a person to attend an interview. In practice, NCAs use these powers rarely, and failure to comply does not normally go beyond administrative proceedings.
- (e) **Breach of confidentiality obligations.** During the course of merger investigations, merging parties and third parties may receive commercially sensitive information pertaining to other parties. Disclosure of this type of information will typically be limited to certain individuals. The UK CMA, for instance, may disclose information on a merger investigation outcome to assist merging parties in preparing a response to an announcement or publication by the CMA. Merging parties are not permitted to use the information for any other purpose. Disclosures of confidential information to unauthorised parties or individuals within parties can lead to both

administrative and criminal penalties. The Swedish Competition Authority may disclose certain confidential information to merging parties for the specific purpose of enabling them to exercise their rights of defence, subject to certain conditions (including restrictions on the individuals who will have access to said information). Disclosures of confidential information to unauthorised parties or individuals within parties can lead to both administrative and criminal penalties.

11. Categories (a) and (b) were considered to fall within the Procedural Violations category by approximately 80% of NCAs, and most cases of Procedural Violations reported by NCAs fall within these categories (as seen further below in the sub-section 'Case studies of sanctions for Procedural Violations within the last five years'. Approximately half of the NCAs considered categories (c), (d) and (e) to be Procedural Violations (although NCAs generally noted that these types of Procedural Violations take place relatively infrequently).
12. The prevalence of categories (a) and (b) is perhaps unsurprising, given these violations in particular go to the heart of NCAs' ability to conduct well-evidenced investigations and are crucial for maintaining the quality and effectiveness of an NCA's work in the public interest.

Sanctions for Procedural Violations

Type of proceedings / subject of proceedings

13. All NCAs responded that they have the power to impose sanctions on companies (and in some cases also on individuals) for the obstruction and/or failure to comply with the requirements of merger control proceedings. However, the exact scope of these powers differed across NCAs and, as is also apparent from the case studies discussed further below at 'Case studies of sanctions for Procedural Violations within the last five years', it is more common for penalties to be imposed on merging parties through administrative (rather than criminal) proceedings. It is also rare for penalties to be imposed against third parties (rather than merging parties).
 - (a) Nearly all NCAs reported that they could resort to administrative proceedings in the event of an infringement and that they could either pursue criminal proceedings themselves or refer criminal proceedings to a relevant court. However, NCAs including the Turkish Competition Authority and the Office for the Protection of Competition (**OPC**) in the Czech Republic reported that they could resort to administrative proceedings only, and that these could be brought on companies and on individuals.

- (b) The majority of NCAs that addressed the question of whether disciplinary proceedings could be brought on third parties in addition to merging parties reported that they could. However, NCAs including the Fair Trade Commission in Taiwan reported that both administrative and/or criminal proceedings could be brought upon the merging parties only.

Severity of sanctions

14. Administrative penalties imposed in the Procedural Violations context typically involve fines on companies. Maximum penalties are calculated either as percentages of a company's turnover or as absolute figures.
- (a) Seven NCAs (those of Bulgaria, Denmark, Portugal, Spain, Zambia, France and Turkey) impose financial penalties that are calculated as a percentage of the company's revenues.
- (b) Several NCAs (those of Brazil, the Czech Republic, Estonia, Germany, Japan, Taiwan and the UK) impose fines that are limited to an absolute maximum. These maximums range from, for example, TWD 1,000,000 (c. USD 32,400)⁷ to BRL 5 million (c. USD 1.3 million).
- (c) Other NCAs calculate fines according to different criteria, including the Competition Bureau of Canada with fines of an amount not exceeding CAD 10,000 (c. USD 7,536) for each day the party has failed to comply, and the US agencies that can request fines of up to USD 42,530 for each day the party has failed to comply. The Colombian Superintendencia de Industria y Comercio (**SIC**) imposes fines contingent on the profits gained by committing the infraction.
15. With respect to penalties imposed on individuals:
- (a) Seven NCAs reported issuing fines to individuals who had committed a Procedural Violation. The Autorité de la Concurrence of France reported the highest fine, among the responses, for an individual (EUR 300,000 (c. USD 336,000)).
- (b) Five NCAs reported that Procedural Violations could lead to an individual's imprisonment. The US agencies, for example, reported that the destruction of records carried a potential sentence of up to 20 years.

⁷ This currency conversion was made using the year-end average for 2019 provided by the US Federal Reserve on its website. 2019 US Federal Reserve average rates for specific currencies have been used throughout this report, except when referring to specific fines. In these instances, the authors used the year-end average provided by the US Federal Reserve on its website for the year the fine was issued.

Factors considered when deciding whether to enforce against a Procedural Violation and determining level of fine

16. As regards what mitigating and aggravating factors NCAs consider when deciding whether to enforce against a Procedural Violation and, if so, on the severity of sanctions, one of the most commonly mentioned factors is an infringing party's willingness to cooperate with the NCA once an investigation into a Procedural Violation has begun. NCAs will typically also take into account the merging parties' history of compliance, and in particular recidivism, as well as the scope and duration of non-compliance on that particular instance.
17. Several NCAs, including those of Brazil, Colombia, Taiwan and the UK reported that they will consider the benefits accrued by merging parties from non-compliance and the impact on the investigation of non-compliance. For this reason, non-compliance judged to have resulted from negligence is a significant mitigating factor in some jurisdictions.
18. However, in the case of the UK CMA, this will not necessarily exempt a merging party from enforcement action if the infringement led for example to a significant adverse impact on the CMA's investigation. The NCAs of Denmark, Finland and Germany, for example, will also consider the degree of impact of the infringement on the outcome of a merger investigation. The NCAs of Brazil and Taiwan adopt a broader approach by considering the impact of the Procedural Violation on third parties and the overall competitiveness of the market in which the merging parties are active.
19. Some agencies, such as the OPC of the Czech Republic, will additionally consider the ability of merging parties to pay a fine, based on their financial situation at the time, to ensure that the fine does not compromise the viability of the merging party involved.

Statute of limitations and other timing restrictions to sanction a Procedural Violation

20. The majority of NCAs have timing restrictions on their ability to sanction a Procedural Violation, although eight NCAs (including those of Australia, Brazil, Estonia, Mauritius, Panama, Zambia and South Africa) stated that they do not have such limitations.
21. Timing restrictions range from four weeks from the relevant day of violation for the UK CMA to a maximum of 6 years for the OPC of the Czech Republic for certain offences. For other jurisdictions, statutes vary according to the type of Procedural Violation, and typically end five years from the date the infringement

occurred. In the US, for example, the statute of limitation for bringing a criminal contempt offence action is one year, while the statute of limitation for criminal proceedings brought under other sections of the US crimes and criminal procedures legislation is five years from the date the infringement occurred.

'Soft enforcement' mechanisms

22. The survey explored whether there are any other forms of non-sanction recourse action or 'soft enforcement' mechanisms for a Procedural Violation (for example, 'stop clock' measures to suspend a merger control timetable; share or asset disposal powers; warning letters or 'on notice' procedures; declaration of nullity of clearance decision).
23. In general, NCAs have a range of mechanisms for enforcement (although five NCAs said that they did not have such soft-enforcement powers). The most commonly reported powers are revocation of a clearance decision (reported by seven NCAs) and 'stop clock' measures (reported by nine NCAs). For example, the OPC of the Czech Republic and the ACCC reported that in the former event of a revocation, they may obtain a court order forcing the merging parties to not progress the acquisition or divest some or all of the acquired assets. Such soft measures will clearly impact merging parties' commercial deal risk and, in combination with the risk of fines, may act as significant deterrents for parties wishing for a smooth, swift merger clearance process.
24. While not having the power to 'stop the clock', the US agencies can seek an order from a court to extend the waiting period and reported that they will enter into timing agreements whereby merging parties will commit to not close the transaction before a certain date or event. The UK CMA reported that in addition to having the power to 'stop the clock' it can reject a merger notice (ie, the notification form for the merger), which would mean that the CMA would no longer be bound by its original statutory Phase 1 working deadline of 40 working days.

Rights of appeal

25. All NCAs reported that infringing parties have rights of appeal in relation to an enforcement decision against a Procedural Violation. Some NCAs reported limitation periods within which parties must lodge an appeal.

Case studies of sanctions for Procedural Violations within the last five years⁸

26. Ten NCAs (including those of Bulgaria, Denmark, Germany, Portugal, Turkey, the UK, the US and Zambia) reported having imposed sanctions within the last five years, with three of these (the NCAs of the UK, the US and Zambia) having done so more than once. Nearly all of the examples provided by NCAs fall within the category of provision of false, incomplete or misleading information, or failure to comply with requirements to give evidence and relevant information.
27. Only two NCAs, those of Bulgaria and Denmark, reported an appeal to an imposed sanction, one of which was successful and resulted in the sanction imposed by the NCA of Bulgaria being overturned (as detailed further in the case study below).
28. No NCA reported sanctions against third parties in its case studies.

Provision of false or misleading information

29. The following case studies provided by the NCAs of Germany, Denmark, Bulgaria, Turkey and Slovenia all concerned the provision of false, incomplete or misleading information. In each case: (i) the violation was discovered by the NCA either independently or following a submission by a third party; (ii) the sanction was imposed on a company rather than an individual; and (iii) the sanction was an administrative fine:
 - (a) In 2011, the **Bundeskartellamt of Germany** investigated and cleared the proposed acquisition by Bongrain, a subsidiary of Savencia, of the majority of the shares in Söbbeke. Both Savencia and Söbbeke are dairy companies, with the target specialising in organic products. The Bundeskartellamt subsequently found Savencia had only succeeded in achieving clearance by submitting incorrect information. Specifically, the merging parties had submitted misleading information which underestimated their combined shares of supply. Moreover, Savencia had failed to disclose information relevant to how much control it exerted, or could exert, over Andechser Molkerei Scheitz GmbH, an organic dairy company Savencia invested in in 1999. As an aggravating factor, Savencia submitted incorrect sales figures in response to further queries on this matter. In 2015, the Bundeskartellamt informed the merging parties of its preliminary findings with respect to its investigation into infringements. In order to avoid the dissolution of the merger between Savencia and

⁸ References to 'the last five years' in this report refers (unless otherwise specified) to 2015-2019 inclusive.

Söbbeke, which in the Bundeskartellamt's view was necessary, Savencia offered to give up its participation in Andechser and to sell its shares. This measure was implemented later in 2015, leading the Bundeskartellamt to terminate divestiture proceedings which would have forced Savencia to divest Söbbeke. In 2016, the Bundeskartellamt followed its infringement finding by imposing a fine of EUR 90,000 euros (c. USD 100,000) on Bongrain.⁹

- (b) In 2014, the **Danish Competition and Consumer Authority (DCCA)** investigated the proposed merger between Euro Cater A/S and Metro Cash & Carry Danmark A/S (**Metro**). During its investigation, the DCCA asked Metro if any other parties had shown interest in buying Metro. When answering the question, Metro failed to provide the DCCA with information on all interested buyers. The DCCA considered this information crucial to determining the appropriate counterfactual for assessing the impact on competition of the proposed merger. In December 2014, the DCCA referred the case to The State Prosecutor for Serious Economic and International Crime. In April 2017, The City Court of Glostrup, which ruled on this case, imposed on Metro a fine of DKK 50,000 (c. USD 7,600). Metro subsequently appealed this fine. In November 2017, the High Court in Denmark upheld the sentence, forcing Metro to pay the fine.¹⁰
- (c) In 2018, the **Bulgarian Commission for Protection of Competition (the CPC)** investigated and cleared the acquisition by Speedy of Rapido Express and Logistics, two competitors providing logistics services in Bulgaria. During its investigation, and following a submission by a third party, the CPC found that Speedy had failed to disclose the fact that the target had acquired assets of a separate competitor, D&D Express, earlier in 2018. Bulgaria's CPC consequently imposed a fine on Speedy which was equivalent to 0.2% of Speedy's turnover in 2017. Speedy subsequently appealed the CPC's decision to impose a fine. The Bulgarian Supreme Administrative Court determined that the CPC had in fact been provided with complete information, as defined in the relevant legal code, in connection with the proposed acquisition by Speedy of Rapido Express and Logistics. It therefore overturned the CPC's decision. The Bulgarian CPC then revoked its decision to fine.
- (d) In 2015/16, the **Turkish Competition Authority** investigated the acquisition of joint control over RAC Group Limited (**RAC**) by funds managed by GIC Pte. Ltd (**GIC**), the sovereign wealth fund of Singapore,

⁹ Bundeskartellamt press release, 5 October 2015: [Demerger of organic dairies Andechser and Söbbeke](#); and Bundeskartellamt press release, 7 January 2016: [Conclusion of fine proceedings against Bongrain Europe SAS](#).

¹⁰ DCCA press release, 16 November 2017: [Denmark: "Metro Cash & Carry Danmark A/S, Denmark, sentenced to pay a fine of DKK 50,000 for withholding information in a merger case."](#)

and funds advised by CVC Capital Partners. In early 2016, The Turkish Competition Authority separately investigated the acquisition of OCM Luxembourg EPF III Railpool Topco S.à r.l. (Railpool) by other funds managed by GIC. In 2018, following additional notifications by GIC, the Turkish Competition Authority detected inconsistencies with the information provided in previous notifications. It consequently examined GIC's historic notifications and identified instances of false and misleading information having been provided by GIC in relation to the RAC and Railpool investigations referenced above. The Turkish Competition Authority fined GIC one thousandth of annual gross revenue.

Failure to comply with requirements to give evidence and relevant information

30. The **UK CMA** has in recent years been highly active in enforcing against failures by merging parties to comply with their disclosure obligations. These include the imposition of various fines (the statutory maximum for which is GBP 30,000 (c. USD 38,300)). In all of these cases, the CMA emphasised that information requests are a key tool for the CMA to collect the information it needs to carry out its merger investigations, and it is therefore of utmost importance that parties take their obligations seriously in this respect.
- (a) In *Amazon Deliveroo* (2020), the CMA imposed penalties of GBP 25,000 (c. USD 31,900) and GBP 30,000 (c. USD 38,300) on Amazon for failing to provide complete responses to two sets of information requests. The CMA found that there were a large number of responsive documents which Amazon had failed to provide by the required deadlines, and that this failure had resulted in unnecessary delays to the CMA's investigation.¹¹
- (b) In *Sabre/Farelogix* (2019), the CMA imposed a penalty of GBP 20,000 (c. USD 25,500) on Sabre for failing to produce responsive materials to information requests on time. As part of its assessment, the CMA found that Sabre failed to adopt a quality control process that ensured compliance and significantly delayed taking steps to resolve its failure.¹²
- (c) In *AL-KO/Bankside* (2019), the CMA imposed a penalty of GBP 15,000 (c. USD 19,200) on AL-KO in relation to a pattern of errors in responding to the CMA's information notices. The CMA found that the breach was serious as it resulted in the late production of a material volume of documents,

¹¹ Amazon.com NV Investment Holdings LLC / Roofoods Ltd (trading as Deliveroo) ([case ME/6836/19](#)); CMA publication, 26 August 2020; [Penalty notice under section 110 of the Enterprise Act 2002 – Addressed to Amazon.com Inc.](#)

¹² *Sabre Corporation/ Farelogix Incorporated* ([case ME/6806/19](#)); CMA publication, 27 September 2019: [Penalty notice under section 110 of the Enterprise Act 2002 – Addressed to Sabre Corporation.](#)

involved the CEO of the acquiring business, and concerned matters of central importance to the CMA's investigation.¹³

(d) In *Rentokil/MPCL* (2019), the CMA imposed a penalty of GBP 27,000 (c. USD 34,500) on Rentokil for providing responsive material, after the expiry of the deadline specified in an information request, in response to subsequent information requests.¹⁴

(e) In *Just Eat/Hungryhouse* (2017), the CMA similarly found Hungryhouse had no reasonable excuse for its incomplete response and imposed a penalty of GBP 20,000 (c. USD 25,800). The penalty decision emphasises that it is the parties' responsibility to ensure its method of identifying documents does not create a substantial risk of missing responsive ones. The CMA emphasised that it is also their responsibility to ensure they have sufficient internal or external resources to comply with CMA requests.¹⁵

31. The US DoJ was the only NCA that reported a case study relating to the bringing of criminal proceedings against an individual for a Procedural Violation. In 2009, Coach USA Inc. and City Sights LLC, two tour bus companies based in New York, formed a joint venture called Twin America LLC. During its investigation of this joint venture, the DoJ found that the merging parties had destroyed evidence and failed to preserve documents relevant to the DoJ's investigation. In 2015, the DoJ ordered Twin America LLC to pay USD 250,000 in attorney's fees and associated costs. In 2017, a court found Ralph Groen, then an executive of Coach USA Inc., guilty of destroying documents and records responsive to the DoJ's investigation, as well as of providing false and misleading statements during the course of a subsequent related administrative antitrust litigation. Ralph Groen was sentenced by a court to 15 months imprisonment.¹⁶

Statistics

32. Ten NCAs (those of Colombia, Czech Republic, Estonia, Germany, Mauritius, Panama, Slovenia, Spain, Sweden and France) reported that they were uncertain as to whether the total annual number of sanctions for Procedural Violations was increasing or decreasing compared to five years ago. Nine

¹³ *AL-KO Kober Holdings Limited / Bankside Patterson Limited* (case ME/6776/18); CMA publication, 21 May 2019: [Penalty notice under section 110 of the Enterprise Act 2002 – Addressed to AL-KO Kober Holdings Limited](#).

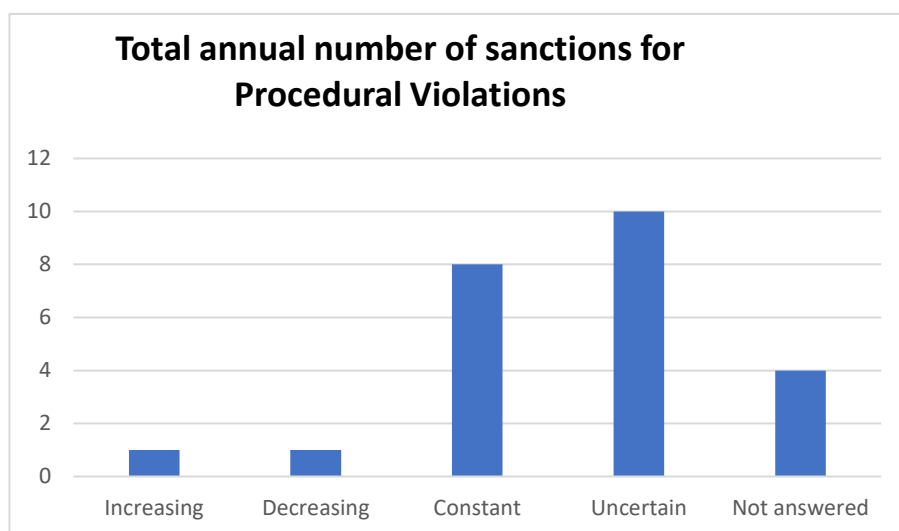
¹⁴ *Rentokil Initial plc / MPCL Limited (formerly Mitie Pest Control Limited)* (case ME/6784-18); CMA publication, 7 August 2019: [Penalty notice under section 110 of the Enterprise Act 2002 – Addressed to: Rentokil Initial plc](#).

¹⁵ *Just Eat plc/ Hungryhouse Holdings Limited* (case ME/6659-16); CMA publication, 24 November 2017: [Penalty notice under section 110 of the Enterprise Act 2002 – Addressed to Hungryhouse Holdings Limited](#).

¹⁶ Department of Justice press release, 23 March 2017, [Former Coach USA Inc. Executive Sentenced to 15 Months in Prison for Obstruction of Justice](#).

NCAAs (including those of Brazil, Denmark, Japan, Finland, Portugal, Taiwan, Turkey, United States) reported that this number had been constant. Three NCAs (those of Australia, Bulgaria and South Africa) did not answer this question. Only one NCA, that of Zambia, reported that the total number of sanctions was decreasing.

33. The UK CMA was the only NCA to report that the total number of sanctions was increasing. This is consistent with the public position of the UK’s NCA as one that ‘continues to get tougher on mergers and enforcement.’¹⁷



Source: NCA responses to survey

PART 2: GUN JUMPING

Definition of Gun Jumping

34. Gun Jumping is a broad concept that refers to several types of infringements. Gun Jumping infringements could be categorised into two main groups: (i) the violation of the obligation to notify a reportable transaction (**Type 1 Infringements**); and (ii) the implementation of a merger before obtaining clearance; in other terms, the violation of the so called “standstill obligation” (**Type 2 Infringements**).

Mandatory merger notification

35. The majority of NCAs that responded to the survey have mandatory merger notification regimes for transactions meeting certain thresholds. During the past

¹⁷ See [speech by Chief Executive of the CMA, Andrea Coscelli on 25 February 2020](#).

decade, the number of jurisdictions with a mandatory pre-merger notification system has grown substantially. Of the 25 NCAs which responded to the questionnaire, only five do not require such notification and operate voluntary regimes (the UK, New Zealand, Mauritius, Australia and Panama). Such voluntary regimes still allow the NCAs to investigate mergers that are not notified but may nevertheless raise competition issues.

36. For example, in Australia, New Zealand and the UK, merging parties often opt to proactively and voluntarily notify mergers that may raise competition concerns due to the perceived likelihood that such mergers will in any event be identified and ‘called in’ for investigation by the NCAs. After opening an investigation, the UK CMA also has the ability (both in anticipated mergers (where mergers are yet to complete) and in completed mergers) to impose orders (referred to collectively as ‘interim measures’) preventing or unwinding ‘pre-emptive action’ (ie, any action which might prejudice the outcome of a reference to an in-depth ‘Phase 2’ investigation or impede the taking of appropriate remedial action).¹⁸

Standstill obligation

37. Standstill obligations prohibit the merging parties from implementing a merger prior to obtaining a clearance. The majority of mandatory regimes impose standstill obligations, although there may be limited exemptions and “case by case” exceptions.

Possibility of Implementation Before Clearance

38. The main difference between an exemption and an exception is that, while exemptions are automatic under certain circumstances, exceptions normally require active intervention of the NCA. The survey reveals three different exceptions and exemptions, similar to those identified by the Jurisdictional Guide about “*Gun Jumping in Merger Control*”:¹⁹

- (a) Public bid exemptions;
- (b) Case-by-case exceptions; and
- (c) Early termination of the waiting period.

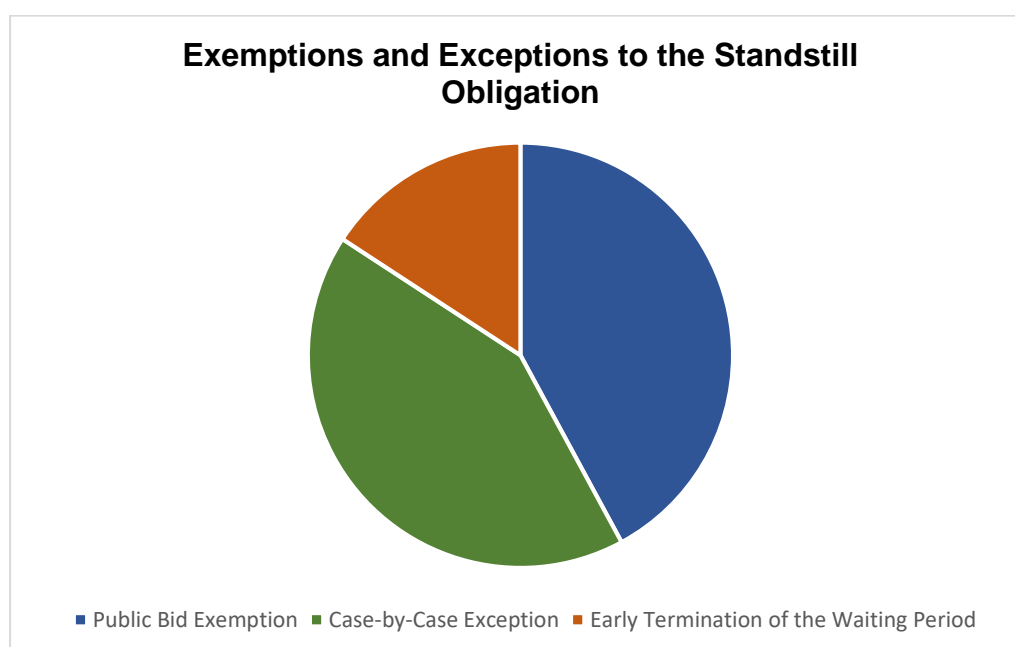
39. The most common exemptions to the standstill obligation are public bids for the acquisition of securities on a stock exchange authorised by the competition authority. This exemption requires that the transaction is notified without delay

¹⁸ See the CMA’s [Guidance on Interim measures in merger investigations, 28 June 2019, CMA108](#).

¹⁹ See International Bar Association, Mergers Working Group of the Antitrust Section: [Gun Jumping in Merger Control](#).

and that the acquirer does not exercise the voting rights of the shares acquired or does so only to maintain the full value of its investment. This exemption is established in Article 7(2) of the EU Merger Regulation and also in other jurisdictions' national regulation (Bulgaria, the Czech Republic, Denmark, Finland, France, Germany, Portugal, Spain and Sweden).

40. So-called “case-by-case” exceptions allow transactions to be implemented prior to clearance under certain circumstances. Jurisdictions such as Brazil, Czech Republic,²⁰ Denmark, Estonia, Finland, France,²¹ Germany, Slovenia, Sweden and Spain provide examples for this type of exceptions. Under them, merging parties may request a derogation of the standstill obligation subject to the relevant authority's approval. To grant these exceptions, authorities analyse each case, typically taking into account the following factors: (i) if implementing the transaction entails any risks to competition in the relevant market or (ii) if not implementing the transaction can cause serious damage to the undertaking or to a third party.
41. The rest of the jurisdictions do not provide any exemptions or exceptions to the standstill obligation (including in Colombia, Japan, Taiwan, Turkey, the US and Zambia). However, the NCAs of Japan and the US offer the merging parties the possibility to request an “early termination” of the waiting period, which is of 30-days in all three jurisdictions. In the US there is also a 15-day waiting period for cash tender offers and certain bankruptcies.



²⁰ In previous decisions, the OPC of the Czech Republic has allowed the implementation of an act or certain acts rather than the whole merger.

²¹ Article L.430-4, 2nd paragraph, of the French commercial code states that parties can ask the Autorité de la Concurrence for an exemption “in case of a particular necessity”. In the majority of instances, this exemption is implemented in operations in which one of the companies is engaged in an insolvency procedure.

Source: NCA responses to survey

42. Voluntary regimes can also retain certain mechanisms to prevent the integration of the merging parties' businesses prior to clearance. In Australia, New Zealand and Mauritius, the NCAs can prohibit the implementation of mergers that are likely to substantially lessen competition in a market. While the UK operates a voluntary notification regime which does not prevent the merging parties from implementing and closing the transaction before clearance, the UK CMA can, as noted above, impose an order preventing or unwinding pre-emptive action (a broad concept that can cover, for example, the integration of the merging parties' businesses and the exchange of commercially sensitive information).

Criteria to determine if a transaction has been implemented

43. The scope of what constitutes gun jumping (and, specifically, what constitutes premature 'implementation' of a transaction) is not always clear-cut. There has been considerable debate regarding what conduct should be considered premature implementation (eg the exchange of competitively sensitive information during due diligence; implementation of pre-closing covenants governing conduct between signing and closing and integration planning steps). However, while certain conduct may be perceived to clearly fall within the 'prohibited' category²², other conduct may be perceived to fall into a 'grey' area.
44. The complexity of the matter can often arise from the existing trade-off between the requirements of the standstill obligation and the merging parties' legitimate interests in protecting the value of the target business. In this sense, most jurisdictions allow the implementation of measures that are necessary to preserve and safeguard the property or necessary for the continuation of the day-to-day operations of the business.
45. NCAs tend not to take a prescriptive approach in relation to the specific conduct that will comprise premature implementation / Type 2 Infringement and will instead make assessments on a case-by-case basis. Only the NCAs of Brazil, the Czech Republic and South Africa have referred to the formal guidelines in their survey responses. In Brazil, the guidelines that have been published by its NCA, Conselho Administrativo de Defesa Econômica (**CADE**)²³ divide activities that lead to a violation of the standstill obligation into three major groups: (i) the exchange of information between economic agents involved in a merger; (ii) the

²² As occurred in the *Canon/Toshiba* case mentioned in the *Background* section, in which China's then-Ministry of Commerce, the US agencies and the European Commission all agreed that Canon had committed gun jumping in its 2016 'two part' acquisition of Toshiba Medical Systems Corporation.

²³ For specific examples of conducts that may fall under each group, see [Guidelines for the Analysis of previous Consummation of Merger Transactions](#).

definition of contractual clauses governing the relationship between economic agents; and (iii) the activities of the merging parties before and during the implementation of the merger. In the US, the US Federal Trade Commission has published an article describing actions that merging parties should avoid taking during the waiting period prior to obtaining a clearance.²⁴ This article focuses on the exchanges of information and offers suggestions for safeguarding competitively sensitive information during a transaction.

46. Most NCAs (including those of Australia, the Czech Republic, Denmark, Estonia, Finland, France, Italy, Portugal, Slovenia, South Africa, Spain and Sweden) have an approach similar to the European Commission and the European Courts whereby “control” is defined as the ability to exercise decisive influence over an undertaking.²⁵ Furthermore, in many jurisdictions, “decisive influence” is exercised when a shareholder has the ability to block strategic decisions, even if the shareholder holds less than 50% of the shares. The US standard is whether the acquiring firm has obtained beneficial ownership of the acquired firm, for example, by looking at the benefit of gain, risk of loss, the right to vote shares and other indicia.
47. The Survey reveals that the most common conduct considered as obviously comprising premature implementation are the transfer of assets or shares, the merging of operations or physical infrastructures, the transfer of customers, the exchange of sensitive commercial information and, as previously mentioned, the exercising a decisive influence and/or control on the activity of the acquired undertaking (eg, through the vetoing of strategic commercial decisions). However, in many jurisdictions, the standards established by case law can leave room for interpretation as to where the precise boundaries lie between infringing conduct and that which is borderline.

Sanctions for Gun Jumping

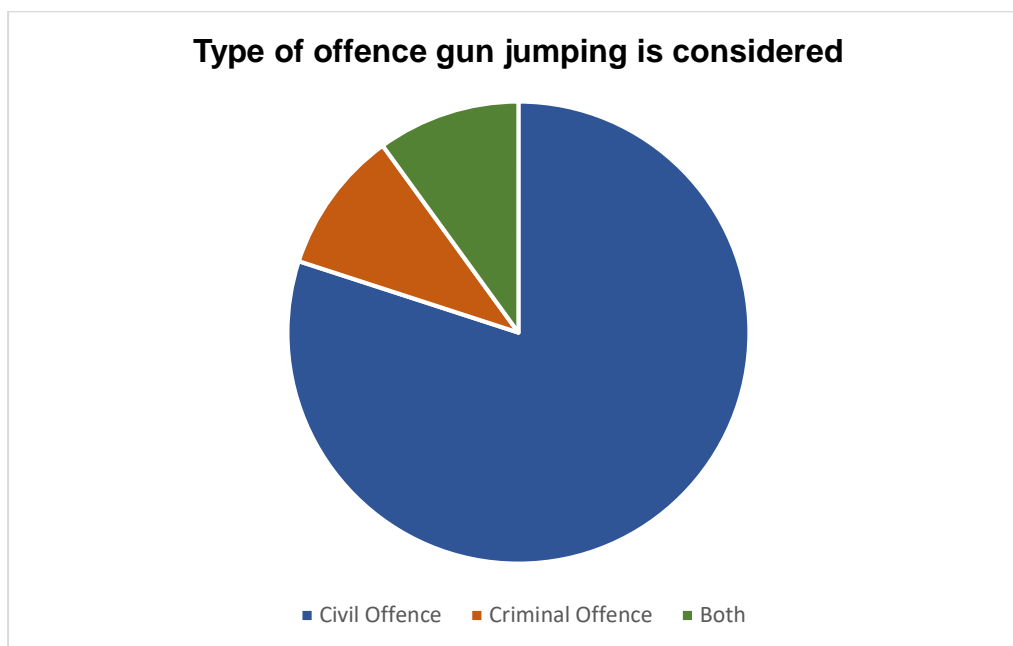
48. Violations of the obligation to notify a reportable transaction and of the standstill obligation are considered serious offenses and can be subject to severe legal sanctions in mandatory regimes. Enforcement against Gun Jumping has risen compared to 2000-2010.

²⁴ FTC blog, 20 March 2018: [Avoiding antitrust pitfalls during pre-merger negotiations and due diligence](#)

²⁵ See article 3.2 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

Type of sanctions

49. All jurisdictions with a **mandatory pre-merger notification system** can impose sanctions for Gun Jumping, except for Sweden.²⁶ In general terms, Gun Jumping is considered as an administrative infringement of a merger control regime, punishable with fines. Only a small number of jurisdictions consider it to be a criminal offence (including in Denmark, Japan and Estonia) – of these, only in Estonia do possible sanctions include the imprisonment of up to thirty calendar days.



Source: NCA responses to survey

50. NCAs with voluntary regimes do not impose sanctions for Gun Jumping. As noted above, although the UK operates a voluntary notification regime with no standstill obligation *per se*, the CMA has the ability to impose orders to prevent the implementation of certain transactions (where it perceives such actions to comprise pre-emptive action) and can levy sanctions if merging parties breach these orders. These sanctions take form of fines which can be up to 5% of the total value of turnover.²⁷
51. In general terms, sanctions imposed by NCAs are the same regardless of the type of Gun Jumping infringement committed (i.e. violation of the obligation to notify or the standstill obligation). Italy's Autorita' Garante della Concorrenza e del Mercato is an exception to this. While a Type 1 Infringement failure to notify a notifiable transaction can lead to fines, a Type 2 implementation of a merger

²⁶ In Sweden there are no sanctions for violating the standstill obligation, unless there is also an infringement of general antitrust rules. The Swedish Competition Authority may however impose a hold separate order, under penalty of fine, for which there is no maximum level.

²⁷ CMA's [Guidance on Interim Measures in Merger Investigations](#), para 7.6.

prior to obtaining clearance does not carry sanctions, as the notification of a transaction does not automatically oblige the merging parties to suspend their implementation. In practice, though, companies normally wait for the clearance as to avoid the antitrust risk of a prohibition or conditional clearance decision.

52. The Survey reveals that fines are normally imposed on the corporate group. However, seven NCAs (those of the Czech Republic, Colombia, Estonia, France, Germany, Spain and Slovenia) also impose fines on individuals. The exact amount of these fines varies across jurisdictions but has generally increased significantly over the past decade. There are also noticeable differences between fines imposed on companies and those imposed on individuals, with those imposed on companies being typically much higher.
53. Failure to notify or the violation of the standstill obligation may also lead to the invalidation or dissolution of the transaction, remedial measures or to the attachment of conditions on the implementation of the transaction, as occurs, for example, in France, South Africa and Portugal.

Maximum fines

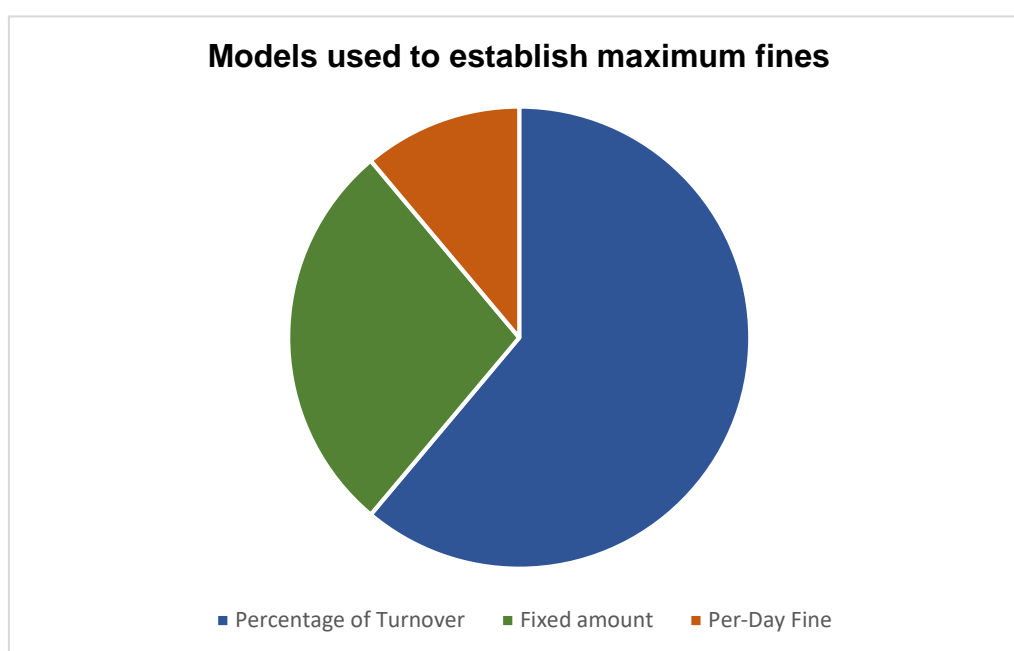
54. Jurisdictions use different methods to calculate the fines imposed on companies and to determine the maximum amount. The survey reveals that there are three main methods used to establish the maximum level of fines:
 - (a) Percentage of the infringing undertaking's turnover.
 - (b) Fixed fines.
 - (c) Per-day fines.
55. Fines are typically a percentage of an undertaking's turnover. The majority of NCAs use the total turnover (those of Germany, Bulgaria, the Czech Republic, Denmark²⁸, Finland, Italy, Slovenia, Spain or Zambia), but other jurisdictions use the local national turnover (Portugal and Turkey). The exact percentage also varies. The most common one is 10%²⁹ of the undertaking's turnover (Germany, Bulgaria, the Czech Republic, Denmark, Finland, Portugal, Slovenia, Spain or Zambia). Other jurisdictions have established lower rates, such as Italy (1%) or Turkey (0,1%).
56. Some NCAs determine the maximum level of fines on the basis of a fixed amount (Brazil, Colombia, Estonia, Japan and Taiwan). These fixed amounts

²⁸ In theory it is possible to impose fines up to 10% of the company's yearly revenue under the Danish Competition Act. In practice, the DCCA has imposed fines of DKK 4 million (USD 599,628) to each undertaking involved in a case of acquisition of joint control and DKK 6 million (USD 899,442) in a case of acquisition of sole control.

²⁹ 10% is the percentage used in the EU as established by the EU Merger Regulation (EC) 139/2004.

range between JPY 2 million (c. USD 18,345) in Japan to around USD 23 million in Colombia. In Canada and in the US, the maximum level of fines is determined on a per-day basis (CAD 10,000 (c. USD 7,536) in Canada and USD 42,520 in the US), for each day during which the infringement is committed.

57. Some jurisdictions also impose fines on individuals. In these cases, the maximum fine is a fixed amount, which differs depending on the jurisdiction: EUR 1.5 million (c. USD 1.68 million) in France, BRL 60 million (c. USD 11.315 million) in Brazil, EUR 400,000 (c. USD 447,760) in Estonia, CZK 10 million (c. USD 436,013) in the Czech Republic, EUR 100,000 (c. USD 111,940) in Germany, EUR 60,000 (c. USD 67,164) in Spain and EUR 10,000 (c. USD 11,194) in Slovenia.



Source: NCA responses to survey

Factors considered when determining level of fines

58. When calculating the amount of the fine, NCAs usually take different factors into consideration, including both aggravating and mitigating factors. In many jurisdictions, fines have previously been imposed by the NCA on a discretionary basis. However, in recent years, NCAs have tried to establish objective criteria for the application of fines due to the breach of the standstill obligation.
59. Most EU member states participating in the Survey (the Czech Republic, Bulgaria, Denmark, Estonia, France, Germany, Italy, Portugal, Slovenia, Spain and Sweden) use a methodology whereby the “base fine” is calculated as the proportion (%) of the revenue related to the infringement obtained in the preceding financial year, determined according to the gravity of the

infringement. The figure can then be adjusted in light of any aggravating and/or mitigating factors. The maximum fine limit would not generally exceed 10% of the aggregate turnover of the infringing company. However, some jurisdictions also consider additional factors. The NCAs of Germany and Poland, for instance, consider the financial situation of the undertaking in question, while the Spanish CNMC considers the market share of the undertaking. The NCAs of Spain and Portugal consider the profits obtained by the undertaking as a result of the infringement.

60. Furthermore, in Germany, the regulatory fine will be calculated so that it exceeds the purported financial benefit that could be obtained by the undertaking as a result of the offence. Similarly, in Bulgaria, the amount of the fine is calculated so as not to be less than the fee which should have been paid if the merger had been notified and cleared before implementation.
61. Non-European jurisdictions participating in the survey, with mandatory pre-merger notification systems, consider similar factors when determining the amount of fines, including aggravating and mitigating factors along with the benefit to the violator and harm to the public (such as in Brazil, Colombia, Japan, Taiwan, South Africa and the US). Moreover, in Brazil, CADE has issued a Resolution³⁰ establishing objective criteria to determine fines, with a base fine of BRL 60,000 (c. USD 15,213) and aggravating and mitigating circumstances determining the final value. Turkey is the only exception, as fines are determined by a fixed rate, taking no consideration of aggravating or mitigating factors.

Infringements of the laws on anticompetitive horizontal agreements

62. Some pre-closing conduct may be considered as Gun Jumping, such as the coordination of pricing or the exchange of information which can also be addressed as an infringement of the laws on anticompetitive horizontal agreements (antitrust law).
63. The importance of antitrust law in this context relies on the fact that it continues to apply after a merger clearance is obtained. By contrast, Gun Jumping cannot occur after a merger clearance is obtained. Moreover, the fines for the infringement of the laws on anticompetitive horizontal agreements tend to be higher than those for Gun Jumping.
64. Most national jurisdictions contemplate the possibility of applying antitrust law in addition to, or instead of, the merger control regime. However, only a few NCAs have faced this possibility in practice. Indeed, the Survey results have

³⁰ See CADE's [Resolution nº 24](#) (not available in English).

revealed that NCAs in just six out of 25 jurisdictions (including Australia, Colombia, Germany, Sweden and the US) have dealt with this issue. In particular:

- (a) In Germany, the case in question took place in 2012 and was related to an anticompetitive joint venture of suppliers of rolled asphalt.³¹
- (b) The Swedish Competition Authority noted that it was running an antitrust investigation for the alleged anticompetitive conduct of two bus travel companies. The authority found that the two travel companies engaged in the coordination of prices, discounts and cancelled tours. Both companies attempted to justify their actions by claiming that they had been part of an ongoing process of merging their companies. Neither the authority nor the Court accepted their argument and defined their conducts as an infringement of both the merger control regime and the rules prohibiting anticompetitive horizontal agreements.
- (c) In the US, a Gun Jumping violation occurred in 2014 in relation to the acquisition by Flakeboard of particleboard mills and medium density fibreboard from SierraPine. In this case, the merging parties closed down a mill which belonged to SierraPine ahead of the US DoJ clearing the merger. The DoJ considered this case as a Gun Jumping violation and an infringement of the laws on anticompetitive horizontal agreements, requiring the merging parties to pay an administrative penalty.
- (d) In Australia, Cryosite Limited signed an agreement in June 2017 to sell some of its assets to Cell Care. This agreement contained a clause that required Cryosite to refer all customer enquiries to Cell Care before the transaction was approved. The Federal Court considered this pre-closing conduct to be both a Gun Jumping violation and a cartel, ordering Cryosite to pay AUD 1.05 million (USD 805,455) in penalties.³²

65. By definition, enforcement against Gun Jumping is only possible in regimes with mandatory pre-merger notification control and with standstill obligations. However, some jurisdictions with voluntary regimes contemplate the possibility of imposing measures preventing integration before giving clearance, as is the case of the ACCC which can bring court action seeking an injunction if a merger that raises competitive concerns is not notified in advanced or may seek orders for divestiture, refund of purchase monies, and penalties if the merger is already completed.

³¹ See the [final report](#) on the investigation of the rolled asphalt sector.

³² See ACCC press release, 13 February 2019: [Cryosite to pay \\$1.05m for 'gun jumping' cartel conduct](#).

66. Furthermore, conduct that violates pre-closing measures can also be considered to be an infringement of the laws on anticompetitive horizontal agreements.

Ability to unwind a merger

67. In most jurisdictions, NCAs have the ability to unwind a merger that was implemented prior to notification and/or obtaining a clearance. From the 25 NCAs which responded to the Survey, only seven do not have the powers to unwind the merger (including those of Australia, Finland, Italy, Japan, Mauritius, New Zealand and Panama).
68. Regarding the five countries that operate under a voluntary system, the NCAs of the UK and Mauritius can order the unwinding of a transaction. Moreover, in Australia and New Zealand, the NCAs can unwind the transaction indirectly by applying to the court. The rationale behind including this option in voluntary systems is that it allows the NCAs to restore the market position to what it would have been had the integration not taken place, in order to avoid prejudicing the investigation into the merger and any possible remedies which could be required in due course if it is found that a merger may lessen competition.
69. On the other hand, most of the jurisdictions where NCAs cannot unilaterally unwind a merger that violates the merger control rules can alternatively apply to the court, as is the case in Australia, Finland and New Zealand. However, such an option has hardly been applied in practice.

Statute of limitations

70. All the NCAs that operate under a mandatory pre-merger notification regime reported that they have a statute of limitations to sanctions for gun jumping violations, except for the NCAs of Estonia, Italy, South Africa and Sweden.

Detection of Gun Jumping

71. The Survey reveals that most authorities use a wide range of tools to detect gun jumping, including proactive screening, third party complaints and findings obtained during the investigation of the transaction.³³ All three options have been used to detect violations at least once in the cases reported by the NCAs.
72. One of the most common methods for identifying these infringements is from submissions provided by the merging parties themselves. In many cases, merging parties self-report Gun Jumping, because they discovered that they

³³ There are some exceptions such as Germany, where proactive screening is not considered as an option to detect any gun-jumping violation.

failed to notify after closing the transaction, or because this can lead to a reduction of the fine in some jurisdictions.

73. From the Gun Jumping cases mentioned in the Survey, around 47% of them were self-reported by the merging parties, 25% of them were reported by third parties, 18% of them were detected during the investigation of the transaction and only 10% through proactive screening carried out by the authority.



Source: NCA responses to survey

74. Some authorities such as the Finnish Competition and Consumer Authority consider that merging parties rarely fail to notify a reportable transaction and that they usually seek advice proactively in unclear cases.

Case studies of sanctions imposed against Gun Jumping in the last five years

75. All jurisdictions with a mandatory pre-merger notification regime have reported Gun Jumping cases in the past five years, except for the NCAs of Bulgaria, Finland and Sweden. Some of the main findings obtained from the reported gun jumping cases by the different jurisdictions are:
- (a) The number of gun jumping cases reported by the NCAs of Brazil, the Czech Republic, Colombia, Denmark, Estonia, Italy, Japan, Portugal, Turkey, Slovenia, Spain, Taiwan, and France has been less than four. Only the NCAs of Brazil, Germany, South Africa, and the US have reported more than four Gun Jumping cases within the last five years.
 - (b) The majority of fines reported by NCAs in this survey were for Type 1 Infringements relating to failures to notify reportable transactions, with only

five cases out of more than 75 reported corresponding to Type 2 Infringements regarding failures to file.

- (c) Most authorities have used fines when sanctioning Gun Jumping cases. These fines are normally imposed on the parties to the transaction, but in some jurisdictions the legal representatives of the merging parties have also been sanctioned. In Colombia, in the case *Laboratorio Internacional de Colombia S.A.S / Grünenthal Colombia S.A. / Gain Capital S.A.S.*, the SIC imposed a fine of USD 1.964 on the legal representatives of the merging parties.
- (d) Most Gun Jumping cases have not been appealed by the merging parties. The Survey reveals that only the NCAs of Czech Republic, Denmark, Slovenia and Spain have faced appeals on sanctioning decisions. In some cases, appeals have led to either a reduction of the fine (Czech Republic and Slovenia) or a complete overturn of the decision (Denmark)³⁴. Other decisions of the NCAs are still under appeal³⁵ and several have been confirmed by the courts.
- (e) The case studies show that NCAs are determined to increase enforcement against Gun Jumping. There has been a stricter approach when facing Gun Jumping in the last five years, which is reflected in the fact that: (i) the amount of fines for Gun Jumping violations has increased significantly, (ii) avoidance schemes are also investigated and sanctioned by competition authorities and (iii) there has been an increase in Gun Jumping cases self-reported by the merging parties in order to avoid higher sanctions.

Type 1 Infringements: breach of mandatory notification obligation

76. **Voluntarily admission of an infringement:** on 26 June 2019, the Danish oil and petrol service station company Circle K Denmark A/S (Circle K) accepted a fine of DKK 6 million (c. USD 899,000) for failure to notify the acquisition of 72 service stations from 12 different lessees in May 2016 following the European Commission's approval in March 2016 of Circle K's acquisition of Dansk Fuel, which constituted Shell's Danish activities. The acquisition of the 72 gas stations was not included in the approval by the European Commission and neither the European Commission nor the DCCA were notified about the acquisitions.

- (a) On 4 October 2018, Circle K proactively contacted the DCCA and notified the acquisition of the 72 gas stations, and the DCCA approved the

³⁴ Case EY/KMPG. For further information see the preliminary ruling by COJ: Ernst & Young P/S v Konkurrencerådet / C-633/16

³⁵ Among other case [SNC/DC/074/16 CONSENUR](#) of the Spanish Competition Authority

acquisition without remedies on 22 October 2018. However, the Danish State Prosecutor for Serious Economic and International Crime gave Circle K notice, on May 2019, of a DKK 6 million (USD 899,000) fine for having breached the notification requirements and the standstill obligation.

(b) The amount of the fine was calculated taking into consideration the gravity and the duration of the infringement as well as the turnover of the company. the fact that Circle K proactively contacted the DCCA was judged as a mitigating factor.

77. **Sanctions against ‘avoidance’ schemes:** In June 2019 the US agencies announced a violation by Canon Inc. (**Canon**) and Toshiba Corporation (**Toshiba**) and a fine of USD 5 million in total (USD 2.5 million for each of the merging parties) for deliberately structuring Canon’s acquisition of Toshiba Medical Systems Corporation (**TMSC**) in order to avoid pre-merger notification and the waiting period requirements in violation of the Hart-Scott-Rodino Act (**HSR Act**). Toshiba decided to sell TMSC to Canon in order to improve Toshiba’s financial difficulties suffered during 2015 by recognizing the gains of the sale before March 31, 2016 – the end of its 2015 fiscal year. However, this deadline was not long enough to fulfil the HSR waiting period and, according to the complaint, the merging parties devised a scheme to avoid the HSR Act requirements. Under the HSR Act the acquisition of voting securities, valued over certain thresholds, has to be notified while the acquisition of non-voting securities or options, regardless of value, does not have to be notified. In order to avoid pre-merger notification and the waiting period requirements, the merging parties attempted to take advantage of this distinction between voting and non-voting securities by developing a multi-step acquisition process:

(a) First, Toshiba created new classes of voting and non-voting securities, as well as options convertible into ordinary shares, in TMSC.

(b) Second, on March 17, 2016, Toshiba sold Canon the TMSC non-voting securities and options for USD 6.1 billion—a dollar amount that exceeded the jurisdictional threshold, but a transaction that nonetheless was not reportable because it was an acquisition of non-voting securities. Toshiba transferred all of the TMSC voting securities to a newly created special purpose holding company (MS Holding) in exchange for a nominal payment of USD 900—an amount below the threshold.

(c) Third, on April 26, Canon and MS Holding filed an HSR notification for Canon’s exercise of the options to acquire TMSC’s ordinary shares.

78. According to the complaint³⁶, this complex transaction structure had no other purpose than to avoid the HSR notification and waiting period requirements in order to complete the transaction within a certain period of time and for this reason both merging parties faced a combined fine of USD 5 million. This case provides an important reminder to merging parties that competition authorities will also investigate and act against any avoidance scheme.³⁷

Type 2 Infringements: breaches of standstill obligation

79. **Settlement agreement for breaching the standstill obligation:** in Brazil, in December 2019, CADE approved a settlement agreement under which IBM was fined a record BRL 57 million (USD 14.45 million) for closing the purchase of Red Hat Inc in July 2019, before CADE had concluded its review. The merging parties announced that they would resolve this with a temporary carve-out, and act as independent entities until clearance was obtained. CADE did not accept this proposed approach and ultimately imposed a fine on the merging parties representing a 5% discount from the maximum penalty in Brazil of BRL 60 million (USD 15.21 million) due to the fact that the merging parties voluntarily filed the settlement agreement. The Lead Commissioner stated that the fine would have been much higher had it not been for the BRL 60 million (USD 15.21 million) limit. CADE's Tribunal suggested increasing fine limits for high-value transactions.
80. **Implementation of two transactions before receiving clearance:**³⁸ In France, in November 2016, the Autorité de la Concurrence fined jointly both Altice Luxembourg and SFR Group EUR 80 million for having breached the standstill obligation in two mergers, notified in 2014, in the electronic communications sector: namely, the acquisition of SFR by Altice subsidiary Numericable (cleared on 30 October 2014); and the acquisition of OTL (operating the brand Virgin Mobile in France) by Altice subsidiary Numericable (cleared on 27 November 2014). The Autorité found that Altice implemented these transactions prior to clearance by exercising decisive influence over the targets and accessing commercially sensitive information from the targets. These findings were the results of the dawn-raids carried on the premises of Numericable, SFR and OTL after competitors of the parties alerted the Autorité of the potential behaviour. In particular, the Autorité identified the following behaviour as infringing the standstill obligation:

³⁶ FTC press release, 10 June 2019: '[Canon Inc., Toshiba Corporation Agree to Pay \\$5 Million for Violating Federal Antitrust Laws](#)'

³⁷ As noted above previously at footnote 5, this acquisition also resulted in fines by the European Commission, and the Chinese Ministry of Commerce, as well as a public announcement by the Japan Fair Trade Commission that the arrangements may be in violation of antitrust law.

³⁸ Autorité de la concurrence press release, 22 November 2016: '[8 November 2016: Gun jumping/Acquisition of SFR and Virgin Mobile by Numericable](#)'.

- (a) Intervention by Altice in the operational management of SFR and OTL by validating a number of strategic decisions such as (i) the renegotiation of a major mobile network sharing agreement between SFR and another operator; (ii) intervention in SFR's sales policy, in particular in its pricing policy for its high-speed broadband Internet access offering; and (iii) strategic decisions on behalf of OTL concerning agreements to host OTL's mobile customers with network operators, among others.
- (b) Strategic coordination between Altice and SFR including (i) coordination during the takeover of the OTL group; and (ii) preparation of the joint launch under the SFR brand of a new range of high-speed broadband offers using the Numericable cable network instead of SFR's own infrastructure. It took several months of intense preparation on both sides to launch the "Box TV Fibre" offer on 18 November 2014, just a few days after the Autorité had cleared the merger.
- (c) Exchange of strategic information before the merger was cleared, including of individualised data, SFR's recent commercial performance and forecasts for the coming months, and a system of weekly reporting of commercially sensitive information allowing Altice to closely monitor OTL's economic performance.

Infringements of rules in voluntary regimes

81. In the UK, the CMA has imposed several fines against breaches of interim measures by merging parties:
- (a) In 2018, the UK's CMA imposed a fine of GBP 100,000 (c. USD 133,630) on Electro Rent for failing to comply with interim measures.³⁹ In 2019, an additional fine of GBP 200,000 (c. USD 255,360) was imposed for a different breach related to the same interim measure.⁴⁰
 - (b) Over the course of 2019, the CMA sanctioned four additional breaches of interim measures: in January, Ausurus Group was fined a total GBP 300,000 (c. USD 383,040) for two breaches of interim measures.⁴¹ In

³⁹ Notice of penalty pursuant to section 94A of the Enterprise Act 2002 – addressed to Electro Rent Corporation, 11 June 2018: [Completed acquisition by Electro Rent Corporation of Test Equipment Asset Management Limited and Microlease Inc.](#)

⁴⁰ Notice of penalty pursuant to section 94A of the Enterprise Act 2002 – addressed to Electro Rent Corporation, 12 February 2019: [Completed acquisition by Electro Rent Corporation of Test Equipment Asset Management Limited and Microlease Inc.](#)

⁴¹ Decision to impose a penalty on Ausurus Group Ltd and European Metal Recycling Ltd under section 94A of the Enterprise Act 2002, 10 January 2019: [Completed acquisition by Ausurus Group Ltd through its subsidiary European Metal Recycling Limited of Metal & Waste Recycling Limited.](#)

March, Vanilla Group was fined GBP 120,000 (c. USD 153,216).⁴² In June, Nicholls Limited was fined a total of GBP 146,000 (USD 186,413) for three breaches.⁴³ In September, PayPal was fined with a then record fine of GBP 250,000 (c. USD 319,200) for breaching one interim measure by promoting the target's business to potential customers in the UK.⁴⁴

82. In Australia, the Federal Court ordered Cryosite to pay a fine of AUD 1.05 million (USD 730,000) in February 2019 for engaging in cartel conduct in its asset sale agreement with Cell Care Australia Pty Ltd.⁴⁵
83. Finally, between 2018 and 2019, the New Zealand Commerce Commission identified five cartel infringements. Four of these cases took place in 2018, *Platinum Equity LLC / Staples / OfficeMax Holdings Limited Case*,⁴⁶ *Vero Insurance New Zealand Limited / Tower Limited Case*,⁴⁷ *First Gas Limited / GasNet Case Limited and Fulton Hogan Limited / Stevenson Group Limited Case*,⁴⁸ and one in 2019, *David Ferrier / Cavalier Wool Holdings Case*.⁴⁹ The High Court ordered the divestment of the respective shares and assets in all of them and imposed a fine of NZD 3.4 million (USD 2.24 million) on First Gas.⁵⁰

Statistics

84. In relation to Type 1 Infringements imposed for not notifying a reportable transaction, ten NCAs (those of Canada, Czech Republic, Estonia, Germany, Panama, Portugal, Slovenia, Spain, South Africa and France) reported that they were uncertain as to whether the total annual number of sanctions was increasing or decreasing compared to five years ago. Three NCAs (including those of Japan, Taiwan and Turkey) reported that this number had been constant, while seven NCAs (those of Australia, Bulgaria, Finland, Mauritius, New Zealand, Sweden and the UK) did not answer this question. Only three NCAs (including those of Brazil, Denmark and the US) reported that the total

⁴² Notice of penalty pursuant to section 94A of the Enterprise Act 2002 – addressed to JLA New Equityco Limited and Vanilla Group Limited: [Completed acquisition by Vanilla Group Ltd \(JLA\) of Washstation Ltd.](#)

⁴³ Notice of penalty pursuant to section 94A of the Enterprise Act 2002 – addressed to Nicholls' (Fuel Oils) Limited, 16 July 2019: [Completed acquisition by Nicholls' \(Fuel Oils\) Limited of the oil distribution business of DCC Energy Limited in Northern Ireland.](#)

⁴⁴ Notice of penalty pursuant to section 94A of the Enterprise Act 2002 – addressed to PayPal Holdings, Inc., PayPal (Europe) Sarl et Cie SCA and PayPal SE, 24 September 2019: [Completed acquisition by PayPal Holdings, Inc. of iZettle AB.](#)

⁴⁵ ACCC press release, 13 February 2019: [Cryosite to pay \\$1.05m for 'gun jumping' cartel conduct.](#)

⁴⁶ Commerce Commission of New Zealand press release, 19 April 2018: [Platinum to divest Winc NZ to address competition concerns in office products market.](#)

⁴⁷ Commerce Commission of New Zealand press release, 26 July 2017: [Commission declines Vero Insurance clearance to acquire Tower.](#)

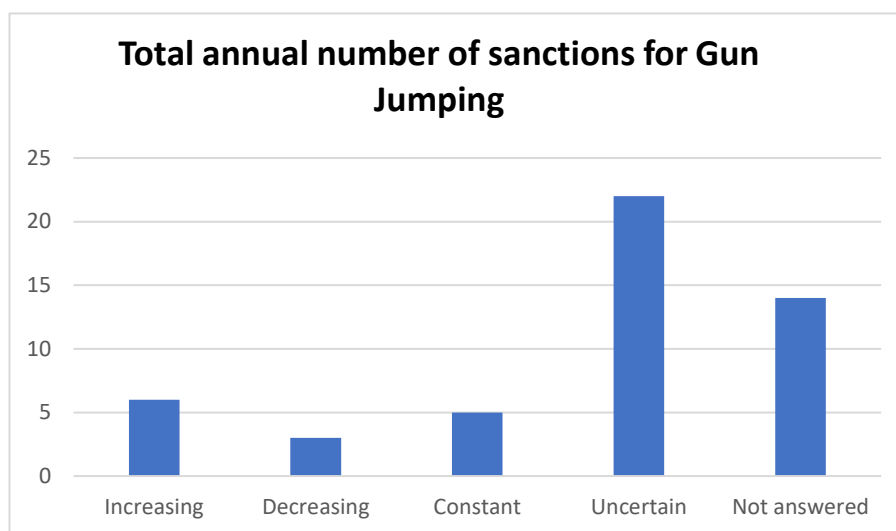
⁴⁸ Commerce Commission of New Zealand press release, 15 October 2018: [Commission closes investigation into Fulton Hogan's acquisition of Stevenson's construction materials business.](#)

⁴⁹ Commerce Commission of New Zealand press release, 16 May 2019: [Commission closes investigation into David Ferrier's acquisition of stake in Cavalier.](#)

⁵⁰ Commerce Commission of New Zealand press release, 22 February 2019: [First Gas to pay \\$3.4 million for anti-competitive conduct.](#)

number of sanctions was increasing, and only two, those of Colombia and Italy, reported that the total number of sanctions was decreasing.

85. In relation to sanctions imposed for Type 2 Infringements breaching the standstill obligation, twelve NCAs (those of Brazil, Canada, Czech Republic, Estonia, Germany, Panama, Portugal, Slovenia, Spain, South Africa, Turkey and France) reported that they were uncertain as to whether the total annual number of sanctions was increasing or decreasing compared to five years ago.



Source: NCA responses to survey

86. Three NCAs (including those of Japan, Taiwan, and the US) reported that this number had been constant. Seven NCAs (those of Australia, Bulgaria, Finland, Italy, Mauritius and Sweden) did not answer this question. Three NCAs (including those of Denmark, New Zealand and the UK) reported that the total number of sanctions was increasing. Only one NCA, that of Colombia, reported that the total number of sanctions was decreasing.

PART 3: REMEDY VIOLATIONS

Oversight of remedies' implementation

87. All NCAs can impose remedies as a condition to approve a merger and can oversee the implementation of these remedies (whether through themselves or third party). Some NCAs appoint trustees to monitor compliance with technical details and to ensure the practical viability of remedies, with some doing so at least partly on the basis that trustees are better equipped than the relevant authority to identify any breaches of commitments:

- (a) In Bulgaria, Colombia, the Czech Republic, Estonia, Japan, Mauritius, Slovenia, South Africa, Spain and Taiwan, the implementation of remedies is mainly overseen by the competition authority.
 - (b) In Brazil, Finland, France, Germany, Sweden and Portugal, the implementation of remedies is overseen by a trustee.
 - (c) In Australia, Denmark, Italy, New Zealand, Panama, Turkey, the UK and the US, the implementation of the remedies can (depending on the case) be overseen by both the relevant NCA and a third party (eg divestment trustees).
88. Merging parties are normally required to submit regular reports to the NCA about the implementation of the commitments. However, NCAs or third parties can also typically collect information on their own initiative and in some jurisdictions, such as Colombia or Spain, also through dawn raids.
89. Third parties appointed by the NCA are normally independent and impartial actors that monitor and supervise the implementation of remedies, but do not have decision-making powers. When violations in the established commitments are discovered, trustees will typically report back to the NCA, who will make the ultimate decision on whether to act and/or impose fines. Some NCAs such as the Bundeskartellamt of Germany distinguish between monitoring and divestiture trustees, depending on the type of remedy imposed.

Sanctions against Remedy Violations

90. Most NCAs that responded to the survey reported that they had the ability to directly take actions or impose fines if a remedy violation is discovered. However, there are some exceptions, such as Australia, Mauritius, New Zealand, Finland, and the US where the NCA must apply to the court which will be in charge of taking any actions or imposing fines. Panama is the only case in which no actions can be taken against Remedy Violations (either by the NCA or by a court).
91. The survey reveals that the most common actions taken, either directly by the NCA or a court, to sanction Remedy Violations are: (i) fines, (ii) directions to unwind the merger, (iii) the modification of remedies or application of new remedies or (iv) the review of the merger decision. Only in Estonia can the NCA order the detention of any person involved for up to thirty calendar days. Furthermore, in some jurisdictions such as Germany, the actions taken by the NCA depend on the type of remedy the company is infringing.

Maximum fines

92. Most NCAs contemplate the possibility of imposing administrative fines. In these cases, the maximum fine is normally determined by law. There are two primary methods used to calculate the fines (similar to those used in both Procedural Violations and Gun Jumping):
- (a) Percentage of the infringing undertaking's turnover: in most jurisdictions, fines can be up to 10% of the total turnover of the company (this is the case in Bulgaria, the Czech Republic, Denmark, Finland, Italy, Portugal, Slovenia, South Africa and Turkey). Other jurisdictions use lower rates and the local turnover of the company instead of the total turnover. This is the case in France, where maximum fines can be up to 5% of the turnover of the company obtained in France.
 - (b) Fixed fines: in other jurisdictions a fixed amount is used to sanction undertakings involved in remedy violations. This is the case in Estonia (EUR 400.000 (c. USD 447,760)), New Zealand (NZD 500.000 (c. USD 329,550)), Taiwan (NT\$ 50 million (c. USD 1,617,861)), and the US (up to USD 42,530 per day). This is the most common method for calculating fines on individuals. The NCAs of Colombia, the Czech Republic, Estonia, France, Slovenia and Turkey have the statutory power to fine individuals for remedy violations.
93. There are other jurisdictions, such as Brazil, where there is no maximum fine limit established by law for remedy violations. In Brazil, for example, the amount is established in the final decision or in the commitments imposed on the merging parties as a condition for clearance.

Factors considered when determining level of fines

94. The factors considered when calculating the level of fines are similar to those considered in Gun Jumping with both mitigating and aggravating factors considered. Some of the most common factors are: (i) the gravity of the infringement, (ii) the duration of the infringement, (iii) the degree of involvement in the infringement, (iv) the circumstances in which the infringement was committed, and (v) the benefits obtained as a result of the infringement.

Proceedings to sanction a remedy violation

95. As mentioned above, some NCAs can apply to a court for a mandatory order requiring the enterprise to fulfil the remedies and to take actions if an infringement of the remedies is discovered. This is the case in Australia, Brazil, Finland, France, Italy, Mauritius, New Zealand, the UK, and the US.

96. Some NCAs cannot apply to the court when an infringement is found, or they enforce legal codes which do not contain specific provisions for remedy violations. This is the case in Bulgaria, Colombia, the Czech Republic, Denmark, Estonia, Germany, Japan, Slovenia, South Africa, Sweden, Portugal, Taiwan, and Turkey.

Case studies of sanctions imposed against Remedy Violations within the last five years

97. Only a small minority of NCAs have imposed sanctions or taken actions against Remedy Violations within the last five years: Brazil, France, Italy, South Africa, Spain and the US.
98. **Brazil's CADE** reported one case in 2018, *Petróleo Brasileiro S.A. / White Martins Gases Case*, in which the merging parties were sanctioned for violating behavioural remedies after their non-compliance was flagged by the monitoring trustee assigned to oversee the implementation of the remedies imposed to approve the merger. CADE did not impose a fine but decided that the trustee should broaden the scope of its monitoring.
99. The **Autorité de la concurrence of France** reported three cases in the last five years:
- (a) In 2016, SFR and Altice were fined EUR 15 million (c. USD 16.61 million) for violating behavioural remedies imposed as a condition for approving the merger.
 - (b) In 2017, SFR and Altice were fined again for violating behavioural remedies, in this case EUR 40 million (c. USD 45.20 million), after receiving a complaint from a competitor.
 - (c) In 2018, Fnac and Darty were fined EUR 20 million (c. USD 23.63 million) for a violation of structural remedies. All three fines have been unsuccessfully appealed by the merging parties.
100. **Italy** reported one Remedy Violation case, in 2016. Clearance of the merger between two maritime transport companies, Moby S.p.A and Toremar Ferries, was conditional on remedies designed to facilitate competitors' entry to the most profitable routes the merging parties operated. The merging parties had to (i) release slots and (ii) exchange, at the request of competitors, temporarily available adjacent slots. The violation of these remedies was discovered through the merging parties' own submissions on their implementation of the remedies and led to a fine of EUR 374,000 (c. USD 414,726). The case was appealed by the merging parties, but the appeal is still ongoing.

101. **South Africa** has reported three Remedy Violation cases in the last five years.
- (a) In 2014, the Competition Commission of South Africa found that Sibanye Gold Limited and Newshelf were not meeting the employment requirements imposed as a condition for clearing their merger.
 - (b) In 2019, two more violations were detected by the Competition Commission. One of them involved Holcim Limited and LaFarge S.A, which infringed structural remedies imposed by the authority. The other one involved Coca-Cola Beverages Africa Limited, which had infringed employment requirements.
102. **Spain's CNMC** has reported two Remedy Violation cases in the last five years.
- (a) In 2019, CNMC fined Telefónica EUR 1.5 million (c. USD 1.68 million) for violating one of the conditions for clearing its merger with DTS. The CNMC found that Telefónica was incorrectly allocating the fixed costs that determine the price it charged its rivals for the “Movistar el Partidazo” Channel.⁵¹
 - (b) In 2019 CNMC also initiated proceedings against an oil company, REPSOL, for violating one of the conditions imposed as a condition for clearing its acquisition of Petrocat. This investigation is currently suspended and as at the date of this report, is pending its final resolution.
103. Finally, the US agencies have brought four sanctions in the past five years for Remedy Violations:
- (a) In 2015, Continental AG and Veyance Technologies were required by a court to complete a divestiture within a specified date, having missed two previous deadlines. Failure to have completed the divestiture by that specified date would have resulted in a fine of USD 30,000 for every day the merging parties went without completing the divestment. In calculating this figure, the DoJ considered the profits accrued by the acquirer from retaining an asset it had been ordered to divest.⁵²
 - (b) In 2015, further to a civil investigation into the legality of a joint venture involving Twin America LLC (see paragraph 31 above). In addition to ordering a divestment of assets, a court ordered the defendants to pay USD 7.5 million they were judged to have obtained from the operation of an illegal joint venture.

⁵¹ CNMC press release, 22 October 2019: [The CNMC fines Telefónica 1.5 million euros for violating one of the conditions of its merger with DTS.](#)

⁵² [United States v. Continental AG and Veyance Technologies, Inc., 1:14-cv-02087 \(D.D.C. filed June 8, 2015\)](#)

- (c) In 2016, Star Pipe Products, Ltd., agreed to pay USD 120,000 in civil penalties to resolve FTC allegations that it violated a 2012 Commission order prohibiting it from sharing competitively sensitive information. It also agreed to an order modification that adds training and notification obligations to prevent additional violations.⁵³
- (d) In 2017, General Electric and Baker Hughes failed to complete divestiture within the specified time period and were fined USD 855,000.

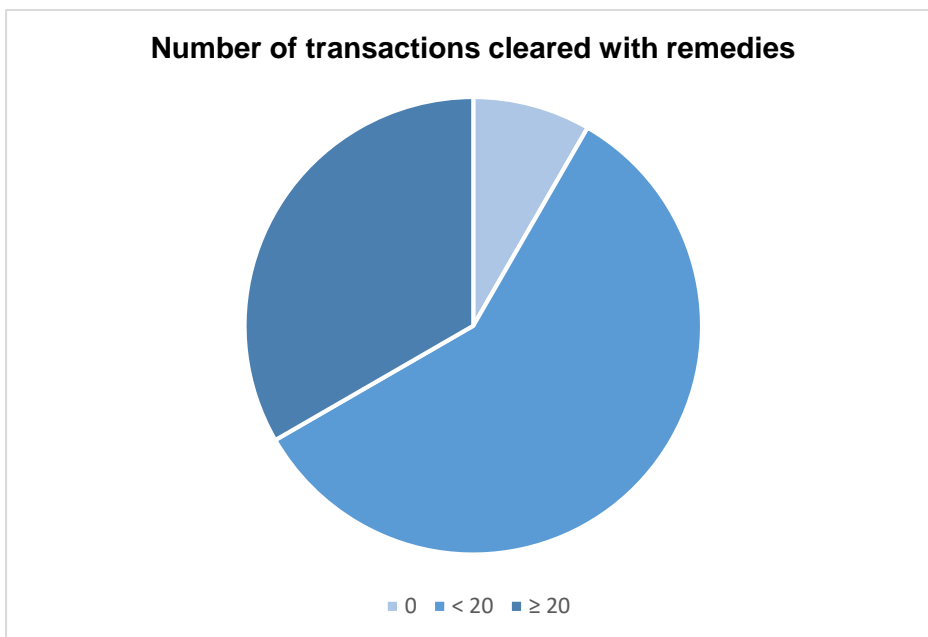
Statistics

Total number of mergers in which remedies were imposed as a condition for approval in the last five years

104. There are considerable differences between jurisdictions in the prevalence of remedies. The Survey revealed that in the last five years from 2015 to 2019, the ACCC and Bulgaria's CPC were the only NCAs not to impose remedies as a condition for clearance. In the remaining jurisdictions, the number of transactions cleared with remedies was:⁵⁴
- (a) Fewer than twenty: in Panama (3), Germany (3), Sweden (3), Mauritius (4), Estonia (4), Portugal (4), New Zealand (5), the Czech Republic (6), Slovenia (5), Denmark (7), Taiwan (6), Finland (11), Turkey (11), Italy (17) and Spain (18).
- (b) Twenty or more: in Colombia (20), the UK (55), Japan (27), Brazil (28), France (34), the US (140) and South Africa (204).

⁵³ US FTC press release, 25 April 2016: [Star Pipe Products, Ltd. Agrees to \\$120,000 Civil Penalty and New Obligations to Settle Charges that It Violated FTC Order](#).

⁵⁴ Note that certain jurisdictions (for example, the UK) have provided these statistics on a financial year (ie April-March) rather than calendar year basis.



Source: NCA responses to survey

Total annual number of sanctions for remedy violations

105. Statistics related to sanctions for Remedy Violations are not easy to obtain due to the lack of data, as only four jurisdictions have imposed any kind of sanction in the past five years. In general terms, the Survey reveals that only in Brazil is the total number of sanctions for remedy violations decreasing compared to five years ago, while in France, South Africa and the US, the total number of sanctions has remained constant.

CONCLUDING REMARKS

106. Enforcing against Procedural Infringements is essential to ensure that parties to a merger investigation take compliance seriously and do not prejudice NCAs’ ability to fulfil their statutory obligations to conduct rigorous and robust merger investigations for the benefit of consumers.

107. The majority of NCAs that responded to the Survey typically sanction Procedural Infringements through fines and ‘soft’ enforcement actions such as stopping statutory clocks and revoking clearance decisions. However, there are important differences in the criteria for deciding whether enforcement action should be pursued and if so, the severity of sanctions, as well as the frequency with which sanctions are used.

108. It is clear that NCAs can and will enforce against Procedural Infringements regardless of whether the breaches are deliberate – as opposed to being due to human error – and regardless also of the substantive assessment of the

merger in question. Enforcement of Procedural Infringements is nevertheless occurring against a backdrop of NCAs arguably becoming more interventionist in their substantive assessments, particularly in areas of perceived historic underenforcement such as dynamic markets. What emerges, then, is a picture of NCAs toughening their stance across the board. This report reinforces the need for companies to be prepared not only to have their mergers assessed, but also to have good quality control procedures to ensure they are engaging with authorities in a thorough, prompt and transparent way.

109. Given the potential impact of Procedural Infringements and the importance of creating effective deterrents, NCAs may consider:
 - (a) Sharing experiences and insights on the effectiveness of certain sanctions as deterrents (including for situations where infringements are the result of negligence rather than deliberate actions).
 - (b) Collaborating in the assessment and enforcement of Procedural Infringements with multi-jurisdictional implications.

ANNEX: ICN SURVEY

ICN Merger Working Group

Surveys on procedural infringements, gun jumping and remedy violations

Note: this survey comprises three separate questionnaires on the following merger control-related topics: (i) procedural infringements; (ii) gun jumping; and (iii) remedy violations. Please complete each applicable questionnaire, for your jurisdiction. The meaning of the relevant concepts is explained in the first question or in the footnotes of each of the three questionnaires.

Please note that these questionnaires do not seek confidential information; please provide only non-confidential information. Please complete these surveys and send to DL-Mergers-International@cma.gov.uk and mergers@cnmc.es by close of business **Friday 29 November 2019**.

Please state your name, position, email address and the full name of your agency.

Agency name	
Contact name/position	
Contact email	

Regarding your answer to this survey, would you agree to MWG co-chairs disclosing your authority's name on the report presented at ICN events, ICN website, etc.?

a. Yes

b. No

c. Other

Other (please explain)	
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QUESTIONNAIRE FOR PROCEDURAL INFRINGEMENTS

1. Please specify and further describe the types of conduct which, in your jurisdiction, would comprise a breach or violation of merger control proceedings under your domestic merger control legislation or other statutory instrument / guidelines (a 'Procedural Infringement').

Types of conduct	Does the conduct constitute a Procedural Infringement in your jurisdiction? (Specify Y or N)	Scope/example of conduct
Provision of false, incomplete or misleading information		<p><i>[Please include any relevant additional detail in this column eg if your jurisdiction distinguishes between intentional and inadvertent Procedural Infringements; what type of information is considered 'misleading', etc.</i></p> <p><i>To the extent these types of conduct are applicable to only one of (rather than both) merging parties and third parties, please specify this.]</i></p>
Failure to comply with requirements to give evidence (eg internal documents)		
Obstruction by (eg merging parties) of others' (eg third parties') compliance with requirements to give evidence		
Failure to comply with requirements to provide documents and/or information within a mandated deadline		
Failure to comply with summons (eg to attend compulsory interview)		
Breach of confidentiality obligations		
Other (please identify/describe)		

2. Does your jurisdiction give your agency powers to impose or pursue (in a court of law) sanctions on companies and/or individuals for the obstruction and/or failure to comply with requirements of merger control proceedings?

- a. Yes b. No

If your answer was Yes, please describe what type of sanction(s) you impose:

Type of sanction(s)	<i>Specify:</i> - civil / criminal / both - corporate / individual liability / both; - on just merging parties, or also third parties contacted as part of the merger investigation - other details on scope/nature of sanction(s)
Maximum fine (eg up to proportion of undertaking's turnover) / duration of imprisonment	
How amount of fine/duration of imprisonment is calculated, specifying existence of any discretionary aggravating or mitigating measures that may be considered for the purposes of calculation	
Legislation from which sanction powers above are derived	<i>[Please provide the name of the Act or statutory instrument and a link, if available online and in English]</i>
Any other details	<i>[If your agency has discretion on whether to impose a penalty (eg for first-time offences), please explain this]</i>

If your answer was No, please describe whether your jurisdiction contemplates specific proceedings (eg, court proceedings) to sanction a Procedural Infringement.

Description of proceedings	
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3. Does your jurisdiction include a statute of limitations and/or any other timing restrictions to sanction for a Procedural Infringement?

- a. Yes b. No

If your answer was Yes, please specify the limitation period and when it begins to run.

Details of limitation period / timing restriction	
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4. Does your jurisdiction allow your agency to take any other forms of non-sanction-related recourse action or 'soft enforcement' mechanisms for a Procedural Infringement (for example, 'stop clock' measures to suspend a merger control timetable; share or asset disposal powers; warning letters; 'on notice' procedures; declaration of nullity of clearance decision)?

- a. Yes b. No

If your answer was Yes, please describe the types of recourse actions at your disposal.

Description of other types of recourse actions	
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5. What are the factors you have regard to in your jurisdiction when deciding whether to enforce (through sanctions or other forms of recourse) against a Procedural Infringement?

Description of factors	<i>[Please describe for instance, any consideration given as to intent, length of the infringement, voluntary disclosure of the infringement, cooperation during the investigation, impact on merger investigation, etc, as applicable.]</i>
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Please refer in your answer to any guidelines that address or provide a framework for your jurisdiction’s approach to assessing Procedural Infringements.

If applicable (and available online in English), please provide a link to these guidelines, specifying when they were last updated:

Link	
Last update	

6. Do parties have rights of appeal in relation to an enforcement decision against a Procedural Infringement?
 a. Yes b. No

If your answer was Yes, please describe the appeal rights at parties’ disposal.

Description of appeal rights	
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7. Have you imposed sanctions for Procedural Infringements within the last five years?
 a. Yes b. No

If your answer was Yes, please complete the details requested in the tables below.

Year (2015 to 2019) ⁵⁵	Case (Parties / case number / link to public case page)	Type of Procedural Infringement	How infringement was discovered	Description of sanction(s) imposed	Case appealed (if so, overturned)?
	<i>[Please list all relevant cases for each year]</i>				

8. Please also specify the total number of mergers reviewed in your jurisdiction in each of the last five years.

⁵⁵ For 2019 cases, please include all relevant cases as at 31 October 2019.

Year	Total number of merger reviews conducted
2015	
2016	
2017	
2018	
2019 (as at 31 October 2019)	

9. Is the total annual number of sanctions for Procedural Infringements increasing or decreasing compared to 5 years ago?

- Increasing Decreasing Constant Uncertain

QUESTIONNAIRE FOR GUN JUMPING⁵⁶

1. Does your jurisdiction require the notification, either prior or ex-post, of mergers that meet certain thresholds (“mandatory merger notification” or “ex-ante merger control”)?

a. Yes b. No

2. Does your jurisdiction include a standstill obligation or does your authority have any other type of powers that prohibit putting a merger into effect until it is cleared (“**standstill obligation**”)?

a. Yes b. No

If your answer was Yes, please explain whether your authority has the possibility of allowing the implementation of the merger prior to clearance and whether this decision is published.

Possibility of implementation before clearance?	
Decision published?	

3. What criteria does your authority use to determine if a transaction has been implemented? Please specify the type of actions that would normally meet those criteria.

Criteria to determine the implementation of a transaction	
Actions considered	

4. Does your jurisdiction include any kind of sanction for the implementation of a transaction without prior notification where notification is mandatory?

a. Yes b. No

If your answer was Yes, please describe what type of sanction(s) you impose:

Type of sanction(s)	<i>Specify:</i> - civil / criminal / both - corporate / individual liability / both; - on just merging parties, or also third parties contacted as part of the merger investigation - other details on scope/nature of sanction(s)
Maximum fine (eg, up to proportion of undertaking's turnover) / duration of imprisonment	

⁵⁶ For the purposes of this questionnaire the concept of gun jumping is a broad one and includes when the merging parties fail to observe mandatory pre-merger notification requirements and/or fail to observe the waiting period requirements under applicable merger control laws, so that they execute the transaction after having filed it, but before they have obtained the merger clearance.

How amount of fine/duration of imprisonment is calculated, specifying existence of any discretionary aggravating or mitigating measures that may be considered for the purposes of calculation	
Legislation from which sanction powers above are derived	<i>[Please provide the name of the Act or statutory instrument and a link, if available online and in English]</i>
Any other details	

5. Does your jurisdiction include any kind of sanction for implementing a merger prior to obtaining clearance?

- a. Yes b. No

If your answer was Yes, please describe what type of sanction(s) you impose:

Type of sanction(s)	<i>Specify:</i> - civil / criminal / both - corporate / individual liability / both; - on just merging parties, or also third parties contacted as part of the merger investigation - other details on scope/nature of sanction(s)
Maximum fine (eg, up to proportion of undertaking's turnover) / duration of imprisonment	
How amount of fine/duration of imprisonment is calculated, specifying existence of any discretionary aggravating or mitigating measures that may be considered for the purposes of calculation	
Legislation from which sanction powers above are derived	<i>[Please provide the name of the Act or statutory instrument and a link, if available online and in English]</i>
Any other details	

6. Has your authority ever considered that a gun jumping violation (e.g. the violation of the standstill obligation) led to an infringement of the laws on anticompetitive horizontal agreements?

- a. Yes b. No

If your answer was Yes, please briefly describe the anticompetitive practice

Anticompetitive practice	
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7. If a merger was implemented prior to notification or obtaining clearance, does your authority have the ability to unwind the merger?

- a. Yes b. No

If your answer was No but your authority has other alternatives in these types of situations, please briefly describe them.

Alternative powers	
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8. Does your jurisdiction include a statute of limitations to sanction for not filing a notifiable transaction / implementing it before obtaining clearance?
 a. Yes b. No

9. Does your authority detect gun jumping cases through proactive screening and/or through complaints by third parties, or during the investigation of the transaction? (choose all the applicable options)
 a. Proactive screening b. Third party complaint c. Investigation
 d. Other

Please briefly describe the mechanisms used.

Detection mechanisms	
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If your answer was Yes to questions 4 and/or 5, please complete the details requested in the table for the cases you have faced over the past five years.

Year (2015 to 2019) ⁵⁷	Case (Parties / case number / link to public case page)	Type of Infringement (implementation without prior mandatory notification (Type 1) or implementation prior to clearance (Type 2))?	How infringement was discovered	Description of sanction(s) imposed	Case appealed (if so, overturned)?
	<i>[Please list all relevant cases for each year]</i>				

10. Is the total annual number of sanctions for implementation of a merger prior to mandatory notification increasing or decreasing compared to 5 years ago?
 Increasing Decreasing Constant Uncertain

⁵⁷ For 2019 cases, please include all relevant cases as at 31 October 2019.

11. Is the total annual number of sanctions for implementation of a merger prior to obtaining clearance increasing or decreasing compared to 5 years ago?

- Increasing Decreasing Constant Uncertain

QUESTIONNAIRE FOR REMEDY VIOLATION⁵⁸

(To be answered only if you have powers to impose remedies as a condition to clearing a transaction)

1. If a transaction is cleared with remedies, does your authority or a third party oversee the fulfilment of these remedies?
 - a. Yes
 - b. No

If your answer was Yes, please provide a brief description of how the following:

Description of oversight	
Role of the third party (i.e. can find a violation or merely reports back to the authority)	

2. If an infringement of a remedy imposed (behavioural / structural) is discovered, does your authority have the ability to take action and/or impose fines?
 - a. Yes
 - b. No

If your answer was Yes, please provide a brief description of the actions that can be taken (unwinding of the merger, imposing a sanction, modification of the remedies etc.) and the type of sanction(s) you impose:

Description of actions	
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Type of sanction(s)	<i>Specify:</i> - civil / criminal / both - corporate / individual liability / both; - on just merging parties, or also third parties contacted as part of the merger investigation - other details on scope/nature of sanction(s)
Maximum fine (eg, up to proportion of undertaking's turnover) / duration of imprisonment	
How amount of fine/duration of imprisonment is calculated, specifying existence of any discretionary aggravating or mitigating measures that may be considered for the purposes of calculation	

⁵⁸ For the purpose of this questionnaire, the concept of remedy violation includes any type of non-compliance (formal or material) of the remedies imposed by a competition authority in order to clear a merger.

Legislation from which sanction powers above are derived	<i>[Please provide the name of the Act or statutory instrument and a link, if available online and in English]</i>
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3. Does your jurisdiction contemplate specific proceedings (eg, court proceedings) to sanction a remedy violation?
- a. Yes b. No

If your answer was Yes, please provide a brief description of it and its statute of limitations, if any.

Description of proceedings / statute of limitations (if applicable)	
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4. Has your authority imposed sanctions and/or taken action for remedy violations within the last five years?
- a. Yes b. No

If your answer was Yes, please complete details requested in the tables below.

Year (2015 to 2019) ⁵⁹	Case (Parties / case number / link to public case page)	Type of remedy (behavioural/structural)	How violation was discovered	Description of sanction(s) imposed	Case appealed (if so, overturned)?
	<i>[Please list all relevant cases for each year]</i>				

5. Please also specify the total number of mergers in which remedies were imposed as a condition to clearance in your jurisdiction in each of the last five years.

Year	Total number of mergers in which remedies were imposed
2015	
2016	
2017	
2018	
2019 (as at 31 Oct 2019)	

⁵⁹ For 2019 cases, please include all relevant cases as at 31 October 2019.

6. Is the total annual number of sanctions for remedy violations increasing or decreasing compared to 5 years ago?

- Increasing Decreasing Constant Uncertain