



# GCLC LUNCH TALK, 10 JULY 2017

THE STANDARD OF CARE IN MERGER CONTROL PROCEEDINGS  
Observations from the perspective of a practising lawyer

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SLAUGHTER AND MAY

# A timely reminder from the top

## Tweeting in the wee small hours



**Margrethe Vestager** ✓

@vestager

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3 x Statements of Objections in 3 separate cases: Not giving full/accurate information or putting a merger into effect before cleared.  
Don't

2:32 am - 6 Jul 2017

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# Do give full/accurate information!

## Are you confident you can sign on the dotted line?

### SECTION 11

#### **Declaration**

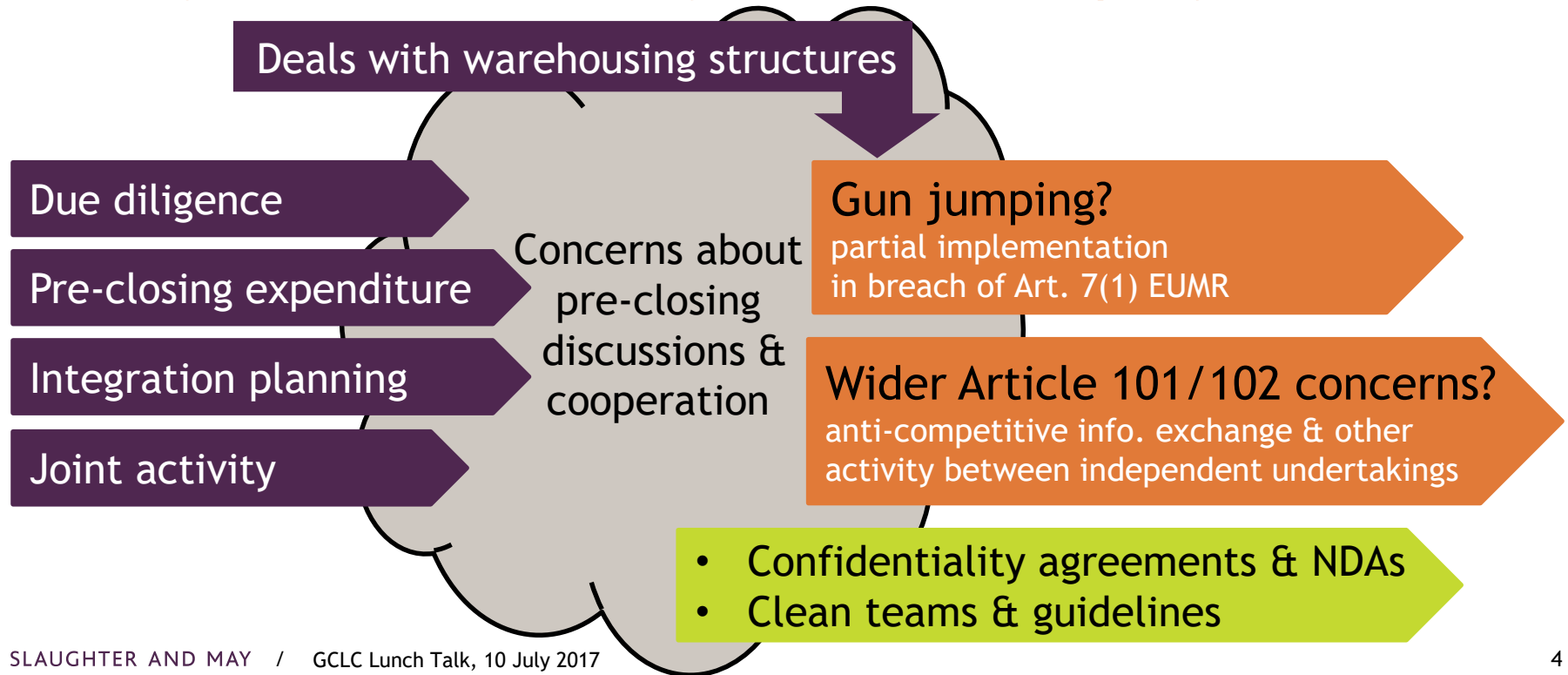
The notification must conclude with the following declaration which is to be signed by or on behalf of all the notifying parties:

‘The notifying party or parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by Form CO have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

They are aware of the provisions of Article 14(1)(a) of the Merger Regulation.’

# Don't jump the gun!

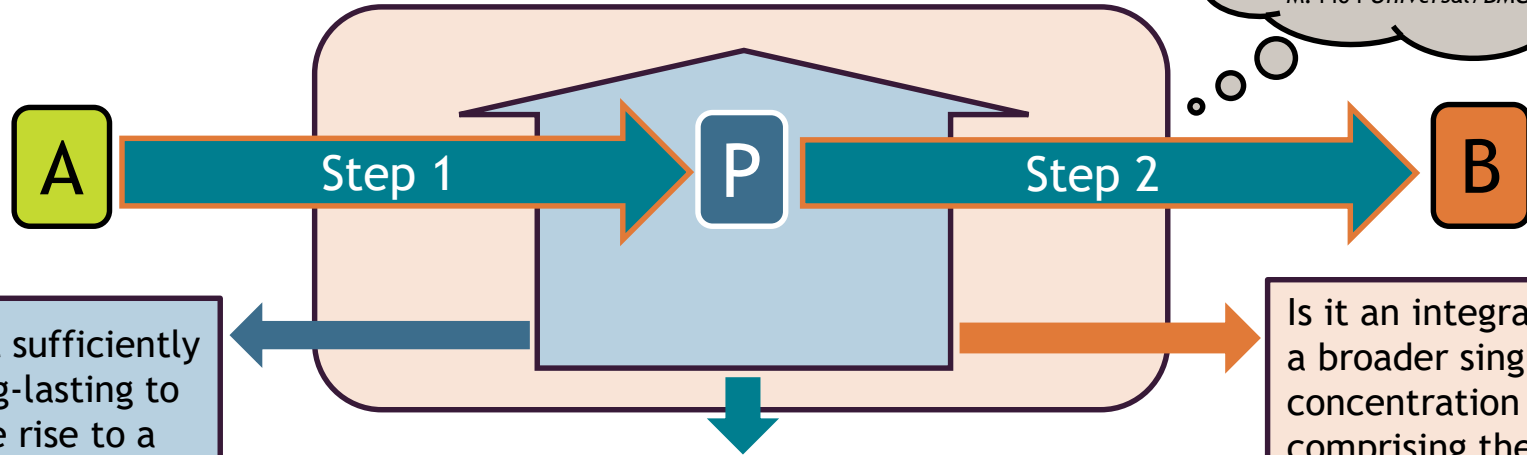
Broadly similar issues may arise in multiple jurisdictions



# Warehousing arrangements

## Parking restrictions apply!

OK for buyer to pay purchase price upfront while waiting for EUMR notification and clearance, e.g. Case M.4404 *Universal/BMG* (2007)

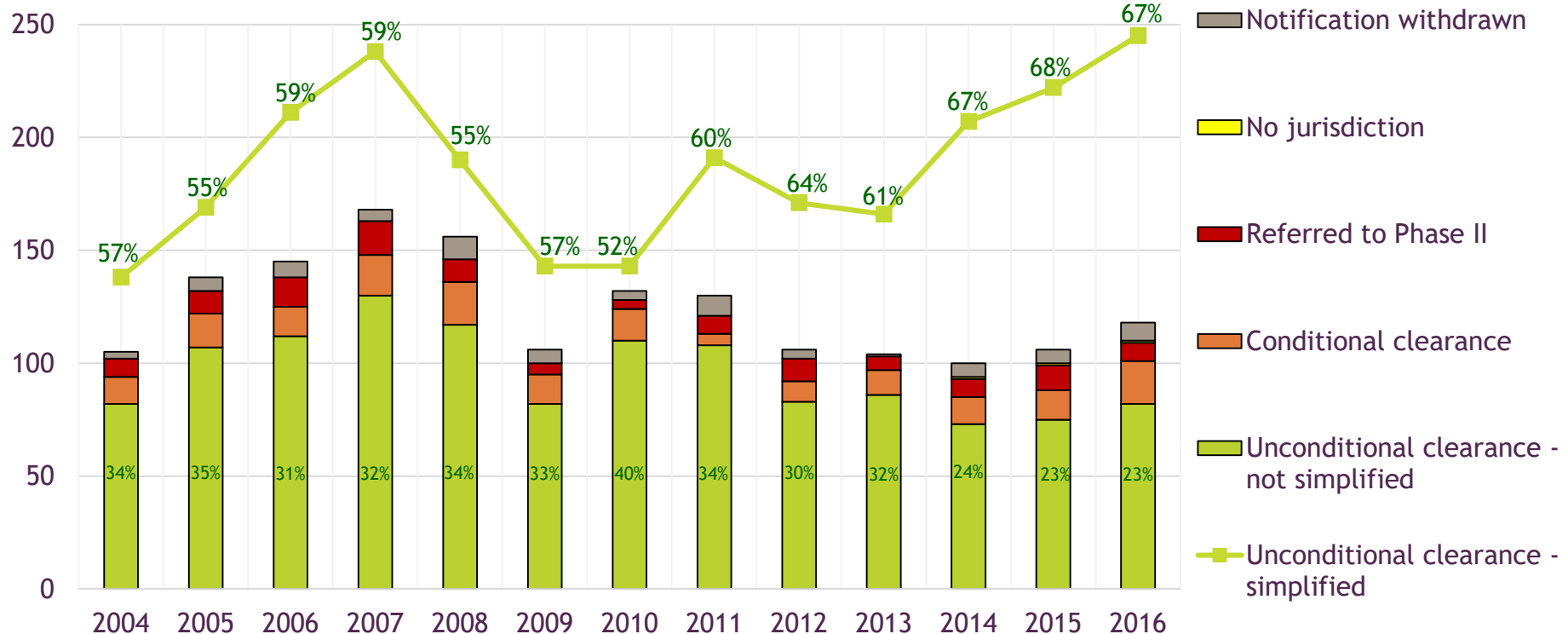


- Current Merger Reg. (2004) added concept of *change of control on a lasting basis*
- Jurisdictional Notice (July 2007), para. 35: *will consider the transaction by which the interim buyer acquires control in such circumstances as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer*

- In M.2978 *Lagardère/Natexis* (7 Jan 2004) Commission found temporary warehousing within Art. 3(5)(a), so not notifiable
- 3<sup>rd</sup> party appealed (*Odile Jacob v Commission*) but dismissed in Case T-279/04 (2010) & Case C-551/10P (2012)


# Is EC merger control getting more challenging?

## Some Phase I statistics?



# Pressures and challenges in the digital age

## Data rich, time poor?

Increasing access to (& volumes of) data	<ul style="list-style-type: none"><li>• information gathering techniques (meetings -&gt; calls -&gt; emails)</li><li>• internal documents (smoking guns and silver bullets)</li><li>• reviewing custodians' emails</li><li>• economic analysis</li></ul>
Increasing globalisation (& regulatory scrutiny)	<ul style="list-style-type: none"><li>• multi-jurisdictional scrutiny</li><li>• coordination of reviews</li><li>• impact on timing</li></ul>
Increasing time (& cost) pressures	<ul style="list-style-type: none"><li>• commercial pressures to get the deal done quickly</li><li>• practical obstacles to using pre-notification process constructively</li><li>• post-notification RFIs with tight deadlines</li></ul>
Increasing role (& influence of) third parties	<ul style="list-style-type: none"><li>• sophisticated complainants (including threats of appeals)</li><li>• seek to flush out concerns (e.g. by allowing pre-notification contacts)</li><li>• press scrutiny</li></ul>
 Project management skills	Proper Preparation Prevents Poor Performance

# 2004 Best Practices on EUMR proceedings

## Are they still relevant in 2017?

Scope and purpose	<ul style="list-style-type: none"><li>to foster &amp; build upon <b>spirit of co-operation &amp; better understanding</b> between DG Comp &amp; legal &amp; business community</li><li>to further enhance <b>efficiency</b> of investigations &amp; ensure high degree of <b>transparency &amp; predictability</b></li><li>making the short time available in EC merger procedures as <b>productive &amp; efficient</b> as possible</li></ul>
Pre-notification contacts	<ul style="list-style-type: none"><li>in the interests of DG Comp &amp; the business &amp; legal community to ensure that notification forms are <b>complete</b></li><li>mutual benefits for DG Comp &amp; the parties of a <b>fruitful pre-notification phase</b> can only materialise if discussions are held in an <b>open &amp; cooperative atmosphere</b>, where all potential issues are addressed in a <b>constructive</b> way</li></ul>
Information to be provided	<ul style="list-style-type: none"><li>parties advised to fully &amp; frankly <b>disclose information</b> relating to all potentially affected markets &amp; competition concerns</li><li>parties &amp; their advisers should ensure that the information contained in Form CO has been <b>carefully prepared &amp; verified</b></li><li>parties should take special care that the appropriate <b>contact details</b> are provided for customers, suppliers &amp; competitors</li></ul>
Future review	<ul style="list-style-type: none"><li>these Best Practices <b>may be revised</b> to reflect changes to legislative, interpretative &amp; administrative measures or due to case law of the European Courts which govern EC merger control or any experience gained in applying such framework</li><li>DG Comp further intends to engage, on a regular basis, in a <b>dialogue with the business &amp; legal community</b> on the experience gained through the application of the Merger Regulation in general, &amp; these Best Practices in particular</li></ul>



# Back-up Slides

# Annex 1: Fines for incomplete information (Art. 14(1))

## A. Under original Merger Reg. (maximum fine was €50,000)

Case	Fines	Failure
M.1543 <i>Sanofi/Synthelabo</i> (1999)	€50k each	Did not disclose overlap in morphine
M.1608 <i>KLM/Martinair</i> (1999)	€40k	Did not disclose Med. route overlaps
M.1610 <i>Deutsche Post/Trans-oftflex</i> (1999)	€50k each	Did not disclose previous share acquisition of possible indirect control
M.1634 <i>Mitsubishi Heavy Industries</i> (2000)	€50k + €900k periodic pens.	Incomplete response to RFI (by decision) - third party to Ahlström/Kvaerner merger
M.2624 <i>BP/Erdölchemie</i> (2002)	€35k	Did not disclose co-operation agreements and activities in ACN technology licensing
M.3255 <i>TetraLaval/Sidel</i> (2004)	€90k (2x€45k)	Did not disclose technology developments

## ... (Annex 1, continued)

### B. Under current Merger Reg. (fines up to 1% of worldwide turnover)

Case	Fines	Failure
M.8228 <i>Facebook/WhatsApp</i> (May 2017)	€110m	Did not disclose ability to establish automated matching between Facebook & WhatsApp users' accounts

### C. In the pipeline (SOs sent July 2017)

Case	Alleged failure
<i>Merck/Sigma-Aldrich</i>	Failure to provide info on innovative project for lab chemicals (deal cleared Jun 2015 subject to conditions as concerns re lab chemicals; after complaints, Merck licensed additional technology to Honeywell, purchaser of divestment business)
<i>General Electric/LM Wind</i>	Failure to provide info on R&D and a specific wind turbine project in initial Jan 2017 notification, but GE pulled & refiled with info in Feb 2017 (deal cleared without commitments in March 2017, after parallel <i>Siemens/Gamesa</i> case)

# Annex 2: Fines for gun jumping (Art. 14(2))

## A. Under original Merger Reg. (maximum fine was €50,000)

Case	Fines	Failure
M.920 <i>Samsung/AST Research</i> (1998)	€33k (€5k + €28k, i.e. €2k x 14 months)	Samsung failed to notify public bid prior to implementation + implemented prior to clearance (it informed EC 14 months after acquiring control; concentration notified late and cleared without conditions at Phase I)
M.969 <i>A.P. Møller</i> (1999)	€219k (€45k (3x€15k) + €174k, i.e. €6k x 29 months)	A.P.Møller failed to notify three concentrations + implemented all three prior to clearances (it informed EC 3, 6 and 20 months after acquiring control; all three concentrations notified late and cleared without conditions at Phase I)

## ... (Annex 2, continued)

### B. Under current Merger Reg. (up to 10% of worldwide turnover)

Case	Fines	Failure
M.4994 <i>Electrabel/Compagnie Nationale du Rhône</i> (2009)	€20m	Electrabel failed to notify acquisition prior to implementation + implemented prior to clearance (it informed EC more than 3½ years after acquiring control; concentration notified late and cleared without conditions at Phase I)
M.7184 <i>Marine Harvest/Morpol</i> (2014)	€20m (2x€10m)	Marine Harvest failed to notify acquisition prior to implementation + implemented prior to clearance (it informed EC over 9 months after acquiring control; concentration notified late and cleared with conditions at Phase I)

## ... (Annex 2, continued)

### C. In the pipeline

Case	Status	Alleged failure
<i>M.7993 Altice/PT Portugal</i> (NB Nov 2016: French NCA fined Altice €80m for early implementation of another deal)	May 2017: SO sent to Altice	Concerns that deal put Altice in position to exercise decisive influence over PT Portugal and that it did so prior to clearance and in some cases prior to notification (deal announced in Dec 2014; notified in Feb 2015 and cleared with conditions at Phase I)
<i>Canon/Toshiba Medical Systems</i> (NB Canon already fined by MOFCOM (c. €40k) and criticised by JFTC)	July 2017: SO sent to Canon	Concerns that warehousing structure amounted to partial implementation (deal structure involving special-purpose vehicle company implemented in Mar 2016; notified Aug 2016 and cleared without conditions at Phase I)

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