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Declaration

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Introduction

According to the Cambridge English Dictionary, the expression „*to jump the gun*" means to act or to do something too soon, especially without thinking carefully about it.[1] The phrase originally comes from the sports environment and is used to describe the situations when athletes set off for the race before the starting pistol went off.[2] With regard to competition law of the European Union and the EU merger control regime, the term *„gun-jumping"* stands for an early implementation of a concentration of undertakings prior to its notification or before receiving an approval of the transaction.[3] Such action amounts to an infringement of Article 7(1) of the EUMR and, *inter alia*, a significant fine of up to 10 percent of the aggregate turnover of the undertaking in question may be imposed in accordance with the Article 14(2)(a) of the EUMR.[4] Moreover, certain forms of early implementation of a concentration and premerger coordination might even be interpreted in some cases as an infringement of the Article 101 TFEU.[5]

For a long time, the gun-jumping problem has been perceived as a rather marginal topic within the area of competition law with only a small number of decisions and case law on the subject existing. Neither the European Commission or the NCAs were paying much attention to these merger-related issues.[6] Moreover, most of the original decisions were dealing with rather obvious and clear examples of gun-jumping such as the undertakings simply failing to comply with the notification obligation.

However, a growing interest of both the Commission and NCAs in gun-jumping has been apparent lately.[7] The competition watchdogs are not hesitant to put more mergers under a thorough scrutiny due to questionable premerger coordination conduct and to impose hefty fines in case of

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[1] Jump the gun. In: Cambridge Dictionary [online]. Cambridge University Press. Available at: https://dictionary.cambridge.org/dictionary/english/jump-the-gun.

[2] ALLENDESALAZAR, Rafael. GUN JUMPING. In: Concurrences: Antitrust publications and events [online]. Concurrences. Available at: https://www.concurrences.com/en/dictionary/gun-jumping

[3] Procedure for Reviews under the Merger Regulation, 2018. BAILEY, David a Laura Elizabeth JOHN. Bellamy & Child: European Union Law of Competition. Eighth edition. Oxford: Oxford University Press, 2018, p. 666.

[4] JONES, Alison a Brenda SUFRIN. EU competition law: text, cases, and materials. Sixth edition. Oxford: Oxford University Press, 2016, p. 1126-1127.

[5] BAILEY, JOHN, op. cit. 3, p. 664.

[6] HULL, David a Catherine GORDLEY, 2018. Gun Jumping in Europe: An Overview of EU and National Case Law. E-Competitions [online], p. 1-2, Available at: https://www.concurrences.com/en/bulletin/special-issues/gun-jumping/gun-jumping-in-europe-an-overview-of-eu-and-national-case-law

[7] HONORÉ, Pierre a Guillaume VATIN, 2017. The French Competition Authority's Altice Decision: Record Fine for the First 'Genuine' Gun Jumping Case in Europe. Journal of European Competition Law & Practice. 8(5), 314-320.

finding an infringement being committed. As a result of that, several groundbreaking and landmark decisions on the topic have emerged during the last few years.[8]

In 2021, the General Court upheld the Commission's tough decision in the *Altice/PT Portugal* case and confirmed the highest fine for a gun-jumping offence up to date under the EU merger control regime.[9] The growing trend of a more stringent gun-jumping appraisal is also apparent from the publicly expressed opinions and comments of the Commission's representatives. In the case of *Illumina/GRAIL*, which has already been under the Commission's merger control scrutiny for different reasons, a suspicion of an early implementation of the transaction arose. The Commission did not hesitate to open a probe into the case in terms of suspicion of a possible gun-jumping conduct as well. Regarding the case, Margrethe Vestager, the Commissioner in charge of competition policy, delivered the following statement:

„*Companies have to respect our competition rules and procedures. Under our ex-ante merger control regime companies must wait for our approval before a transaction can go ahead. This obligation, that we call standstill obligation, is at the heart of our merger control system and we take its possible breaches very seriously. This is why we have decided to immediately start an investigation to assess whether Illumina's decision constitutes a breach of this important obligation*".[10]

Finally, in 2021, the global number of M&A transactions broke records and the value of such deals hit a new all-time high. This also applies for European dealmaking, which has almost doubled compared to the previous year.[11] Although the deal value in the emerging European markets has partially decreased in 2022 due to the geopolitical and macroeconomic reasons, the overall number of transactions there was even higher than in 2021.[12] Thus, considering the large transactional volume as well as the growing appetite of competition authorities to interfere in the merger

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[8] FARIA, Tânia Luísa; Lopes Martins, MARGOT, 2020. Pre-Closing Competition Law Issues: How To Overcome The Gun Jumping Mania and Other Competition Law Risks. Actualidad Jurídica Uría Menéndez, 54, p. 186-203.

[9] Judgement of the General Court (Sixth Chamber) of 22 September 2021, Altice Europe NV v Commission, Case T-425/18, ECLI:EU:T:2021:607, para. 369.

[10] Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina / GRAIL transaction, 2022. In: European Commission [online]. 20 August 2021. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322. Note: bold text by author.

[11] SEN, Anirban, Pamela BARBAGLIA a Kane WU, 2022. Global M&A activity smashes all-time records to top $5 trillion in 2021. In: Reuters [online]. 20 December 2021. Available at: https://www.reuters.com/markets/europe/global-ma-activity-smashes-all-time-records-top-5-trillion-2021-2021-12-20/

[12] Emerging Europe M&A Report 2022/2023, 2023. In: CMS international law firm [online]. Available at: https://cms.law/en/int/publication/emerging-europe-m-a-report-2022-2023

process, over the last few years, gun-jumping went from a rather scarce and uncommon phenomenon to a grave transactional aspect that is to be taken into account seriously by both the signing parties and their legal representatives.

This thesis sets the following objectives. First, it aims to provide a comprehensive and thorough analysis of the gun-jumping problem on both the theoretical and practical level, especially regarding the EU merger control rules. Furthermore, it seeks to evaluate the approach of the European Commission and the CJEU to the topic, with increased focus on the recent case law breakthroughs. Finally, it has the intention to identify the possibly problematic aspects of mergers and acquisitions that may result in prohibited premerger coordination, which might constitute gun-jumping offences and can also lead to a possible distortion of competition. To fulfill these goals, the following research questions will be asked:

1. How has the approach to gun-jumping enforcement in the EU developed throughout the years and what are the current trends and tendencies in the gun-jumping decision-making practice in the EU?
2. What practices do constitute gun-jumping and might be considered problematic from the undertakings' point of view?
3. What are the grey areas of gun-jumping and is there any space for clarification from the Commission?

To provide a logically coherent and clear presentation of the subject matter that allows for reader's continuous study and straightforward orientation in the text, the thesis is going to be structured into several parts. After this introduction, the first substantial part regarding the fundamental aspects of gun-jumping and its legal context will follow. Subsequently, a chapter focused on the specific types of gun-jumping conduct will be presented, representing the core of the whole thesis. The chapter will demonstrate the various existing types of gun-jumping as established by the decision-making practice of the European Commission and the Court of Justice of the European Union. In the third chapter, the exemptions from the EUMR gun-jumping prohibition will be presented together with the assessment of various transaction schemes and their permissibility from the gun-jumping perspective. The fourth chapter will lay down the consequences of gun-jumping, analyse the Commission's fining policy and will also examine the relationship between gun-jumping and Article 101 TFEU. Eventually, the answers to the research questions will be provided in the conclusion.

Regarding the sources of information and the data for the thesis, a wide range of materials is going to be used. The relevant legislation, both on the EU and national level, will be analysed. Books and monographs focused on the EU law, merger control and competition law will provide the essential information and legal concepts related to the issue of gun-jumping. To reflect the doctrinal opinions and obtain more detailed insights, academic journals, articles, and research papers will be examined. Competition authorities' decisions and the judgements challenging them will serve as an essential source of information. However, it is also necessary to highlight the significance of various soft law documents such as guidelines, notes or staff working documents as they might be important for understanding the subject. Finally, considering the dynamic developments and the relative novelty of the topic, the opinions expressed by academics, law practicioners and competition executives presented on legal blogs or in newsletters will undoubtedly serve as a valuable supplementary source of knowledge.

In relation to the methodology, the following research methods will be used. Firstly, it is the descriptive method, mainly to lay down the doctrinal and legislative notions and concepts to be covered particularly in the first chapter of the thesis. Analytic method will then be used to examine and research the relevant legislature, materials, decisions, and case law related to the topic. To identify possible distinctions and discrepancies between the legal theory and the decision-making practice, comparative method will be applied. For outlining potential de lege ferenda recommendations, normative method might be utilised. Eventually, conclusions from all the analysed data and researched sources will be drawn based on the synthetical and inductive method.

1 Gun-jumping in the context of EU competition law

This first substantive chapter of the work aims to present the core issues related to gun-jumping as a specific phenomenon within the competition law merger control procedures. The applicable legislation and its context will be presented, alongside with its objectives and purpose. Subsequently, the gun-jumping problem *per se* will be laid down, with increased focus on the relationship between Articles 4 and 7 EUMR and their application scope.

1.1 EUMR context

Competition law regulation is considered to have a predominantly *ex post* character, meaning that regulatory steps are taken and restrictive measures are implemented as a reaction to the alleged anti-competitive conduct. While this is true in relation to the prohibited agreements as well as the abuse of dominant position, the EU merger control procedure is built on the opposite principle, having an *ex ante* effect, which is mainly caused by the nature of the aforementioned restricted conduct and its consequences on the competition: while it is relatively feasible to undo the damage caused by cartel agreements or by abuse of dominance, for example by ordering remedies, restoring the premerger market situation once the concentration has already been implemented is much more complicated.[13] Thus, over the course of time, the need for an *ex ante* controlling measures allowing for a prospective concentration assessment arose since the otherwise typical *ex post* regulation simply does not suffice for safeguarding an effective and working competition in this area of competition law. Nevertheless, the objective of the EU merger regulation, that is to ensure a functioning and competitive market environment in the first place, remains the same.[14]

Therefore, where a concentration does have an EU dimension, the Article 4(1) of the EUMR imposes an obligation to notify such concentration to the European Commission. The notification shall be made after the conclusion of the agreement, the announcement of the public bid or after the acquisition of a controlling interest, but in each case prior to the implementation of such concentration. Furthermore, a notification may also follow in a situation where undertakings

[13] KOKKORIS, Ioannis a Howard SHELANSKI, 2014. In: KOKKORIS, Ioannis a Howard SHELANSKI. EU Merger Control: A Legal and Economic Analysis. Oxford: Oxford University Press, p. 26. See also JONES, Alison, Brenda SUFRIN a Niamh DUNNE. Jones & Sufrin's EU Competition Law: Text, Cases, and Materials. 7th edition. Oxford: Oxford University Press, p. 57.

[14] KINDL, Jiří, 2021. Kontrola koncentrací podniků. In: *Soutěžní právo*. 3rd Edition. Prague: C.H. Beck, Beckovy mezioborové učebnice, p. 57.

demonstrate to the Commission a good faith intention to conclude an agreement or to make a public bid, meaning the investigative procedure may be initiated but the parties are granted the advantage of fixed time limits ahead of completing the legal aspects of the transaction.[15]

Article 7(1) of the EUMR enacts a suspension period during which the concentration cannot be carried out. The parties to the concentration have the obligation to refrain from implementing the concentration until it is given a green light from the Commission in a form of either a Phase I or Phase II clearance decision, or until the assumption of granting the Commission's clearance decision applies as presumed by Article 10(6) of the EUMR. Unless, as explained below, a derogation from the concentration suspension is granted by the Commission or the public bid exemption applies, the suspensory waiting period applies as a general principle.[16]

Suspension of concentrations, also known as the so-called 'standstill obligation', as enacted in the provision of Article 7(1) EUMR, constitutes one of the key pillars of the EU merger control regime by design. This idea does not only represent the position of the Commission competition executives as mentioned in the thesis introduction but it was also emphasized by the General Court in its judgement in *Aer Lingus v Commission*, calling it „*one of the founding principles of the regulation* ".[17]

1.2 Gun-jumping criteria

As briefly suggested above, within the competition law jargon, gun-jumping stands for putting the respective transaction in effect too quickly regarding the relevant competition law merger control regulations. Although the term has its origins in the U.S. legal culture, it has become an established and recognized concept within the EU competition law, too, especially during the last few years.[18] In general, gun-jumping can thus be labeled as a conduct of undertakings that goes against the powers of the relevant competition authority and constitutes a breach of the undertakings' legal obligations. More specifically, under the EU competition law, gun-jumping

[15] WHISH, Richard a David BAILEY, 2021. Mergers. In: WHISH, Richard a David BAILEY. Competition Law. 10th Edition. Oxford: Oxford University Press, p. 863.
[16] BAILEY, JOHN, op. cit. 3, p. 663.
[17] Judgement of the General Court (Third Chamber) of 6 July 2010, *Aer Lingus Group plc v European Commission*. Case T-411/07. ECLI:EU:T:2010:281, para. 80.
[18] Merger Regulation Procedure, 2007. In: FAULL, Jonathan a Ali NIKPAY. *The EC Law of Competition*. Second edition. Oxford: Oxford University Press, p. 544.

equals to i) closing a transaction ahead of its notification or without its notification at all or ii) implementing the transaction before being granted a clearance decision from the Commission.[19]

In practice, based on the variants explained above, the following situations can occur:

1. the undertaking in question which has a duty to notify the concentration to the Commission fails in doing so, or it only notifies it behind schedule;
2. the undertaking does comply with the notification obligation, but it implements the concentration without the Commission's consent;
3. a combination of the two at the same time, that is not notifying the concentration as well as implementing it.

In either case, such conduct goes against the purpose of the EUMR since the Commission will lack the necessary information about the concentration and/or will not be able to review the intended transaction and its possible consequences for competition.[20]

Based on these criteria and types of conduct, a distinction can be made between a so-called 'procedural' and 'substantive' gun-jumping. The procedural gun-jumping constitutes an infringement of the notification obligation as stated in Article 4(1) EUMR, whereas the substantive gun-jumping occurs when the standstill obligation pursuant to Article 7(1) EUMR is breached, that is if the concentration is implemented hastily.[21]

Based on Article 14 EUMR, the Commission can also penalize the supply of incorrect or misleading information with regard to distinct aspects of merger control procedure, that is in the notification itself or in the reply to Commission's request for information.[22] As pointed out in the literature, some authors perceive this conduct as closely linked to the traditional forms of gun-jumping.[23] Legal enforcement of providing incorrect and misleading information is, indeed, growing on its importance and becoming a topic in a similar manner as gun-jumping is. The Commission has imposed some significant fines for this conduct in the recent years, such as in the Facebook's acquisition of WhatsApp[24] or in General Electric's acquisition of LM Wind[25].

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[19] JONES, SUFRIN, op. cit. 4, p. 1126.
[20] POWER, Vincent, 2020. Gun-Jumping in European Union Merger Control: The Law and Practice. *Irish Journal of European Law*. 22, p. 66-82.
[21] WHISH, BAILEY, op. cit. 14, p. 866.
[22] Ibid., p. 865.
[23] POWER, op. cit. 20, p. 68.
[24] Commission Decision – COMP/ M.8228— *Facebook/WhatsApp.*
[25] Commission Decision – COMP/M.8436— *General Electric Company/ LM Wind Power Holding.*

However, for the purposes of this thesis and in accordance with the prevailing part of the literature, gun-jumping is understood in its traditional forms as explained above.

1.3 Practical aspects of gun-jumping

It is also worthy considering what is the driving force and the rationale behind gun-jumping. Ignorance of law is rather an unlikely cause, although such cases do occur as well and have to do mainly with the procedural gun-jumping or with the cases having some unusual aspect to it, such as the *Canon/Toshiba Medical* case.[26] However, most gun-jumping cases are probable to happen due to more pragmatic and businesslike reasons, such as when the target company is facing an unfavorable financial situation and the acquirer decides to act in order to protect the value of its investment. Similarly, a profitable business opportunity might come up and thus the merging parties may find it tempting to join forces prematurely, or the buyer seeks to prevent a customer outflow and so on. Therefore, as it is apparent, the impelling causes behind the gun-jumping problem are mainly of practical and economic nature.[27]

As pointed out in a comprehensive study summarising the gun-jumping developments on the EU level, regarding the procedural side of the topic, there is no single approach from the Commission's perspective on how to find out there has been a gun-jumping offense committed.[28] In some cases, the undertakings to blame report themselves in order to reach a more favorable decision from the Commission and to prevent getting themselves into a more complicated legal situation. In other scenarios, when the concentration is put under scrutiny, the Commission concludes that the buyer commited some of the actions described below, such as that he obtained too much information about the target and had thus exercised control over it. As with other types of unlawful conduct, the Commission also acts based on a complaint addressed to it, whether it comes from the customers or the competitors.[29] However, in some cases the Commission (as well as other competition authorities) may become suspicious based simply on the publicly available information, sometimes even shared by the parties of the transaction themselves. For example, the proposed sale of part of FTX, a cryptocurrency exchange, to Binance, the world's leading cryptocurrency exchange in terms of daily volume trading, was communicated through Twitter by

[26] Commission Decision - CASE M.8179 – *CANON/TOSHIBA MEDICAL SYSTEMS CORPORATION*
[27] POWER, op. cit. 20, p. 68-69.
[28] Ibid.
[29] Ibid.

the Binance CEO with plans of the transaction that made it seem like a done deal. Immediately after that, antitrust regulators, including the Commission, expressed their concerns regarding a possible gun-jumping violation.[30]

1.4 Relationship between Articles 4 and 7 EUMR

When it comes to the relationship between Articles 4(1) and 7(1) EUMR, the legal construct might seem a bit odd. Both infringements allow the same level of penalties to be imposed, yet the infringement of one of them, i.e., the notification obligation, automatically results in infringement of the standstill obligation, too. Indeed, the General Court itself acknowledged this by labeling the legal framework as 'unusual' in the *Marine Harvest* case and stating implicitly that the legality of such provisions might be challenged. [31] Such plea of illegality was raised in the *Altice* case where the applicant referred to the previous merger control regulation No 4064/89. In there, a clear distinction between the notification obligation and the standstill obligation existed and the penalties for both infringements were, unlike under the EUMR, different. The General Court, however, rejected these arguments by saying that although the infringement of Article 4(1) EUMR also entails the infringement of Article 7(1) EUMR, the opposite is not true.[32] Therefore, compliance with Article 4(1) EUMR does not by any means rule out the risk of an early implementation of a concentration in defiance of Article 7(1) EUMR.[33]

Sanctioning an undertaking for both infringements was also challenged on the grounds of contradicting the principle of proportionality as well as the prohibition of double punishment. The General Court highlighted that Articles 4(1) and 7(1) EUMR both have their autonomous objectives within the context of the 'one-stop-shop' under the EUMR. This fact itself, according to the General Court, does suffice and justifies the imposition of two distinct fines.[34]

There are also differences in the nature of both provisions. While Article 4(1) EUMR represents an obligation to act, i.e., to notify the concentration prior to its implementation, Article

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[30] FTX, Binance Deal Draws Antitrust Concern, 2022. In: Yahoo Finance [online]. 8.11.2022. Available at: https://finance.yahoo.com/news/ftx-binance-deal-draws-antitrust-172708347.html

[31] Judgement of the General Court (Fifth Chamber) of 26 October 2017, Marine Harvest ASA v European Commission. T-704/14. ECLI:EU:T:2017:753, para. 306.

[32] Judgement of the General Court (Sixth Chamber) of 22 September 2021, Altice Europe NV v Commission, op. cit. 9, para. 54.

[33] POWER, op. cit. 20, p. 71.

[34] Judgement of the General Court (Sixth Chamber) of 22 September 2021, Altice Europe NV v Commission, op. cit. 9, paras. 267-277.

7(1) EUMR on the other hand enacts an obligation not to act, that is to avoid the implementation of the concentration prior to its notification or authorisation. Additionally, breach of the notification obligation equals to an instantaneous infringement while the infringement of the standstill obligation is a continuous infringement and is triggered by committing the infringement of the former, i.e., the notification obligation. Also, the limitation periods for both the infringements are different. While the notification obligation is subject to a three-year limitation period, the standstill obligation is statute-barred after five years. In relation to this topic, the General Court eventually repeated its argument from *Marine Harvest*, saying that if the Commission was unable to distinguish between both obligations, the objectives of EUMR would not be achieved as the breach of the notification obligation would never be subjected to a specific penalty.[35]

An issue closely linked to this specific relationship between Articles 4(1) and 7(1) EUMR is also the *ne bis in idem* principle, the purpose of which in relation to competition law is to prevent an undertaking from being prosecuted and sanctioned repeatedly for the same conduct. The breach of this principle by the Commission was indeed one of the pleas seeking the annulment in the *Marine Harvest* case. The delivered judgement was the first decision regarding the application of this principle in a situation where multiple penalties were imposed in a single decision. The General Court has, however, rejected the claims made by the applicant and based its reasoning on the case law of the ECtHR according to which the application of the ne bis in idem principle must be considered only in a situation where different offences based on one act are prosecuted consecutively, one after the final decision of the other. Thus, the application of the ne bis in idem principle (as well as the set-off principle) is not relevant in merger cases where there have been both the procedural and substantive gun-jumping actions committed.[36] These conclusions were then upheld by the Court of Justice which had not found any error in law in the General Court's judgement.[37] The same argument of the ne bis in idem principle was also raised in the *Altice* case,

[35] Judgement of the General Court (Sixth Chamber) of 22 September 2021, Altice Europe NV v Commission, op. cit. 9, paras. 55-63.

[36] Judgement of the General Court (Fifth Chamber) of 26 October 2017, Marine Harvest ASA v European Commission, op. cit. 31, paras. 307-344.

[37] Judgement of the Court (Fourth Chamber) of 4 March 2020, Mowi ASA v European Commission, Case C-10/18 P, ECLI:EU:C:2020:149, paras. 75-86.

however, the applicant later withdrew it once the General Court made a reference to the *Marine Harvest* decision.[38]

1.5 The scope of standstill obligation

How to interpret the extent to which the standstill obligation shall apply is one of the most intricate issues. There have been some developments and clarifications in this regard, too, as the decision-making practice went from what was a rather restrictive interpretation at first to quite a broad range of application instead.

1.5.1 Ernst & Young

The interpretation of the Article 7(1) EUMR and its scope of application has been the core disputed issue in the *Ernst & Young* case. It is useful to provide a little bit of context at first. Two large global auditing and consulting firms, EY and KPMG DK, intended to merge. Pursuant to the merger agreement, KPMG DK terminated its cooperation agreement with KPMG International. Although the transaction was cleared by the Danish NCA, the KPMG DK was later found to have violated the Danish standstill obligation, a national equivalent to Article 7(1) EUMR. The Danish NCA asserted that the termination of the cooperation agreement was merger specific, irreversible and had the potential to affect the market prior to the merger approval. As EY appealed the case, the Danish Maritime and Commercial Court then requested a preliminary ruling from the CJEU regarding the application scope of Article 7(1) EUMR.[39]

Both the Advocate General and the Court of Justice favoured a rather restrictive interpretation of Article 7(1) EUMR. In his opinion, advocate Wahl stressed out the importance of the concept of concentration as the fundamental criterion to the standstill obligation. According to his view, the acquisition of possibility to exercise decisive influence over the target undertaking is what gives rise to the standstill obligation and therefore, the measures preceding the concentration should stay out of scope of the standstill obligation.[40] While the standstill obligation does also cover partial implementation of a concentration, too, it does not mean that any preparatory move

[38] Judgement of the General Court (Sixth Chamber) of 22 September 2021, Altice Europe NV v Commission, op. cit. 9, para. 261.
[39] CASPARY, Tobias a Julie FLANDRIN, 2018. Ernst & Young: First Guidance on Gun-jumping at EU Level. Journal of European competition law & practice. 9(8), p. 516-518.
[40] Opinion of Advocate General Wahl, Case C-633/16, Ernst & Young P/S v Konkurrencerådet, ECLI:EU:C:2018:23, para. 62.

prior to the concentration falls within the scope of the standstill obligation. If the measure is severable from the moves that give rise to the possibility of exercising decisive influence, then it is out of reach of the Commission's powers.[41]

The Court of Justice supported the AG Wahl's arguments, stating that to extend the scope of the standstill obligation to transactions which do not contribute to the change of control would be an undesirable extension of EUMR. Besides, such interpretation would also go against the grain of regulation No. 1/2003, as even if the actions which do not amount to a concentration, they can still be caught by Article 101 TFEU. Therefore, the Court of Justice concluded that the standstill obligation must be understood in a way that *„(...) a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking* ". Regarding the factual circumstances of the case, the termination of the cooperation agreement was not, despite its ancillary and preparatory character, found out to have contributed to the change of control.[42]

Both AG Wahl as well as the Court of Justice also rejected to consider market effects as an indicator of gun-jumping conduct due to the speculative nature of such assessments. Market effects, however, still must be considered when imposing a fine for the breach of standstill obligation as well as regarding the Commission granted derogation pursuant to Article 7(3) EUMR.[43]

The Ernst & Young case thus established a rather narrow interpretation of Article 7(1) EUMR and provided a haven to certain transaction preparatory measures conducted prior to obtaining clearance if these measures do not amount to change of control. However, as it later turned out, the undertakings must be much more careful about their conduct since the criterion of change in control can be met rather easily.

1.5.2 Altice

The *Altice* case was a landmark decision as it dealt with several legal issues, among which was also the application scope and the interpretation of Articles 4(1) and 7(1) EUMR. One of the pleas raised by Altice was the argument that the notification obligation and the standstill obligation do

[41] Ibid., paras. 63-66.
[42] Judgement of the Court (Fifth Chamber) of 31 May 2018, Ernst & Young P/S v Konkurrencerådet, Case C-633/16, ECLI:EU:C:2018:371, paras. 57-59.
[43] CASPARY, FLANDRIN, op. cit. 34, p. 517.

not forbid covenants that give the '*possibility of exercising decisive influence*' but only restrict *'implementation of control on a lasting basis'*. Altice recalled the previous *Ernst & Young* judgement where the General Court made a distinction between the ancillary and preparatory transactions on one hand and the transactions that result in the actual implementation of the concentration on the other hand. In the *Altice* case, as the applicant argued, the transfer of control was to originate purely from the transfer of shares. In that regard, Altice also made a reference to the *Aer Lingus Group v Commission* ruling where the conclusion was drawn that implementation shall be understood as a full consummation of the concentration.[44] Altice also disputed the fact that the SPA clauses enabled it to fully influence the target as they did not result in transfer of sole, absolute control over it. However, as the General Court pointed out, the relevant criterion is not the change of absolute, sole control but the change of control on lasting basis, with the control being constituted also by only the possibility of exercising decisive influence conferred, for example, by a contract. As the acquirer had the possibility to exercise decisive influence immediately, considering that the relevant SPA covenants were effective immediately, it is then unimportant whether Altice did exercise such control.[45]

The *Altice* case thus provided a useful clarification on the problem of gun-jumping regarding some key concepts and notions of the EUMR. It is not that crucial whether a certain merger related conduct constitutes an ancillary restriction or a preparatory measure. Instead, the decisive criterion is to determine if such conduct does result in the change of control over the target undertaking. The competition authority will not therefore limit its assessment to the transfer of shares or voting rights but will instead look out into the acquirer's possibility to exercise decisive influence over the target. It is indeed the mere possibility to exercise decisive influence over the target that is enough to establish control within the meaning of the EUMR. As the Commission suggested earlier in a situation regarding the voting rights, in *Altice* it was confirmed that it is truly irrelevant whether the decisive influence was exercised. Indeed, as stated by both the Commission and the General Court, this possibility can ensue solely from the interim covenants in the SPA.[46]

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[44] Judgement of the General Court (Sixth Chamber) of 22 September 2021, Altice Europe NV v Commission, op. cit. 9, paras. 70-71.

[45] Ibid., para. 173.

[46] DUFKOVÁ, Barbara, 2021. 'Gun Jumping' in the merger implementation in the EU in light of the Altice Case. In: ŠKRABKA, Jan a Nicole GRMELOVÁ. Challenges of Law in Business and Finance: Conference Proceedings. 13th International Scientific Conference Law in Business of Selected Member States of the European Union – November 4-5, 2021, Prague, Czech Republic.

1.6 Partial conclusion

Gun-jumping constitutes a serious offence under the EUMR and is being taken quite seriously as such conduct undermines the very purpose of the *ex ante* merger control mechanism. Gun-jumping does have two forms: the procedural gun-jumping, which consists of failing to notify the concentration with a Community dimension to the Commission on time or to notify it at all, and the substantive gun-jumping, which stands for implementing the concentration prior to receiving the Commission's clearance decision. The undertaking that has committed such infringements of the EUMR might be sanctioned up to as much as 10 percent of its aggregate turnover.

While gun-jumping can result from a simple ignorance of law, it is rather likely to happen because of the merging parties' carelessness and hurry with the transaction process. The Commission is quite alert about this anti-competitive conduct as it might find gun-jumping evidence even in cases that are under closer scrutiny for different reasons or in transactions that were already given clearance.

The relationship between the notification obligation and the standstill obligation is quite specific as the breach of the former automatically brings about the infringement of the latter as well. As a result, the undertaking can thus be penalised for both the infringements without the Commission breaching the *ne bis in idem* principle or the prohibition of double punishment. In the *Ernst & Young* ruling, the Court of Justice interpreted the standstill obligation rather narrowly only to the transactions that present a direct functional link with the implementation of concentration and result in change of control. However, as later shown in the *Altice* case, the interim pre-closing SPA clauses suffice to grant the acquirer the ability of exercising decisive influence over the target. Therefore, the concetration might be implemented purely by this possibility of exercising decisive influence, irrelevant whether such influence was actually exercised and regardless of the actual implementation of the concentration.

2 Types of gun-jumping conduct

Infringements of the notification obligation, alias the procedural gun jumping, are quite uncomplicated and most of such cases are rather straightforward.[47] On the other hand, the substantive gun-jumping brings us to a much more complicated field. Most cases caught and disputed by the Commission in breach of the standstill obligation are not just plain and simple implementation of concentration in terms of acquiring complete control over the target and transferring the majority of the acquired undertaking's shares. The situations arising in this context are much more intricate and create a breeding ground for a whole range of rather elaborate and tricky legal problems. While this makes gun-jumping a relevant and exciting topic, it also means a considerable amount of legal uncertainty for the merging parties.

Despite the conclusion the General Court reached in the *Ernst & Young* case, according to which only the actions resulting in change of control are to be considered implementation of concentration and are thus caught by the standstill obligation, the decision-making practice shows that distinct areas of problematic and risky conduct during the merger process still can be identified. These grey areas are to be analysed more precisely and in greater detail in this chapter dedicated to the decision making. In general, the following actions and types of commercial conduct might equal to gun-jumping, or they are at the very least likely to attract the attention of the competition authorities.

2.1 Veto rights and management control

Since it is understandable the buyer seeks to oversee the target's operations and wishes to at least keep track of its business, the transaction agreements therefore often include various covenants and mechanisms making this possible. Pursuant to the Ancillary Restraints Notice, certain types of such contractual covenants are deemed permissible, especially if their purpose is to maintain the value of the investment and to prevent material changes.[48] Should, however, such limitations turn out as unnecessary or impeding the target's competitive behaviour, then there is a substantial risk of breaching the Article 7(1) EUMR or Article 101 TFEU.[49]

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[47] POWER, op. cit. 20, p. 70.
[48] EUROPEAN COMMISSION. *Commission Notice on restrictions directly related and necessary to concentrations.* OJ C 56, 5.3.2005, p. 24–31, para. 14.
[49] BAILEY, JOHN, op. cit. 3, p. 665.

Veto rights have been at the very center of the landmark gun-jumping case, *Altice*. It is important to state the facts of the case first. Altice, a global telecommunications company with its headquarters located in Netherlands, entered an SPA with a Brazilian telecommunications operator Oi to acquire PT, a Portuguese telecom operator and subsidiary of Oi. Altice notified the transaction to the Commission and the Commission gave the transaction clearance, although it ordered commitments in a form of divestment. However, after the transaction was completed and the shares of PT were transferred to Altice, Commission decided to reopen the case as it was concerned that Altice might have exercised decisive influence over PT even before the transaction was approved by the Commission. Following the investigation, the Commission concluded that its concerns were not unfounded, and Altice was sanctioned with a massive fine of 124,5 million EUR. The core of the problem was, according to the Commission, the SPA and its covenants that enabled Altice to veto PT's day-to-day business operations. Furthermore, the Commission also disliked the vast information exchange between the acquirer and the target. All these actions did, according to the Commission, allow Altice to exercise decisive influence over PT even before the merger was assessed and cleared by the Commission.[50]

Unsurprisingly, Altice did not share the Commission's view of the merger and called for cancellation of the Commission's decision. In its action for annulment, Altice disputed mainly the claim that the SPA covenants resulted in change of control on a lasting basis and considered the covenants in question ancillary and preparatory to the transaction. The General Court, however, did not agree with such arguments and upheld the Commission's decision.

One of the disputed articles of the SPA prohibited the target, among others, from entering into transactions, taking commitments, incurring liability and entering into or terminating agreements, once these exceeded a monetary threshold of 5 million EUR. Furthermore, the covenant also prevented the target from recruiting or dismissing new directors and officers or from modifying its pricing policies.[51] The Commission did not dispute the fact that for the acquirer to have the possibility to oversee the target's personnel prior to closing may be legitimate to preserve the value of the business or to prevent changes to the business' cost base. The wording in the disputed SPA covenant that gave Altice the decisive say in recruitment and personal issues, however, was way too broad according to the Commission as it was beyond what is necessary and enabled Altice to

[50] Commission decision – CASE M.7993 - ALTICE / PT PORTUGAL

[51] Judgement of the General Court (Sixth Chamber) of 22 September 2021, Altice Europe NV v Commission, op. cit. 9, para. 109.

influence the commercial policy of the target. The General Court confirmed the Commission's conclusion according to which the wording of the SPA allowed the acquirer to co-determine structure of the senior management. To further support such argument and prove that this type of conduct is not justifiable, the Commission referred to the Consolidated Jurisdictional Notice. According to the relevant points 67 and 69 of the Consolidated Jurisdictional Notice, veto rights that confer joint control usually include decisions on issues such as the appointment of senior management, and the power to co-determine structure of senior management usually confers the power to exercise decisive influence.[52]

Furthermore, the General Court upheld the similar view of other covenants. The target's obligations to seek written consent from Altice on pricing policies or to enter or terminate contracts were conceived so broadly and the monetary thresholds so low that by no means could such covenants be perceived as necessary to prevent material changes and to preserve the value of the undertaking.[53] Altice argued that the debated clauses constituted merely a consultation right and not a veto right. Also, Altice pointed out the fact that the SPA contained provisions pursuant to which Altice's consent with the PT conduct could not be unreasonably witheld or delayed. The General Court rejected such view by pointing out that not complying with the obligations in the SPA would result in the target's obligation to pay compensation to the acquirer, meaning these covenants were by no means a simple consultation right but indeed constituted a veto right instead. As these preparatory clauses were found to be unsubstantiated and were applicable immediately, Altice was thus able to exercise decisive influence over PT prior to the notification of the concentration.[54]

Interestingly, Altice was also found to have breached the French national standstill obligation in two cases. The French NCA sanctioned Altice for gun-jumping committed by management intervention. The case shows many similarities with the *Altice* case prosecuted on the EU level, most notably in the way that it deals with substantive gun-jumping, i.e., implementing the concentration while complying with the notification obligation. Prior to the *Altice* cases, the Commission has dealt almost exclusively with unnotified transactions that were proceeded on with.[55] The case shed light on certain kinds of unacceptable interference in the management and

[52] Ibid., paras. 106-114.
[53] Ibid., paras. 116-118.
[54] Ibid., paras. 126-132.
[55] HONORÉ, VATIN, op. cit. 7, p. 318.

operations of the target company. For example, Altice was found to approve directly of the target company's bid participation or an agreement on mobile networks sharing. Furthermore, the acquirer also intervened in the sales policy, pricing and had to approve of many other commercial decisions. Interestingly, it was not the clause itself contained in the memorandum of understanding that prohibited the target from conducting excessive expenditure prior to closing that was contradictory to antitrust rules. It was the parties' interpretation of the memorandum as the necessity to obtain Altice's permission for various commercial actions instead.[56] The decision therefore shows that the competition authorities will not only examine the contractual clauses and covenants but will also investigate the actual actions of the acquirer as well. While the wording may seem like the purchaser will indeed have control only over strategic investments and extraordinary commercial conduct to protect the value of the investment, what matters is the fact that the parties interpret such clauses extensively and vest in the acquirer the power to oversee a wide scale of commercial operations of the target.

To sum it up, regarding the veto rights or control over the management of the target company, it does not go without further that any kind of acquirer's veto rights over the target do automatically amount to gun-jumping. In fact, the Commission did admit that veto rights are a standard transactional practice, nevertheless such conduct is allowed only if its purpose is to maintain the value of the target. It is thus permissible to have veto rights over key personnel of the target company, but a clause granting the acquirer virtually a decisive say in the appointment or dismissal of any director or officer is unacceptable. The same can be said about veto rights over contract conclusion, termination, or modification. While a certain amount of oversight may be found justified to protect the acquirer's investment and to prevent asset deterioration and ensure the value of the business remains intact, having a significant amount of control over distinct commercial conduct of the target undertaking and being able to intervene in the ordinary course of daily business is far beyond acceptable. The acquirer should therefore avoid any kind of veto rights or requiring prior consent regarding the decisions of the target undertaking that are not of substantive and material nature. However, veto rights over the undertaking's pricing policy and offer prices

[56] Ibid. p. 318-319.

are prohibited without further as the possibility to set own prices is crucial for the undertaking to be able to compete independently in the market.[57]

2.2 Exchange of information and data sharing

During the pre-signing phase of a transaction, the buyer usually conducts due diligence to obtain information about the target company and the risks associated with it prior to signing the deal. This due diligence procedure itself along with the planning of the whole process will not raise competition concerns.[58] The buyer, nevertheless, needs to obtain a certain amount of information to identify possible dealbreakers and legal risks. For that reason, the parties enter a non-disclosure agreement to preserve confidentiality. However, it is essential to point out that such agreement itself will not satisfy the competition law demands. Therefore, unless the parties refrain from information exchange or share only non-sensitive information, which is highly impractical and oftentimes even unrealistic, safe means of processing such sensitive information between the parties must be established. This is ensured by creating a so-called clean team, that is a separate and impartial group of personnel participating in due diligence, who process the competitively sensitive information and then disclose it to the bidder in a way that is acceptable from the competition law perspective.[59] The parties to a transaction also have to bear in mind the fact that even if their pre-merger coordination does comply with the EUMR and especially its Article 7, the information sharing and pre-closing coordination might still violate the Article 101 TFEU as explained below.[60]

The Commission conceived suspicion of illegitimate information exchange in violation of the standstill obligation in the *Ineos/Kerling* case but eventually did not pursue this surmise any further and declared the concentration compatible with the internal market unconditionally.[61] Somewhat

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[57] BAILLY, Marion a Christos MALAMATARIS, 2020. Procedural developments in EU merger control. ERA Forum. 21(2), p. 251-265.

[58] BAILEY, JOHN, op. cit. 3, p. 664.

[59] Herbert Smith Freehills LLP, 2014. *Information sharing between competitors in an M&A context: what are the limits imposed by EU competition law?*. In: Lexology [online]. Available at: https://www.lexology.com/library/detail.aspx?g=32cdecb5-592f-40da-bf86-07ec2c6265d5

[60] WILSON, Thomas, 2018. *The ECJ provides welcome guidance on the stand-still obligation in mergers*. In: Kluwer Competition Law Blog [online]. 5.6.2018. Available at: http://competitionlawblog.kluwercompetitionlaw.com/2018/06/05/ecj-provides-welcome-guidance-stand-still-obligation-mergers/

[61] OPI, Sergio Baches a Adela BOITOS, 2019. Gun Jumping in the European Union: An Analysis in Light of Ernst & Young. Journal of European competition law & practice. Oxford University Press, 10(5), p.269-280.

unsurprisingly, it is again the *Altice* case which provides guidance on when the information exchange does constitute gun-jumping.

The Commission identified vast and broad exchange of commercially sensitive and strategic information between Altice and PT. The shared information was relating to, among others, commercial targets and their market behaviour, as well as tariffs, margins or costs. At joint meetings, Altice was presented with granular and updated summaries of PT's daily business. The most important statistics shared with the acquirer was, according to the Commission, the topical and up-to-date financial results of the target's business in various segments. The management of both companies then further continued this information exchange by providing even more detailed information afterwards upon Altice's request. Commission also stressed out the fact that the whole information exchange was carried out blithely via e-mail and without any protective and safeguarding measures such as clean teams. The entire management of both companies was involved, and the scope of the information exchange exceeded what would have been justifiable for the purposes of a due diligence process. Finally, the Commission also pointed out that sharing such detailed and strategic information between two competitors made restoring the prior situation much more complicated.[62] Such argument is indeed in line with the theoretical background that has been presented in the previous chapter regarding the very nature of the EU merger regulation. Considering the *ex ante* nature of EU merger control framework, this only shows that gun-jumping is indeed a very grave offense that circumvents the basic principles of the EUMR.

Altice was, as with its other pleas, trying to fit the disputed conduct into the narrowing and restrictive conclusions of the *Ernst & Young* case, claiming the information exchanges were inevitable and necessary for the transaction purposes. Furthermore, it argued that the sole information exchange cannot account for an infringement of the notification and the standstill obligation. The General Court, however, pointed out that the Commission concluded that the information exchange solely contributed to show that Altice was able to exercise decisive influence over PT. In any case, however, the situation described above was by no means a 'mere' information exchange according to the General Court. While also the General Court acknowledged that it is indeed necessary to share certain amount of information to assess the value of the business, in the present case the information was both commercially and competitively sensitive. Furthermore, the exchange continued even after the signing of the SPA, and it was proved from internal documents

[62] Commission decision, op. cit. 50, paras. 411-424.

that the acquirer was aware of all of this. Thus, the General Court upheld the Commission's conclusions that such an extensive sharing of information of this kind indeed, together with the veto rights, allowed the acquirer to exercise decisive influence over the target.[63]

To determine whether an information is sensitive, factors like the kind of information, its level of detail, novelty, frequency of exchange and the market availability shall be taken into account. Consecutively, the more detailed, granular and recent the information is, the higher level of precaution shall be taken.[64] Any information regarding the pricing, financial operations, intended commercial plans or customer-specific data are amongst the most likely to be labeled as strategic and the competition authority will undoubtedly require specific and competition law tailored measures to be applied if such information shall be subject to exchange between the merging parties.[65] Also, the issue of "necessity of the information" for the purposes of transaction, as required in the *Altice* decision, has to be assessed carefully by the legal advisors. Besides from the criteria that are also used to assess if an information is strategic and sensitive, such as the level of detail, availability of the data and the nature of the relevant industry, the current phase of the transaction process will also play an important role. Although it might not be necessary to share some information with different bidders interested in purchasing a target company, the same information might be essential for the successful bidder later after signing the purchase agreement.[66]

The French Altice decision also provides some guidance in this respect and reveals the hazards of vast information exchange. In the acquisition processes of SFR and OTL, the French Competition Authority disliked, among other things, the commercially sensitive data sharing between the undertakings. Altice required economic forecasts and individualised data of the acquired undertakings. Also, a regular reporting mechanism was set for Altice to keep a close eye on the targets' economic performance. According to the French competition authority, these mechanisms in fact allowed Altice to have as many details and strategic data as a controlling shareholder would get.[67]

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[63] Judgement of the General Court (Sixth Chamber) of 22 September 2021, Altice Europe NV v Commission, op. cit. 9, paras. 219-242.
[64] Herbert Smith Freehills LLP, op. cit. 59, p. 2-3.
[65] WERNER, Philipp, Serge CLERCKX and Henry DE LA BARRE, 2018. Commission Expansionism in EU Merger Control – Fact and Fiction. Journal of European competition law & practice. 9(3), p. 133-145.
[66] OBERSTEINER, Thomas. Pre-Merger Integration Planning – Antitrust Law in the Context of Strategic Transactions with Competitors. SSRN Electronic Journal.
[67] HONORÉ, VATIN, op. cit. 7, p. 319.

Pursuant to the *Altice* decisions, when considering the question of data sharing and information exchange within the M&A process, the following conclusions can be drawn. Alike the veto rights, the issue of information exchange does not have to be perceived as automatically leading to gun-jumping. Both the Commission and the General Court do acknowledge that also this kind of conduct constitutes an ordinary part of the transaction process and is considered acceptable if the purpose of the information exchange is directly related to the acquirer's necessity to evaluate the business worth. However, should the information be very detailed, commercially and competitively sensitive, then the merging parties should definitely refrain from sharing them, only the more so if the undertakings are competitors to one another. The exchange of such detailed and strategic information will not automatically mean that an infringement was committed but can be used as a proof that there might have been the possibility to exercise decisive influence. Nevertheless, once an SPA or another acquisition agreement alike is signed, the justification that the exchange of information is acceptable for the purpose of determining the business value is no longer applicable. While this does not necessarily mean that information exchange is prohibited without further in-between the signing and closing of the transaction, some other grounds, for example the need to prepare the post-closing integration, might have to be given to vindicate the information sharing.[68]

Some guidance on a more practical level can also be found in the literature as a distinction might be made between certain types of information and the risk of their exchange. Information regarding the buildings or other company facilities do not present almost any kind of risk. Information regarding human resources, accounting or administrative tasks are also not too likely to raise risk if they are exchanged between the parties to a merger, yet the parties should proceed already this kind of information more carefully. If the data is relating to research and development or the company's own technologies, then it should yet be processed cautiously and under safeguarding measures. Finally, as outlined above, information on prices, pricing, marketing, customer base or financial indicators are amongst the most sensitive and exchange of such data will almost always raise competition concerns unless strict measures are applied.[69]

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[68] MODRALL, Jay, 2022. EU General Court Upholds Commission Gun-Jumping Decision: Altice Europe NV v Commission. Journal of European competition law & practice. 13(8), p. 549-552.

[69] UDRISTE, Anna Maria, 2014. What is gun-jumping and how can we avoid it?. Romanian Competition Journal. 2014(1-2), pp. 50-60.

Additionally, it is heavily recommended to set up a safety measure in the form of clean team to prevent anti-competitive behaviour. The Commission provided a definition of the clean team, characterizing it as a group of people who do not engage in the day-to-day commercial operations of the business and who are allowed to receive confidential information from the other party to the transaction. Furthermore, such individuals must be bound by strict confidentiality agreements regarding the information they receive.[70] The most secure option, as pointed out even prior to the *Altice* decision, would be for the clean team to consist of a third-party advisor or a consultant who will process the sensitive information on behalf of the receiving party. In any way, besides from establishing a limited team of individuals who are bound by a custom NDA to process the information within the merger process, it must be made sure in writing that no member of the clean team does hold a position to influence the receiving party's market conduct to which the received information is relevant.[71]

2.3 Acquisition of minority shareholding

As repeatedly mentioned throughout the thesis, one of the main concepts of the EUMR (and, thus, gun-jumping as well) is the issue of control. It is obvious that control will be conferred if the purchaser acquires the majority or the whole of the share capital of the target company or its voting rights and therefore there will be an imminent risk of gun-jumping in such transactions. However, the situation is more complicated when only the acquisition of minority shareholding occurs. Also, the minority shareholder may be considered to have de facto control over the undertaking if he is probable to reach a majority at the shareholders' meetings. The Consolidated Jurisdictional Notice does provide some leads to determine this, such as the dispersion of the remaining shares, links of the other shareholders to the main shareholder, the ties between them as well as the interest of the specific shareholders in the undertaking.[72] Therefore, an analysis of whether the minority shareholder was able to exercise decisive influence and does thus have a control over the undertaking is essential in order to determine whether there was a (notifiable) concentration and therefore a gun-jumping offense was committed.

At first, as with other forms of gun-jumping, the Commission was rather benevolent when assessing the cases of omitted or misunderstood notifications. However, the Commission's attitude

[70] WILSON, op. cit. 60, supra note 221.
[71] Herbert Smith Freehills LLP, op. cit. 59, p. 2-3.
[72] KOKKORIS, SHELANSKI, op. cit. 13, p. 115.

has changed in this regard as well as it decided to evaluate also the cases of acquisitions of minority shareholding resulting in change of control more stringently.

A company from Belgium doing business in the energy sector, Electrabel, did increase the ownership of shares in Compagnie Nationale de Rhône from about 17 to 49 percent and the voting rights to about 47 percent. The transaction was not notified to the Commission, although Electrabel did later decide to notify the deal. Although the concentration was cleared, the Commission did not conclude on the specific moment when Electrabel acquired control over CNR. Later, the Commission did concluded that the transaction actually resulted in change of control over CNR.[73]

The Commission, in line with the Consolidated Jurisdictional Notice, substantiated its claims mainly on the dispersed shareholding structure of CNR where almost 200 local and regional authorities held just about 17% of the company's capital. Besides, most of these entities did not participate at the general meetings and were not involved actively in the governance of the company. Furthermore, Electrabel had a majority of its representatives in the CNR management board.[74] These findings have led the Commission to impose what was by then a record gun-jumping fine of 20 million EUR. Although Electrabel attempted to reverse the decision with the General Court as well as the Court of Justice, it did not succeed in any way.[75]

A similar situation occurred in the *Marine Harvest* case. Marine Harvest, a Norwegian seafood company, entered together with two other companies into SPA to acquire about 48% of shares in Morpol, another Norwegian food processing company. This transaction was not notified to the Commission. Pursuant to Norwegian national law, Marine Harvest then made a mandatory public bid for the remaining shares of Morpol. Such transaction was already notified to the Commission, with Marine Harvest also informing the Commission it is not intending to exercise its voting rights according to Article 7(2) EUMR. Although the deal was approved conditionally by the Commission, the Commission then stated an objection of Marine Harvest allegedly acquiring control already with the first transaction and imposed a significant fine of 20 million EUR for breach of Articles 4(1) and 7(1) EUMR, as it did in the *Electrabel* case.[76]

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[73] CARLONI, Francesco, 2014. Electrabel v Commission & COMP M.7184 Marine Harvest/Morpol:: Gun-jumping and Violation of the Merger Standstill Obligation in Europe. Journal of European competition law & practice. 5(10), p. 693-696.
[74] Commission decision – Case No COMP/M.4994 - Electrabel/Compagnie nationale du Rhône, paras. 41 and 78.
[75] KOKKORIS, SHELANSKI, op. cit. 13, p. 694.
[76] Ibid.

Similarly, also here the Commission conducted a thorough analysis from the corporate law perspective to prove that Marine Harvest did indeed have control over Morpol despite owning about only 48% of its shares. Commission found out that the vast remainder of the shareholding structure of Morpol consisted largely of financial investors and it was widely dispersed. Of all these investors, who together held almost 40% of the shares, no single one owned more than 6%. The shareholder structure was, aside from Marine Harvest, significantly fragmented and very little of them participated actively at the shareholders' meetings.[77]

Acquiring over 48% of shares in Morpol did, according to the Commission, grant Marine Harvest the possibility to reach a clear majority at the meetings of shareholders. Consecutively, Marine Harvest thus had the possibility to exercise decisive influence and control was therefore established. The exercise of the voting rights itself, which Marine Harvest claimed to refrain from, is irrelevant for the purpose of establishing control, and could only be considered regarding the exemption pursuant to Article 7(2) EUMR, which did not apply in the *Marine Harvest* case in the Commission's view.[78] Marine Harvest brought the case both to the General Court as well as the Court of Justice but its attempts to reverse the Commission's decision were not successful.

To determine whether an acquisition of minority shareholding will result in establishing control over the undertaking, a granular and thorough analysis is necessary and no single approach that will apply universally can be established. Pursuant to the decision-making practice, however, there are certain leads for which the undertaking shall look for when planning its minority shareholding investment. First, identification of how much is the rest of the shareholders structure dispersed is essential. The situation will be completely different if there are dozens of rather passive subjects involved whose investments do not amount to more than a few percent of the share capital or voting rights. On the other hand, if there is a smaller number of investors involved with higher percent of the shares in their ownership, the acquisition of minority shareholding stake is less likely to result in change of control. It is also important to analyse the position of other shareholders and their voting patterns, for example based on the minutes from the previous shareholders' meetings held in the past, to find out if they are likely to approve of the largest minority shareholder's moves or whether they will rather oppose them instead. The shareholder's background plays a role as well as it also must be considered whether the stakeholder has only financial interest in the company or whether his engagement is of strategic nature instead. Family

[77] Commission decision – Case No COMP/M.7184 – Marine Harvest/ Morpol, paras. 53-54.
[78] Ibid., para. 82.

links to the main minority shareholder are another criterion to be considered. However, as ruled in the past by the Commission decisions, even lower stake of about 36% can be considered enough to result in transfer of control over the undertaking. Additionally, a rather minor increase from about 31% to 35% has also been found by the Commission to confer control.[79]

Therefore, as both the *Electrabel* and *Marine Harvest* cases show, the companies shall be very careful when carrying out their investment of increasing their shareholding even if they remain minority shareholders and the increase can be only rather minor. The Commission will analyse the criteria mentioned and may conclude that even such transactions do suffice to confer control and therefore can trigger the notification and the standstill obligation. As seen, even the omitted notifications in somewhat innocuous situations can result to a hefty fine for the undertaking.

2.4 Premerger integration and coordination of market behaviour

It is possible for the merging parties to jointly promote the deal or to conduct courtesy calls to explain the anticipated impact of the forecoming concentration. Such conduct is permissible and not problematic from the competition law point of view.[80] Nevertheless, prior to the clearance decision, the parties shall refrain from coordinating their marketing strategies, pricing policies or from allocating markets or customers. In a similar manner, the parties should not act unequivocally, for example by conducting joint sales, or take commitments on behalf of the other party. Transfer of personnel or employees of the target company acting out as acquirer's representatives are other examples of problematic conduct.[81] Any kind of coordination activities leading to a restriction or distortion of competition shall thus remain off the table, otherwise the parties face the risk of prosecutiton for breaching the standstill obligation or Article 101 TFEU.

It is important to realise that in-between the signing and the completion of the transaction, both undertakings must remain operating as two separate entities, sometimes even competitors. The acquirer and the target shall thus furthermore refrain from any sort of coordination or allocation of markets or customers. Regarding marketing, in the US the FTC has suggested that distinction can be made between the joint marketing of competing products on one hand and the joint marketing of the transaction on the other hand. While the first shall be refrained from, the common promotion

[79] UDRISTE, op. cit. 69, p. 695.
[80] BAILEY, JOHN, op. cit. 3, p. 665.
[81] MODRALL, James R. and Stefano CIULLO, 2003. *Gun-Jumping and EU Merger Control*. European Competition Law Review. 2003(9), p. 424-430.

of the planned transaction is acceptable.[82] While the actual implementation is forbidden under the standstill obligation, planning and designing an effective implementation is not. The undertakings can therefore engage in discussing personal issues and choosing new employees, make plans regarding the company facilities or consider the future framework of internal benefits.[83]

Prohibited coordination and premature integration between undertakings was found to happen in the *Bertelsmann/Kirch/Premiere* case. This case from 1997 might be considered sort of a first swallow in terms of gun-jumping on the EU level. In here, the Commission went on to open proceedings for suspicion of a partial implementation of a concentration prior to the clearance decision being obtained. Interestingly, this first EU gun-jumping whiff has remained the only case prosecuted for partial implementation of concentration for exactly 20 years until the landmark 2017 decision in *Altice*.[84]

The concentration, consisting in acquiring joint control of a joint venture regarding the launch of a digital pay-TV channel, was duly notified to the Commission. The Commission, however, came to find out that the parties acted contrary to the standstill obligation by conducting joint marketing activities as Kirch let Premiere distribute its digital decoder to use it for Premiere's TV services. However, given the fact that this case was the first of its kind, the Commission opted for an amicable resolution first and sent a warning to the parties to notify them of their illegal conduct. In its letter the Commission pointed out that the parties' conduct equals to a violation of the merger control rules. Therefore, the Commission ordered an immediate suspension of the parties' joint marketing and sales activities. The parties complied with the Commission's request, promptly discontinued all their activities and the Commission did not impose a fine for gun-jumping in return.[85]

The premature integration was also identified as a gun-jumping on the national level. For example, The Office for the Protection of Competition, the Czech NCA, has found the inclusion of the acquired companies in the acquirer's group presented on the acquirer's website prior to receiving the approval of the concentrations to constitute a gun-jumping violation of the Czech

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[82] LYLE-SMYTHE, Anna and Jodie-Jane TINGLE. Gun-Jumping Enforcement: A Comparative Analysis. Antitrust [online]. Chicago: American Bar Association, 2017, 31(2), p. 37-43.

[83] WERNER, CLERCKX, DE LA BARRE, op. cit. 65, p. 57.

[84] HULL, GORDLEY, op. cit. 6, p. 8.

[85] Commission warns BERTELSMANN and KIRCH against infringement of European merger control, 2023. In: European Commission [online]. 1.12.1997. [Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_97_1062. See also. HONORÉ, Pierre a Guillaume VATIN, 2017. The French Competition Authority's Altice Decision: Record Fine for the First 'Genuine' Gun Jumping Case in Europe. Journal of European Competition Law & Practice. 8(5), 314-320.

standstill obligation.[86] In two acquisitions made by the company CSG Industry, the Czech NCA concluded that the fact that certain companies from the acquired group were presented on the website of CSG Industry prove that CSG Industry exercised decisive influence and implemented the concentration. Also, the publication of a press release about some of the acquired companies already being integrated into the acquirer's group are yet another example of infringement of the prohibition to implement the concentration.[87] The inclusion of the acquired companies was not, however, in both cases the only problematic conduct as the findings of the breach of the standstill obligation were substantiated also on the grounds of management changes and exercise of voting rights.[88]

2.5 Transfer of economic risk

Transferring the economic risk from the target's business operations or the risk associated with the concentration may also constitute a gun-jumping action. Early literature from before the Commission hopped on the gun-jumping train considered this type of conduct problematic and deemed it uncertain whether or not this U.S. gun-jumping precedent would become relevant and applicable in the EU merger control context and if the Commission would probe the purchase agreements also in the sense whether the transfer of economic risk do not stand in the way of the target's ability to compete or to maintain the integrity of its business.[89] Somewhat unsurprisingly, the Commission did get inspired by this precedent, too. In *Canon/Toshiba Medical*, an important gun-jumping case dealing with the so-called warehousing structure, i.e., implementing the concentration through a series of transactions, bearing of the economic risk of the concentration by the buyer was indeed found to be one of the problematic issues.[90]

As explained below, in the warehousing scheme, there are usually one or more temporary transactions used prior to the final transaction. That was the scheme used in the *Canon/Toshiba Medical* case, where an interim buyer was involved to acquire 95% of the target undertaking's share capital while Canon then paid for the remaining 5% of the shares and share options. The

[86] NERUDA, Robert and Roman SVĚTNICKÝ. Gun Jumping: the CSG Industry Cases (Czech Republic). Journal of European competition law & practice.
[87] *CSG Industry/Hyundai* (Case No. ÚOHS-21700/2021/873/ASm), the Czech Competition Authority Decision of 29 June 2021, para. 132.
[88] NERUDA, SVĚTNICKÝ, op. cit. 86.
[89] MODRALL, CIULLO, op. cit. 81, p. 430.
[90] Commission Decision – CASE M.8179 – *CANON/TOSHIBA MEDICAL SYSTEMS CORPORATION*, para. 142.

Commission probed the case for gun-jumping and imposed fines on Canon for breaching the notification and standstill obligation.[91] The Commission found out, among others, that Canon was the only subject able to determine the final acquirer of the target and bore the economic risk of the whole transaction already by the time of the interim transaction. Canon did not dispute this but reasoned that bearing the economic risk does not establish acquisition of control and does not trigger the notification obligation nor the standstill obligation.[92] Canon agreed with Toshiba that Canon, instead of the iterim buyer, will bear the economic risk of the transaction from the beginning. Canon paid the full purchase price instead of the interim buyer, whose contribution was rather symbolic despite purchasing most of the share capital. Canon's payment was irreversible, and Canon was not entitled to get the purchase price back if the transaction was not given the necessary antitrust approvals. Furthermore, during the investigation, Toshiba acknowledged that Canon took an extraordinary level of risk as it separated almost all the consideration from gaining control over the target. Based on all of this, the Commission reached a conclusion that as Canon was in the position to determine the final acquirer of the target and assumed all the economic risks of the whole transaction, both transactions constituted together one concentration within the meaning of EUMR.[93]

Bearing the economic risk was thus found to have, although rather indirectly at first glance, contributed to the gun-jumping conduct according to the Commission. The General Court did not further elaborate on these grounds. The problem of bearing of economic risk of the transaction as gun-jumping thus remains rather marginal and undeveloped compared to the previous forms of gun-jumping. It can, however, be recommended to avoid any mechanisms transferirng all transaction risks to the purchaser and limiting the target business' integrity and liability for its commercial conduct. By virtually depriving the target undertaking of its ability to compete, the acquirer might be able to exercise decisive influence over the purchased business and therefore control can be conferred. Considering the stringent conclusions of the *Altice* decisions regarding the applicability of Articles 4(1) and 7(1) EUMR, it is possible that in the future the Commission will be more likely to also consider the criterion of transfer of economic risk as yet another

[91] POWER, op. cit. 20, p. 79.
[92] Commission Decision – CASE M.8179 – *CANON/TOSHIBA MEDICAL SYSTEMS CORPORATION*, paras. 130–132.
[93] Ibid., paras. 133-142.

problematic and delicate conduct that might result in gun-jumping too. For the transactional practice, it can only be advised to approach this issue cautiously, too.

2.6 Partial conclusion

As seen on the analysis of the case law, there are various types of gun-jumping conduct existent. Among the most obvious and frequent ones are the veto rights, management control and information sharing. While none of these do automatically equal to gun jumping *per se*, the condition of them being necessary to protect the value of the investment, prevent substantive changes to the undertaking or to determine the investment worth must be ensured in order not to qualify as gun-jumping. Acquisition of minority shareholding or even a minor increase of the existent stake within the company are other examples of an ordinary commercial conduct which may also result in change of control over the undertaking and therefore might trigger the notification and the standstill obligation. During the transaction process, the parties to the merger shall also be cautious in order not to implement the concentration prematurely by engaging in prohibited coordination or by integrating the businesses too soon. Finally, transfer of economic risk from the target to the acquirer can also be considered to confer control and circumvent the merger controlling mechanisms. The examined case law demonstrates that the Commission is willing to probe all this merger related conduct quite precisely once it gets suspicious of EUMR infringements possibly being committed.

3 Exemptions and multi-step transaction schemes

EUMR enacts two exemptions from the suspension period and the standstill obligation that allow for the implementation of the transaction without breaching the prohibition of gun-jumping rules. The first exemption regards to public bids and stock exchange transactions, while the second one is an exemption granted by the Commission upon the undertaking's request. Both derogations from the general prohibition of gun-jumping will be analysed below. Furthermore, this chapter also focuses on the multi-step transactions schemes that are sometimes being put in practice and their compatibility with the EUMR control measures.

3.1 Legal exemptions and derogations from the gun-jumping prohibition

Article 3(5) EUMR contains several provisions regarding cases where a concentration is not deemed to arise and therefore the EUMR rules will not apply to the operation in question. First exemption, pursuant to the Article 3(5)(a) EUMR, applies to credit institutions and other financial institutions or insurance companies regularly engaging in transactions and dealing in securities for their own account or for the account of others if the relevant acquisition of securities is only temporary and speculative.[94] Note that, however, rescue operations in order to prevent an undertaking from bankruptcy or to save an undertaking already facing insolvency proceedings do not fall within the scope of this exemption and do constitute a concentration pursuant to EUMR.[95]

Furthermore, a concentration does not arise when there is a transfer of competence (and, thus, a control is acquired) from a statutory body of a company to an officeholder following a liquidation, insolvency, or other analogous proceedings in accordance with Article 3(5)(b) EUMR. Finally, an exemption from the EUMR application is used if control is acquired by a financial holding company, assuming the acquirer exercises the voting rights only to retain the investment worth and not to determine the competitive conduct of the undertaking.[96]

These situations constitute general exemptions that apply universally and represent transactions that are excluded from the merger control under the EUMR without further. With relation to the suspension of concentrations enacted in Article 7(1) EUMR, which establishes the

[94] KINDL, op. cit. 14, p. 574-576.
[95] EUROPEAN COMMISSION. *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.* OJ C 95, 16.4.2008, p. 1–48, para. 116.
[96] KOKKORIS, SHELANSKI, op. cit. 13, p. 115.

prohibition of implementation of concentration, two specific exemptions are to be found in the EUMR. Article 7(2) EUMR constitutes an exemption from the general suspension principle in Article 7(1) EUMR and it provides an automatic derogation for public bids and stock exchange transactions. Additionally, Article 7(3) EUMR permits the Commission to grant a derogation from the suspension of concentrations. These two exemptions from the general prohibition of implemention of concentrations will be examined in a greater detail below.

3.1.1 Derogation for public bids and stock exchange transactions

Article 7(2) EUMR sets out a legal exception for the so-called 'creeping bids' or 'creeping takeovers' that applies automatically provided the following criteria are met concurrently:

1. the acquisition of control occurs due to a public bid or following a series of stock exchange traded securities transactions, presuming that control is being acquired from multiple sellers;
2. the concentration is notified to Commission straight away without any delay; and
3. the acquirer does not exercise the voting rights attached to the relevant securities or he only does so based on the individual derogation granted from the Commission pursuant to Article 7(3) EUMR.[97]

The individual exemption granted by the Commission in accordance with Article 7(3) EUMR is only needed for the second situation mentioned above in point 3., that is if the acquirer exercised the voting rights. Such exercise of voting rights, even only to maintain the value of the investment, requires the Commission's permission unless outweighed by third party interests or by those of Commission. Regardless of this, the acquired undertaking's competitive behaviour can not be influenced. Conversely, the prohibition of implementation can only apply in case of such acquirer's action, i.e., affecting the target's competitive behaviour.[98]

The Commission (and, consequently, the EU judiciary as well) dealt with public bid and an Article 7(2) cases under the EUMR predecessor, the Council Regulation No 4068/89.[99] That was the case in *Schneider/Legrand*, where the bid was implemented while the Commission's concentration review was still ongoing and eventually led to the issuance of a prohibitive decision

[97] Merger control, 2016. In: FRENZ, Walter. *Handbook of EU Competition Law*. Heidelberg: Springer Berlin, p. 1282.
[98] Ibid, p. 1283.
[99] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 257/90 P 13.

along with divestment orders.[100] The concentration was, however, annulled by the appeal decision of the Court of the First Instance.[101] The situation was similar in the *Tetra Laval/Sidel* case, where an unconditional bid on the Paris Stock Exchange had been made. Also here the bid was implemented during the Commission's administrative proceedings and the Commission issued a prohibitive decision and ordered a divestment as well.[102] However, both of these public bid cases were consequently reversed on appeal and the latter was given a clearance decision afterwards.[103]

The applicability and interpretation of Article 7(2) EUMR was one of the main pleas in the *Marine Harvest* case. Marine Harvest laid down a broad interpretation as it asserted that the derogation should have applied to its acquisiton of Morpol. As briefly outlined above in the previous chapter, Marine Harvest increased its minority shareholding in Morpol and consecutively made a public offer for the remaining shares, as required by the Norwegian law. Pursuant to Marine Harvest argument, the transaction was to be excluded from the prohibition of implementation as set in Article 7(2) EUMR because of the compulsory public bid as both transactions should have been, according to Marine Harvest, treated as one concentration as they were linked.[104]

However, the Commission rejected Marine Harvest's argument on the applicability of the Article 7(2) EUMR exemption. It stressed out the importance of the fact that for the exemption to apply, control has to be acquired from various sellers. In the given case, the stake conferring control was acquired from one single seller. Furthermore, the first transaction, i.e., the acquisition of minority shareholding, was sufficient to establish control over the target company. Therefore, the exemption pursuant to Article 7(2) EUMR was irrelevant according to the Commission as it only applies to public bids.[105] Both the General Court and the Court of Justice upheld the Commission's conclusions that the interpretation suggested by Marine Harvest would inevitably result in an extensive interpretation of Article 7(2) EUMR. As the courts pointed out the main finding of the *Ernst & Young* case, only the transactions that establish control do fall within the scope of EUMR. As the control over Morpol was already conferred to Marine Harvest after the

[100] Commission Decision – COMP/M.2283 — *Schneider/Legrand.*
[101] Judgement of the Court of First Instance (First Chamber) of 22 October 2002, *Schneider Electric SA v Commission of the European Communities*. Case T-310/01. ECLI:EU:T:2002:254
[102] Commission Decision – COMP/M.2416 — *Tetra Laval/Sidel*
[103] BAILEY, JOHN, op. cit. 3, p. 665, supra note 427.
[104] KIEHL, Philippe, 2020. Mowi v Commission: Gun Jumping—Don't Wag the Merger Control Dog. Journal of European competition law & practice. 11(5-6), p. 257-259.
[105] Commission decision – Case No COMP/M.7184 – Marine Harvest/ Morpol, paras. 100-104.

first transaction, the plea of application of the public bid exemption was irrelevant.[106] As it ensues from the findings of the Commission and the courts, the undertakings shall not be too confident in their relying on the exemption pursuant to Article 7(2) EUMR as applying automatically.

3.1.2 Commission granted derogations

As already indicated above, a derogation from the suspension period and the standstill obligation may also be granted by the Commission following a reasoned request from the parties concerned. Regarding this derogation, and contrary to the public bid exemption, the literature as well as the decision-making practice is a bit more comprehensive and complex. The Commission may grant the decision either *ipso facto* or while imposing certain obligations and conditions that must be met to maintain a competitive environment in the relevant market.[107] There is no exact timeline or date when the parties must file a request for such derogation, meaning the parties can apply even before the notification of the concentration. When deciding whether to grant the derogation, the Commission has to tip the scales while assessing both the impact of the suspension period on the undertakings in question as well as the possible harm to competition arising from the concentration.

In certain situations, the Commission shall not be too hesitant to grant the derogation. Usually, this will be in the case of concentrations falling within the scope of simplified procedure that do not cause competition concerns. If the parties prove it is within their (mainly economic) interest to complete the transaction promptly and that the deal poses no threat to competition, the Commission might give it a green light and the suspensory obligation period shall not apply.[108]

In fact, such situations are anticipated in the Explanatory Memorandum enclosed to the EUMR legislative proposal.[109] The Explanatory Memorandum explicitly refers to venture capital investments as a typical example of transaction that oftentimes needs to be closed quickly. In this kind of transaction, the parties need to be flexible and act quickly to maintain the value of their investments. Thus, it is not unconditionally necessary to insist on the suspensory obligation if such a deal does not result in a combination of market position and does not constitute an impediment

[106] Judgement of the Court (Fourth Chamber) of 4 March 2020, Mowi ASA v European Commission, ECLI:EU:C:2020:149.
[107] FAULL, NIKPAY, op. cit. 18, p. 545.
[108] Ibid.
[109] EUROPEAN COMMISSION. European Parliament legislative resolution on the proposal for a Council regulation on the control of concentrations between undertakings: The EC Merger Regulation, OJ C 81E.

to effective competition. The Explanatory Memorandum assumes a significant overlap between these deals and the concentrations eligible for the simplified procedure.[110]

According to the Commission merger cases statistics, there has been at least one derogation from the suspension period granted each year from 1990, with only one exception in 2016. As of April 2023, there have been 138 derogations granted in total pursuant to Article 7(3) EUMR (or pursuant to its equivalent under the antecedent Council Regulation No 4064/89).[111] As to the specific factual reasons for which the Commission has granted a derogation in the past, these may vary, but they are mostly of economic nature. In most cases, Commission takes such step in order to prevent undertaking's assets further degradation, to prevent damage to the undertakings in question or to enable for financial recovery measures to take effect quickly. Also, things like negative tax consequences have been rarely considered, too. Furthermore, the Commission had also granted a derogation to entitle a new undertaking to start competing in the telecommunications market, a typically oligopolistic sector.[112] If there are not any threats to competition due to the concentration, the worsening of the target's financial situation or other economical harm itself can be enough for the Commission to grant the derogation. However, aspects such as the mentioned negative tax implications are not satisfactory by itself in most cases.[113]

As the literature suggests, the derogation procedure foreseen in Article 7(3) EUMR is not completely forthright since no specific form for making such request exists nor do any stringent deadlines or schedules limit the derogation request. The Commission, after making the request subject to closer examination, issues its decision in a form of a reasoned letter addressed to the parties. The legal reasoning of such a decision along with the subsequent procedure differ depending on the Commission's view of the relevant concentration. Should the Commission have no objections to the request, the decisions shall be brief and concise. If, however, the Commission refuses the request or is only willing to accept it with certain obligations imposed, the decision has to be more comprehensive, and the relevant parties have the right to be heard pursuant to Article 18(1) EUMR. Also, in accordance with this provision as well as Article 12(1) of the Implementing

[110] Ibid., paras. 67-68. Also see Merger Control Regulation — Procedural Rules, 2004. In: RITTER, Lennart a David W. BRAUN. *European Competition Law: A Practitioner's Guide*. 3rd edition. London: Kluwer Law International, p. 450.
[111] See Annex 1 „Merger statistics" for the full picture.
[112] BAILEY, JOHN, op. cit. 3, p. 665, supra note 428.
[113] FRENZ, op. cit. 97, p. 1284.

regulation[114] the Commission must make its objections known and shall provide a certain period during which the parties can inform the Commission of their views. The decision might also be just provisional based on Article 18(2) EUMR, with the parties' hearing following later. In such case, the decision becomes definitive after the parties have been heard pursuant to Article 12(2) of the Implementing Regulation.[115]

It should also be noted that the final decision whether or not to grant a derogation is entirely up to the Commission's deliberate consideration and the parties to the transaction cannot in any way rely on a favourable decision in advance when negotiating the deal.[116] Therefore, as apparent from the merger statistics in Annex 1 as well as the criteria described above, the ad hoc Commission granted derogations shall still be perceived as a rather exceptional instrument.

3.2 Multi-step transaction schemes

The parties to the transaction sometimes seek certain ways to steer clear of the merger control obligations and to protect their commercial interests while still ensuring compliance with the antitrust regulations. Therefore, various arrangements and transaction structures known as 'warehousing', 'parking', 'pooling' or 'spinning' are put into practice.

3.2.1 Pooling and spinning

In pooling and spinning transactions, two or more undertakings merge only for the purpose of acquiring another company based on an agreement laid down in advance. Regarding the pooling mechanism, the jointly acquired assets are then split between the undertakings shortly after the completion of the transaction. In the spinning scenario, the target is spun-off to a third party instead of being divided between the acquirers. The transactions of this kind are thus executed in two phases: firstly, the acquisition of the target (either by one or more undertakings) is carried out, and then the newly purchased assets are divided.[117]

Logically, from the competition law perspective, an essential question comes to mind. Should such transactions be assessed separately, or do they constitute only one transaction? The EU

[114] Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 336.
[115] FAULL, NIKPAY, op. cit. 18, p. 545.
[116] FRENZ, op. cit. 97, p. 1284.
[117] KOKKORIS, SHELANSKI, op. cit. 13, p. 121.

legislation anticipates such legal situations in the Consolidated Jurisdictional Notice.[118] The Commission does not perceive the first transaction (that is, the sole or joint acquisition of the target undertaking) to constitute a concentration and makes only the ultimate transaction a subject to scrutiny if certain criteria are met. Firstly, the consequent disintegration of the target undertaking must be agreed in a legally binding way between the purchasers. Furthermore, such disintegration of acquired assets shall be certain to happen in a relatively short amount of time after the first transaction, with one year being the upper limit. If such conditions are fulfilled, there is not a change of control on a lasting basis but only for the time needed to facilitate the disintegration of the acquired assets. Solely the ultimate transaction shall be perceived to constitute a concentration and will be examined by the Commission. It should be noted that each of the 'final' transactions will amount to a separate concentration.[119] Breach of the standstill obligation of the Article 7 EUMR can thus only occur if the second step of either the pooling or spinning scenario is conducted prior to the clearance decision.

3.2.2 Warehousing and parking

Such situation is different from the warehousing and parking transaction arrangements, where the target undertaking is only temporarily 'parked' or 'stored' with a provisional acquirer on behalf of the ultimate acquirer. Based on a future agreement concluded between the interim buyer and the ultimate acquirer, the interim buyer is legally bound to sell the target to the ultimate acquirer later. Oftentimes it is a bank that is acting as this intermediary and bearing the commercial hazard related to the process. There are couple differences to distinguish the warehousing or parking scenario from the pooling and spinning mechanisms. Here, no other ultimate acquirer is involved in the transaction, the acquired undertaking stays unaltered, and the order and the progress of the transactions is decided by the ultimate acquirer. Most notably, the ultimate transaction could never happen without the first transaction in the first place and there is a direct link between the first acquirer and the ultimate acquirer.[120] In this scenario, the Commission will view the acquisition by the interim buyer as the first and integral part of a single concentration. Therefore, in this case,

[118] European Commission. Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95.
[119] Ibid., paras. 28-32.
[120] KOKKORIS, SHELANSKI, op. cit. 13, p. 122.

breach of the standstill obligation can occur already in the first step, that is with the acquisition conducted by the interim buyer.[121]

Given the fact that it is often the bank that is acting as the intermediary in the warehouse scenario, the exception pursuant to Article 3(5)(a) EUMR where a concentration does not arise in connection with credit or financial institutions holding securities temporarily might come to mind. In fact, that was the Commission's approach before adopting the Consolidated Jurisdictional Notice. In the *Lagardere/Natexis/VUP*[122] case, the Commission approved of a warehousing scenario with reference to the exemption provided by the Article 3(5)(a) of the EUMR, although this transaction was carried out in a way that is deemed undesirable in the later adopted Consolidated Jurisdictional Notice.[123] The ultimate buyer seeking to take control over the assets of the target company did so by 'storing' the shares in a bank before being given clearance for the transaction. If the participation of the bank was considered to form a part of the concentration and the notification and the standstill obligation were not complied with, such conduct would account to gun-jumping by breaching the standstill obligation. The transaction was challenged by a rivaling bidder but the appeals both to the General Court and the Court of Justice were unsuccessful, although the courts did not deal with the warehousing aspect directly since it was not relevant for the legality of the Commission's decision.[124] Later on, an analogous transaction scheme was used in the *Universal/BMG Music Publishing* case.[125] However, here the Commission refused to let the undertakings get away with this. From there on, the Commission declined to allow the undertakings to use this scheme to steer clear from the obligations imposed to them by the EUMR for deals where the seller insists on the purchase price beind paid and the shares being transferred irrespective of the merger clearance.[126]

The one-year time test mentioned in the previous subchapter also applies to the warehousing and parking transaction schemes. That is, to not be a subject to the merger control rules, the transfer of the shares or assets to the final buyer shall follow no more than one year after being 'parked' with the bank. The same rules apply in case of 50 % interim acquisition or when establishing a joint venture that is later transferred to an exclusive control of another undertaking. In a situation

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[121] European Commission. Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, para. 35.
[122] Commission decision – COMP/M.2978 - *Lagardere/Natexis/Vup.*
[123] KOKKORIS, SHELANSKI, op. cit. 13, p. 122.
[124] JONES, SUFRIN, op. cit. 4, p. 1126-1127.
[125] Commission decision – COMP/M.4404 – *Universal/BMG Music Publishing.*
[126] KOKKORIS, SHELANSKI, op. cit. 13, p. 122.

where a target is acquired by one undertaking with the goal of the target being controlled jointly with another undertaking, the acquisition of joint control is understood to form a unitary transaction alongside the first step and has therefore to be examined.[127] Similarly, if the ultimate buyer also bears the financial risk of the transaction and the interim buyer acts only as a facilitator of the deal, the transaction is viewed as unitary with the engagement of the interim buyer being understood as integral to the final deal.[128]

3.2.3 Canon/TMSC

The issue of warehousing was the main issue in the *Canon/TMSC* case. Canon intended to acquire Toshiba Medical Systems Corporation and both the purchaser and the seller agreed to carry out the transaction using a two-step scheme with an interim buyer. Canon established an entity that acted as the interim buyer and acquired 95% of the TMSC shares for only a symbolic amount. At the same time, Canon purchased for a hefty price the remaining 5% of shares and share options over the shares held by the interim buyer. These transactions were not notified to the Commission. Afterwards, after a duly notification to the Commission and receiving approval for the deal, Canon exercised its share options and acquired 100% of the TMSC share capital.[129]

About three years later, the Commission issued a decision according to which Canon infringed the notification and standstill obligation and imposed a significant fine. This was, pursuant to the Commission, because of the fact that both the interim transaction and the final transaction constitute only one concentration under the EUMR as they were both part of one single economic project, that is the Canon's plan to acquire TMSC.[130] It further argued that the interim transaction contributed to a lasting change of control over TMSC as it presented a direct functional link with the implementation of the concentration as established by the *Ernst & Young* case. Given the factual circumstances of the case and the financial troubles TMSC was facing, Commission concluded that the two-step transaction scheme was necessary for the change in control, as if it were not for the two step transaction, Toshiba, the mother company of TMSC, could not receive the consideration irreversibly and that soon because it would have wait for antitrust approvals. The structure was used to enable the interim the interim buyer to obtain all voting shares while not

[127] FRENZ, op. cit. 97, p. 1126-1127.
[128] BAILEY, JOHN, op. cit. 3, p. 621.
[129] Commission Decision – CASE M.8179 – *CANON/TOSHIBA MEDICAL SYSTEMS CORPORATION*
[130] Ibid., paras. 101-102.

setting off the merger control requirements. TMSC needed to receive the full consideration rather quickly until the end of fiscal year for accounting and reporting reasons. Given these reasons, Canon admitted in reply to the Commission's request for information that it opted for this transaction scheme despite being aware its investment might not me protected fully. Canon said it only went with the two-step scheme because of the unusual financial situation of TMSC.[131] Additionally, Canon was the key player within the transaction from the start as it already paid the full purchase price irreversibly during the interim transactions. As a result, from the beginning of the whole operation, Canon was the only subject able to determine the ultimate acquirer of TMSC. On the other hand, regarding the interim buyer's involvement, Commission considered it only temporary as it paid only a minimum amount, the interim buyer's shareholders had agreed in advance to sell all their shares of TMSC for a given price and Canon and Toshiba agreed that the interim buyer would not exercise its voting rights in TMSC until Canon exercised its share options.[132] Besides, the Commission also made a reference to the aforementioned Consolidated Jurisdictional Notice, stating that the Canon's approach highly resembles the types of warehousing schemes that are deemed to form one concentration and that are subject to the notification and the standstill obligation.[133] Based on these arguments, the Commission was confident to make a conclusion that Canon jumped the gun as the whole purpose of the two step transaction structure was only to bypass the merger control mechanisms. Canon attempted to reverse the Commission's decision by bringing an action before the General Court. However, the action was dismissed completely by the General Court which only confirmed that the takeaways from previous gun-jumping cases, mainly from the *Ernst & Young* case, were applied correctly to the given case.

3.3 Partial conclusion

Although there is a general prohibition from implementing the transaction during the suspension period enacted by the standstill obligation, two specific types of exemptions break this rule. First, certain public bid and stock exchange transactions might be implemented if several criteria are met. Second, a derogation may also be granted upon request by Commission's discretion shall it consider there are reasons to allow the parties to carry on with the transaction. Both exemptions are nevertheless quite rare instruments that seldom apply and cannot be relied on

[131] Ibid., paras. 143-149.
[132] Ibid., paras. 151-152.
[133] Ibid., para. 133.

heavily by the undertakings. In certain types of deals, there might be more subjects involved as the transaction might be scheduled into two or more steps, mainly because of economic reasons. The so-called pooling and spinning mechanisms consisting in joint acquisition and consequent dissolution of assets is generally acceptable and safe in terms of gun-jumping if certain conditions are met. On the other hand, the so-called warehousing or parking transactions involving an interim buyer will usually constitute one concentration and therefore trigger the notification and the standstill obligation.

4 Consequences of gun-jumping

As outlined above, gun-jumping is not just an intricate legal phenomenon that is appealing from the theoretic and academic perspective. It is also an offence the undertakings shall be wary of, considering its vast consequences and implications. Similarly to other types of anti-competitive conduct, there are both the regulatory consequences as well as the private effects to gun-jumping conduct. Both will be presented below, with special attention being paid to the sanctioning and fining policy of the Commission and the evolution of gun-jumping enforcement throughout the years. Finally, the relationship between gun-jumping and Article 101 TFEU will also be analysed.

4.1 EUMR consequences

Firstly, as with regards to other infringements of the EUMR, the Commission may take interim measures appropriate to restore or maintain conditions of effective competition. Such measures may be applied pursuant to Article 8(5)(a) in case of an early or unauthorised implementation of concentration. Pursuant to Article 8(4) EUMR, the Commission may also require the concerned undertakings to dissolve by ordering a dissolution of the merger if the concentration has already been implemented. Most importantly, however, the Commission is vested in the right to impose a fine pursuant to Article 14(2) EUMR. The fine may amount to as much as 10 % of the aggregate turnover of the undertaking concerned. According to the letter (a) of Article 14(2) EUMR, a fine may be imposed for failing to notify the concentration prior to the implementation (unless a legal exemption applies or an ad hoc derogation is granted based on Article 7(2) and 7(3) EUMR, respectively). Furthermore, under Article 14(2)(b) EUMR, a fine may also be imposed for implementing the concentration in breach of Article 7 EUMR, that is, implementing the concentration prior to receiving a clearance decision. Although it might not be apparent at first glance and the wording of the EUMR might seem a bit misleading, there are two separate offences, and, therefore, two separate fines can be imposed for committing such infringements.[134] As explained above, the Commission's decision-making practice of imposing both gun-jumping fines has been found as legitimate and legally conforming to the European law by the CJEU. When the fine is being imposed, no distinction is made between the fact whether the infringement was

[134] WHISH, BAILEY, op. cit. 14, p. 865-866.

intentional or negligent. Even though that in the *Samsung*[135] decision, one of the first EU gun-jumping cases, the Commission made such distinction, later in *Altice*, one of the landmark gun-jumping cases, this distinction was not applied.[136]

Also, as with other types of anti-competitive conduct, the Commission probably will not hesitate too much whether to carry out a dawn raid, i.e., an unannounced inspection to obtain evidence regarding possible competition law infringements. Commission conducted dawn raids even in the early cases that eventually resulted in clearance decisions and where no gun-jumping conduct was found to have taken place. Besides, even if no gun-jumping is found to have happened, opening a probe into gun-jumping might have an adverse effect on the subsequent assessment of the transaction itself. The examination of the merger might take longer as the Commission would sort through a significant number of internal company documents. Furthermore, the antitrust investigation for possible gun-jumping is likely to cast a bad light on the transaction, giving it a lot of negative and undesirable attention.[137]

4.2 Private law effects

In accordance with the Article 7(4) EUMR, if the concentration is implemented prior to its notification or until it has been cleared, the validity of such concentration shall still be dependent on a Commission's decision or on a presumption pursuant to Article 6(1)(b) or Article 8(1), (2) or (3) EUMR or on a presumption pursuant to Article 10(6) EUMR. In other words, the determination of whether the transaction is valid depends on the merger decision itself. Breach of the standstill obligation does not automatically result in nullity of the transaction as the implementation can only be declared null in case of the merger being prohibited because of its declared incompatibility with the internal market. On the contrary, jumping the gun, i.e., breaching the standstill obligation, does not make the transaction invalid if such action does not contradict the final decision on the merger.[138]

Unlike with the TFEU provisions on prohibited agreements and abuse of dominant position, the EUMR does not contain any provisions regarding the validity and nullity of the transaction for

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[135] Commission Decision – Case IV/M.920 - Samsung / AST
[136] POWER, op. cit. 20, p. 72.
[137] DIONNET, Stéphanne a Pauline GIROUX, 2017. Gun jumping. In: Skadden, Arps, Slate, Meagher & Flom LLP [online]. Available at: https://www.skadden.com/-/media/files/publications/2017/01/gun_jumping.
[138] BLAŽO, Ondrej, 2020. Nullity and ineffectiveness of contracts as a consequence of violation of EU competition and public procurement rules. Strani pravni zivot. (4), 69-83.

the case of breaching the standstill obligation, i.e., implementing the concentration prior to the Commission's decision. However, despite the EU law remaining silent and not providing any explicit provisions, there is still an unspoken requirement of legal ineffectiveness of such deals. In accordance with what has been said in the previous paragraph, the agreements contravening the suspension duty are to be considered suspended instead of null since they are deemed valid after the clearance decision pursuant to Article 7(4) EUMR. This stays true even though that such agreements were unlawful at the time they happened. However, after the final decision regarding the concentration has been issued, once the deal is incompatible with the internal market, the gun-jumping actions have the same consequences as the concentration itself and are thus invalid from the beginning.[139]

4.3 Gun-jumping and Article 101 TFEU

As already indicated above, an overlap exists between the EUMR gun-jumping provisions and the Article 101 TFEU, with the conduct in question being mainly the exchange of sensitive information between the acquirer and the target within the transaction process. The intricacy of how to apply the Article 101 TFEU on mergers is particularly obvious in the period between receiving the clearance decision and the closing of the transaction, as by this moment the parties need to start developing plans for a post-merger consolidation. Although the exchange of information in the meanwhile does not account to gun-jumping from the legal viewpoint, the Article 101 TFEU is yet applicable during this time. Even though the acquirer is by then legally entitled to control the target, from the corporate law perspective, both companies remain two separate legal entities until the closing. Thus, the provisions of Article 101 TFEU on prohibition of restrictive agreements are still of relevance within this interim period.[140]

As the topic is not addressed in any legislation or the implementing regulations, there are no exact guidelines on how to approach these issues. However, the ECJ provided at least some amount of guidance on how the different situations shall be assessed in the *Ernst & Young* case.[141] In there, the ECJ rather limited the application scope of the Article 7 EUMR as it argued that the provisions

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[139] Ibid.

[140] DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE. Suspensory Effects of Merger Notifications and Gun Jumping: Note by BIAC. In: OECD [online]. 27 November 2018. Available at: https://one.oecd.org/document/DAF/COMP/WD(2018)138/en/pdf

[141] Judgement of the Court (Fifth Chamber) of 31 May 2018, Ernst & Young P/S v Konkurrencerådet, Case C-633/16, ECLI:EU:C:2018:371.

of Article 7(1) EUMR shall only apply in case the exchange of information leads to or contributes to change of control. According to the ECJ, broadening of the application scope of Article 7 EUMR would also reduce the scope of Regulation 1/2003 as it would not be applicable to prohibited coordination within the meaning of Article 101 TFEU.[142] A similar viewpoint of the consequences of the information exchange was considered in the Commission's *Altice* decision. From the decision it seems that when assessing the information exchange and its consequences, the Commission will consider the specific circumstances, such as the existence of clean teams, regularity, and the level of detail of the exchange. Based on these two rulings, a sort of general conclusion can be drawn. Because EUMR is a *lex specialis* in relation to Article 101 TFEU, the criterion between whether to apply EUMR or Article 101 TFEU is the change of control. Therefore, if the information exchange between the acquirer and the target is rather a one-time thing, such action might constitute a violation of the Article 101 TFEU. On the other hand, shall the information exchange result in the acquirer being able to exercise decisive influence over the target and thus gaining control, the standstill obligation would most likely apply instead.[143]

Transfer of economic risk, which has been identified as one of the types of gun-jumping conduct by the Commission, might also pose risks regarding Article 101 TFEU. Where the acquirer does carry the economic risk of the transaction from the beginning, there is also a high likelihood of him depriving the target of its ability to compete prior to closing. Securing the target's financing needs might be one of the types of conduct that could be perceived as reducing competition in the given market and thus being labeled by the competition authority as a concerted practice.[144]

Within the light of the *Ernst & Young*, Article 101 TFEU is therefore applicable on the transactions where a concentration under the EUMR is not constituted but where the undertaking's conduct has the potential to result in coordination between the undertakings that is restricted by Article 101 TFEU. Followingly, the potential risks of Article 101 TFEU being breached in a transaction will differ regarding whether the transaction is involving actual or potential competitors or whether there is a vertical relationship between the undertakings, and thus they are operating on different levels of the supply chain.[145]

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[142] Ibid., paras. 57-58.
[143] DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE, op. cit. 140, pp. 8-9.
[144] FARIA, MARGOT, op. cit. 8, p. 200.
[145] Ibid., p. 199.

However, considering that there is no further guidance from the authorities on the issue, the undertakings shall be rather cautious until a more detailed explanation is provided. Considering the Commission's incentive to interpret the provisions of Article 101 TFEU quite broadly, the risk of an infringement being found regarding the merger process is evident and should not be taken lightly. On the other hand, as some authors point out, from the Commission's perspective it is much easier to apply the strong powers vested in it by EUMR compared to making use of Article 101 TFEU which involves more intricacies and application difficulties.[146]

4.4 Sanctioning policy

What also deserves closer examination is the fining policy applied by the Commission and the evolution of the sanctioning approach. The Commission's decision making practice on gun-jumping might be split into three distinct and somewhat specific phases: the first one, during which the Commission became aware of the problem but did not proceed to any enforcement; the second one, when the Commission already proceeded to the enforcement of this conduct; and the third, which stands out as a very persistent and rigorous enforcement accompanied by significant fines. Regarding the time periods, the first phase dates to the late 1990s, when around the year 1997 the Commission started conducting its first makeshift and preliminary steps into what had until then been a U.S. antitrust phenomenon. Shortly afterwards, just about a year later, the second phase ensued. After that, a certain period of quiet followed, but in fact it only foreshadowed the whirlwind that was yet to come. Thus, from 2008, the Commission embarked the gun-jumping ship fully and the enforcement has since then become very intense with the severity of fines growing quite notably.[147]

4.4.1 First era of gun-jumping enforcement

In Bertelsmann/Kirch/Premiere, the very first prosecuted gun-jumping case on the EU level, the Commission opted for an amicable resolution first and sent a warning to the parties to notify them of their illegal conduct.[148] Interestingly, this intended transaction was eventually prohibited

[146] POWER, op. cit. 20, p. 82.
[147] Ibid., p. 72.
[148] Commission warns BERTELSMANN and KIRCH against infringement of European merger control, 2023. In: European Commission [online]. 1.12.1997. [Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_97_1062. See also. HONORÉ, Pierre a Guillaume

as the Commission issued a negative decision. The transaction would, according to the Commission's assessment, lead to strengthening of the dominant position of one of the involved parties on the pay-TV market and was thus declared incompatible with the internal market.[149] Therefore, in this specific case the gun-jumping conduct of parties' premature integration and joint business activities might have had far-reaching consequences had the Commission not identified it on time. This Commission's approach of 'taking a warning shot' before proceeding to a serious enforcement of gun-jumping was later used by competition authorities in various European jurisdictions, too.[150]

The Commission did once take a similar approach, which was about ten years later in the case *Yara/Kemira Grow How*. The Commission sensed an infringement of the standstill obligation as well as the notification obligation, and threatened to commence a separate proceeding for gun-jumping to find out whether it will impose a sanction according to Article 14(2) EUMR.[151] However, no fine was eventually imposed as there is not even any evidence of the Commission looking into the matter whatsoever.[152]

These two cases represent the abovementioned 'first era' of gun-jumping enforcement and sanctioning on the EU level, where, despite the possible incompatibility of the transactions with the internal market and the anti-competitive conduct of the parties to the merger, the Commission opted for a rather mild approach as it completely refrained from imposing fines. This is quite interesting considering that *Bertelsmann/Kirch* case was the only case prosecuted for partial implementation of concentration for exactly 20 years until the landmark *Altice* decision.

4.4.2 Second era of gun-jumping enforcement

After taking a warning, the Commission then proceeded on to the actual enforcement of gun-jumping in the *Samsung/AST* case. Commission found Samsung to have violated the notification obligation and the standstill obligation as it ascerained Samsung to have acquired control prior to the notification because of being the largest minority shareholder and having majority of the target's board. Regarding the sanctioning powers of the Commission, Samsung claimed that fines

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VATIN, 2017. The French Competition Authority's Altice Decision: Record Fine for the First 'Genuine' Gun Jumping Case in Europe. Journal of European Competition Law & Practice. 8(5), 314-320.

[149] Commission decision – Case No IV/M.993 – *Bertelsmann/Kirch/Premiere,* para. 99 et. seq.

[150] POWER, op. cit. 20, p. 66-82.

[151] Commission decision – COMP/M.4730- *Yara/Kemira GrowHow,* paras. 6-7.

[152] OPI, BOITOS, op. cit. 61, p. 269-280.

shall only be imposed in case of gross recklessness or in case of non-negligible anti-competitive consequences. The Commission rejected all the Samsung's arguments, saying the provisions sanctioning gun-jumping are clear in that they apply both to intentional and negligent actions. Commission also pointed out to the fact Samsung is a multinational company with extensive activities in Europe which shall be wary of the EU merger control rules and comply with them.[153]

While the Commission partly accepted the mitigating arguments presented by Samsung such as the voluntary recognition of the breach, cooperating with the Commission and not causing any damage to competition, its original view of the matter remained unchanged. Given the company size, the length for which the infringement had lasted and the objective negligence in Samsung's conduct, the Commission held there are no grounds for granting amnesty. Above all, to find out that Samsung did gain control over AST did not require any complex analysis as it was not exactly a complicated niche case of acquisition of control. Therefore, the Commission decided to impose sanctions totaling 33 000 EUR.[154] Although such fine seems truly minor compared to the astronomical fines imposed recently, the case showed the course change in Commission's attitude. It is also interesting to point out that the Commission imposed two different fines for the different infringements. Such approach differs from the position applied later, where the levels of fines have been the same for both breaches, i.e., not notifying the transaction and circumventing the standstill obligation.[155]

The *A.P. Møller* is the second case from this era that shows the chiseling of the Commission's approach. The Danish company A.P. Møller was, at the time being, the biggest private company in Denmark. When a transaction where one of A.P. Møller subsidiary companies was involved, it turned out that the whole A.P. Møller concern had to be considered as a group for the purpose of turnover calculation as the group exceeded the thresholds set out in the Regulation No. 4064/89. Due to that, A.P. Møller went through its past transactions and consequently notified three former concentrations. All of them were cleared, yet the gun-jumping conduct committed by A.P. Møller was evident.

The leading argument A.P. Møller repeatedly made was that the company was under no obligation to set up consolidated accounts of the whole group in terms of corporate or tax purposes. Furthermore, after the Commission was informed about the unnotified transactions, A.P. Møller

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[153] Commission Decision – Case No IV/M.920 - *Samsung/AST*, paras. 10-15.
[154] Ibid., paras. 18-30.
[155] POWER, op. cit. 20, p. 74-75.

asserted that a significant amount of time was needed to submit the notification due to the alleged difficulty and complexity of the information. The Commission easily rejected the A.P. Møller leading plea, pointing out the direct applicability and supremacy of the Community laws. In other words, it is irrelevant whether there is a corresponding legal obligation on the national level once there is an obligation resulting from EU regulation. With respect to the delay in-between the moment the Commission got informed about the unnotified transactions and the actual notification, the Commission recognised a reasonable amount of time must be given to submit a Form CO. However, according to the Commission, the time A.P. Møller took was longer than reasonable. Nevertheless, given the novelty of the proceedings, the Commission decided not to consider the time frame in-between finding out about the transactions and their actual notification. Also, various mitigating factors were considered by the Commission, such as the recognition of the breach, no damage to competition emerging and voluntary informing of the transactions. On the other hand, similarly as in *Samsung*, it was made clear that companies this big cannot exonerate themselves by claiming negligence and unintentional conduct neither not being aware of the EU law requirements. The Commission also accentuated the fact that A.P. Møller was involved in other competition cases in which it was advised by experts and also the company had its own legal department. Based on the abovementioned criteria the Commission imposed fines totaling 219 000 EUR.[156] What goes a bit contrary to the argumentation and the logic the Commission used is imposing the same level of fine for each month of the breach. One would rather expect the amount of fine to be greater for the latter months due to the increased harm to both the consumers and the competition.[157]

Interestingly, it almost seems like the Commission took a break in the enforcement of gun-jumping for 10 years as if it only cautiously tested the waters first. During the period of quiet, Commission identified and investigated possible gun-jumping conduct in two cases but eventually did not pursue either of them any further.[158] Thus, for a significant amount of time, *Samsung* and *A.P. Møller* remained the only two cases where the Commission fined the undertakings for gun-jumping behaviour and undermining the leading principles of the EU merger control regime. Besides, the penalties imposed in those two cases seem to be of minor importance compared to

[156] Commission decision – Case No IV/M.969 - *A.P. Møller,* paras. 14-23.
[157] POWER, op. cit. 20, p. 75-76.
[158] Ibid.

what was about to come, and even the more so from today's perspective.[159] These two cases thus mark the end of the so-called second era of gun-jumping enforcement on the EU level.

4.4.3 Third era of gun-jumping enforcement

After the enforcement break, the Commission returned with prosecution of gun-jumping on a large scale. As the facts of all the cases and their substantive issues have been laid down in the previous chapters, attention will now only be paid to the fining and sanctioning aspects of those decisions. In many regards, in these decisions, the Commission repeated its arguments presented in the first cases on gun-jumping, especially about imposition of fines. Still, these cases carried certain novelties with them.

In the *Electrabel/Compagnie National du Rhône* case, the Commission applied a different approach regarding the calculation of fines. Following its claim that Electrabel acquired control over CNR prior to notification, the Commission decided that the reference turnover year for the calculation of fines is the year prior to acquiring control instead of the year of the actual notification.[160] The fine imposed on Electrabel was massive compared to the previous cases, totalling 20 million EUR, which only showed the toughening of the Commission's stance as it was no longer willing to take the infringements of the merger control rules mildly. The Commission briefly commented on this in the very end of the decision, stating that it „*takes into account the need to ensure that fines have a sufficiently deterrent effect.*" It further added that to have such character and to prevent the infringement from happening again, considering the undertaking's size, the amount of fine has to be significant.[161] To further justify the huge amount of fine as well as to stress out the gravity of the infringement, the Commission reminded Electrabel of the existence of previous gun-jumping decisions where it said clearly it is not going to take infringements and circumventions of the EUMR lightly. Given the existence of similar precedents, Electrabel could not have therefore relied on expecting their condcut to be assessed as a novelty.[162]

An identic fine of 20 million EUR was imposed in the *Marine Harvest* decision. Although that in general the Commission's approach was much in line with the previous cases, the *Marine Harvest* case is still different on some levels. First, the infringement had lasted for a much shorter

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[159] MEMETI, Nora, 2018. Gun-Jumping in EU Law: Echoes From A National Competition. Kilaw Journal. 6(3), p. 25-50.
[160] Commission decision – Case No COMP/M.4994 - Electrabel/Compagnie nationale du Rhône, para. 13.
[161] Ibid., paras. 226-227.
[162] Ibid., paras. 205-206.

period of only about 9 months compared to approximate 5 years in the *Electrabel* case. On the other hand, the Electrabel acquisition posed no threat to competition while in *Marine Harvest*, the concentration only received clearance conditionally upon fulfilling the commitments imposed by the Commission. Also, the Commission knew about the Marine Harvest transaction as the deal was notified and Marine Harvest refrained from exercise of voting rights. In the *Electrabel* case, on the contrary, the acquirer contacted the Commission after 3 years.[163] Interestingly, the Commission imposed the high fine on Marine Harvest despite the fact there had been no aggravating circumstances. This might seem a bit contrary to the previous decisions where there had been aggravating circumstances found, yet the sanctions for the infringements were much lower. In both cases, the fines imposed were still quite far from the upper limit of 10% of the turnover, as the fines were in fact even less than 1% of the undertakings' turnover. Nevertheless, despite to some of the criteria, such as the lack of aggravating circumstances, the increase in the level of fines compared to the previous decisions was self-evident, which only shows the importance of the notification obligation and the standstill obligation in Commission's view. As the Commission put it in the *Marine Harvest* case, it considers the breaches of these pillars of the EUMR *ex ante* control mechanisms serious as they can undermine its effectiveness.[164]

Canon attempted to alleviate this Commission's outlook, claiming that the asserted seriousness actually overestimates the significance of the standstill obligation, pointing out there are certain national merger control regimes without the standstill obligation and that the original Union merger control rules were enough by establishing only a three week lasting standstill obligation.[165] The Commission firmly rejected such arguments, once again repeating that the Articles 4(1) and 7(1) EUMR constitute a keystone of EU merger control regime. Gun-jumping can therefore be an offense as serious as the infringements of Articles 101 and 102 TFEU.[166] In the given case, there were no aggravating or mitigating circumstances according to the Commission. Nevertheless, considering the huge size of the company, the Commission considered the fine necessary to be high to have a disuasive and preventative effect. The fine thus increased yet again compared to previous cases to 28 million EUR.[167]

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[163] Op. cit. 72, p. 695.
[164] Commission decision – Case No COMP/M.7184 – Marine Harvest/ Morpol, paras. 135-136.
[165] Commission Decision – CASE M.8179 – CANON/TOSHIBA MEDICAL SYSTEMS CORPORATION, paras. 188-189.
[166] Ibid., paras. 193-197.
[167] Ibid., paras. 223-226.

Although issued a year prior to the *Canon* gun-jumping decision, the 2018 *Altice* Commission decision still stands out from all the EU gun-jumping cases on many levels, and the fines imposed in there are no exception. The fines imposed are simply tremendous compared even to the other 'third era' Commission decisions. For each violation, the Commission inflicted a fine of 62.25 million EUR, the overall amount thus totalling 124.5 million EUR. As the Commission has already had established a solid decision-making practice to base its arguments on, much of the reasoning with regards to the fine and the seriousness of the infringement was repeated with reference to the previous case law. Still, the decisions provided some new outlook even in this regard.

Altice sought a milder assessment by claiming that it notified the transaction in accordance with Article 4(1) EUMR and that it acquired the shares of PT only after receiving the clearance decision. However, these facts were irrelevant in Commission's view as it turned out Altice was able to exercise decisive influence prior to that. It further added that gun-jumping may occur even in spite of the positive outcome of the merger review process, meaning a clearance decision does not by any means rule out the possibility of detecting a gun-jumping conduct later on.[168] Furthermore, the Commission noted that just the fact itself that the transaction does raise concerns about its competitive effects on the market is an essential criterion that does make the breach more serious and it substantiates high level of deterrence.[169] Commission also rejected the argument made by Altice with regards to nonexistence of guidelines on the infringements of Articles 4(1) and 7(1) EUMR and the calculation of fines for such breaches. Existence of such guidelines is not, according to the Commission, a vital prerequisite for the imposition of fines. The lack of guidelines that further explain the gun-jumping conduct does not mean that only a minor, symbolic fine shall be imposed for breaches of EUMR.[170]

The General Court did not accept Altice's arguments on acting negligently, imposing two sanctions for the same conduct or insufficient reasoning of the Commission's decision. Nevertheless, the General Court did intervene in the issue of the proportion if fines. Considering that Altice informed the Commission voluntarily and quite in advance prior to signing the SPA and requested a case allocation, the gravity of the infringement of the notification obligation was somewhat lesser compared to how seen by the Commission. Therefore, the General Court decided

[168] Commission decision – CASE M.7993 - ALTICE / PT PORTUGAL, paras. 574-575.
[169] Ibid., para. 591.
[170] Ibid., paras. 614-615.

to step in and exercise its unlimited jurisdiction to reduce the fine for the infringement of the notification obligation by 10% to 56.025 million EUR.[171]

Lately, the Illumina/GRAIL case seems to be the newest addition to the growing gun-jumping collection on the EU level. The case has turned out to be quite a complicated antitrust saga on several levels. This is the case of the so-called killer acquisition where the Commission is concerned about the acquisition of GRAIL, a company that is developing cancer tests, by a biotech giant Illumina. The transaction did not meet the notification thresholds, but the Commission received referral from several European countries and the transaction is thus probed based on Article 22 EUMR. Although Illumina notified the transaction following these regulatory hurdles and immediate opening of Phase II, it then went on to complete the deal despite the antitrust approval pending, likely to comply with the SPA covenants. Illumina claimed to keep GRAIL separate until the Commission ends its probe. Eventually, in 2022, the Commission prohibited the transaction given its potential to stifle competition. Nevertheless, the gun-jumping proceedings remain open.[172] Although the gun-jumping probe is pending as of now as Illumina has challenged the Commission's jurisdiction in the given case, shall Illumina not succeed, the Commission is expected to issue a gun-jumping decision. In fact, there are some clues that the fines imposed for infringement of EUMR might be the highest up to date. Illumina has allegedly set aside a whopping 453 million USD which indicates that the fines might be astronomical end even exceed the level of penalties imposed in the *Altice* decision.[173]

4.5 Partial conclusion

Gun-jumping is a grave offense that circumvents the basic principles of the EU merger controlling ex ante mechanisms. Not respecting the notification and the standstill obligation and implementing the transaction prematurely might have several consequences, the most perceptible of which being the Commission's discretion to impose a fine of up to 10% of aggregate turnover. Commission can also apply interim measures or order a dissolution of the merger to restore

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[171] Judgement of the General Court (Sixth Chamber) of 22 September 2021, Altice Europe NV v Commission, op. cit 9, paras. 364-369.

[172] Mergers: Commission prohibits acquisition of GRAIL by Illumina, 2022. In: European Commission [online]. 6 September 2022. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364.

[173] MODRALL, Jay. Illumina/Grail Prohibition: The End of the Beginning for EU Review of "Killer Acquisitions"?. In: Kluwer Competition Law Blog [online]. 8 September 2022. Available at: https://competitionlawblog.kluwercompetitionlaw.com/2022/09/08/illumina-grail-prohibition-the-end-of-the-beginning-for-eu-review-of-killer-acquisitions/

premerger competition. The gun-jumping transactions shall be considered suspended as their validity will depend on the Commission's assessment of the merger itself. There is also a link between gun-jumping and Article 101 TFEU. Although the issue is rather undeveloped as of now, it might be concluded that EUMR rules are more likely to be enforced given their relative simplicity. However, should the transaction not result in change of control on a lasting basis, the undertakings are still in danger of being prosecuted for restrictive agreements or concerted practices, especially regarding the information exchange or premerger coordination conduct. As apparent from the analysis of the sanctioning policy, the Commission has been gradually escalating the severity of its approach to the gun-jumping from no enforcement at the beginning to imposing very tough decisions within the last few years.

Conclusion

The issue of gun-jumping has become very topical during the last few years. Infringements of the notification obligation and the standstill obligation are now taken very seriously by the Commission. The EU competition enforcers do not hesitate to impose hefty fines to the undertakings for circumventing the EUMR controlling mechanisms and taking part in anti-competitive conduct during commercial transactions. Within the last decade, there have been some turbulent developments in this field. Lots of welcome guidance have been provided by the Commission and the CJEU as many concepts or issues have been elaborated and explained. On the other hand, some uncertainties remain. To summarize the enforcement evolution, the types of gun-jumping actions and the possible ambiguities and areas to clarify as identified throughout this thesis, the following research questions raised in the beginning will now be answered.

1. How has the approach to gun-jumping enforcement in the EU developed throughout the years and what are the current trends and tendencies in the gun-jumping decision-making practice in the EU?

The enforcement of gun-jumping on the EU level can be divided into three phases. For a long time, gun-jumping has been a set aside and overshadowed by Articles 101 and 102 TFEU and was considered a scarce, marginal issue. Starting its enforcement by mid-90s, with the first case, the Commission opted for a friendly and diplomatic settlement as it issued a warning and did not impose any fines, even despite the concentration's incompatibility with the internal market. Shortly afterwards, with what is described as the second era of gun-jumping enforcement, the Commission did already proceed to penalize the gun-jumping conduct, although the fines imposed were quite minor compared to the latter decisions. Also, these initial decisions were rather straightforward and did not bring about many legal intricacies. For a while then, the Commission took a break from gun-jumping prosecution only to return in full swing by 2008. Ever since, the Commission's appetite for gun-jumping enforcement has only grown as the EU competition watchdog has been quite active in this regard.

The Commission has become very sensitive to infringements of the notification and the standstill obligation as they undermine its investigative and controlling powers under the EUMR that aim to ensure working competition, maintain level playing field and safeguard consumer protection. To stress this out, both the Commission and the CJEU have repeatedly pointed out in their decisions that gun-jumping is an offense as serious as the restricted agreements or abuse of

dominance. To send a clear message, the Commission has proceeded to serious enforcement and penalised various types of merger related conduct. Also, the Commission is no longer pursuing only the plain breaches of not reporting transactions but it is also willing to dive into more complicated cases of premature implementations of concentrations. Most importantly, the fines for gun-jumping have been rising steadily and the trend likely seems to remain the same. The recent fines imposed for gun-jumping conduct even exceed the current average fines imposed for cartels, although the number of gun-jumping is much lower.

As it is also apparent from the decision-making practice, there has also been a significant shift in the approach to the legal grounding and the standard of proof to which the Commission reasons its decisions. From the very brief and concise decisions from the first era of gun-jumping that only consisted of few dozens of recitals, the Commission has moved over to decisions the extent of which is in several hundreds of recitals. An overwhelming portion of these recitals revolves around the factual circumstances of the case as the Commission puts significant effort into proving that the acquirer was able to exercise decisive influence over the target and that there was a change in control. Indeed, all of the actions and appeals brought before the General Court or the Court of Justice were dismissed as the CJEU considered the Commission's reasoning convincing.

2. What practices do constitute gun-jumping and might be problematic from the undertakings' point of view?

With its still growing case-law, the Commission has identified several types of conduct that might result in breach of Articles 4(1) and 7(1) EUMR and that are quite likely to attract its attention when exercising its merger screening and controlling powers. While some of them have been elaborated on quite deeply and there is a certain level of guidance on how to approach them, other might remain quite undeveloped. The following types of behaviour and practices are typical examples of a gun-jumping conduct.

Veto rights are one of the typical kinds of gun-jumping behaviour. Veto rights are acceptable if their purpose is to preserve the value of the investment and maintain the worth of the acquired business. Specifically, it is thus acceptable to have veto rights over the appointment or dismissal of certain key employees of the company, but being in control over any director or officer is unacceptable. The possibility of determining the senior management also usually grants the power to exercise decisive influence. Similarly, being able to block the target company's incentive to conclude, modify or terminate contracts is deemed permissible should it relate to strategic purposes. However, being able to interfere to the target company's contracting activities from low

monetary thresholds and on a broad scale of commercial decisions is by no means understood as necessary to maintaining the business value and will result in limiting the target's incentive to compete and remain independent. The same goes for interfering into sales or pricing policy. The undertakings also must bear in mind that the competition authority will not only examine the covenants but will look at their interpretation and practical application as although the wording might look acceptably on paper, the acquirer might actually construe the covenants more extensively.

Data sharing and information exchange may also pose a great risk of gun-jumping behaviour. Although the decision-making practice does acknowledge that information sharing is part of the transaction routine, the parties' data sharing must stay within certain boundaries, meaning the information shall be necessary to assess the value of the business. The undertakings should avoid sharing any information regarding prices, pricing policies, customer data, detailed and topical financial results, or economic indicators. Once again, no general rule exists as to how to determine whether an information is commercially sensitive and strategic. However, the criterions of information granularity, topicality and availability are crucial for such assessment, as well the indispensability of the data and the current phase of the transaction process. To minimise the risk of gun-jumping and ensure antitrust compliance, clean teams of independent individuals bound by strict NDAs shall be established to process the risky information within the merger process.

Acquiring a minority stake or increasing the existent shareholding might also result in breach of the notification and the standstill obligation. As illustrated by the decision-making practice, there have been cases of gun-jumping where the undertaking remained a minority shareholder. What is more, control has been found with only about 35% of shareholding or where there had been only a very minor stake increase. To assess whether an acquisition of a minority shareholding or stake increase will result in change of control, the undertakings have to consider aspects such as the dispersion of the rest of the remaining shares, position of other shareholders, the voting patterns at the shareholders' meetings as well as the economic or other ties between the stakeholders.

Until a clearance decision is obtained, the merging undertakings also must approach carefully the issue of coordination and integration of their mutual activities. In any way, the companies should avoid acting on behalf of one another, synchronizing their marketing or sales. Similarly, the undertakings shall also abstain from performing uniformly by integrating the purchased business into the acquirers' structures prematurely or transferring the employees between the undertakings. On the other hand, planning for a future integration prior to closing is not prohibited

as the undertakings are allowed to debate for example human resources issues, company facilities or benefit policy.

Although the concept of transfer of economic risk is rather undeveloped, it has also been identified by the Commission to at least contribute to gun-jumping. This conduct is inherent to the multi-step transaction schemes, but it might also occur in the standard transactions too. Undertakings shall avoid mechanisms that would transfer all the economic risk from the target undertaking to the acquirer as such approach would likely limit the target's incentive to compete and would lead to the acquirer obtaining control over it. In the transaction agreements, the purchaser shall therefore avoid separating the remuneration paid for the target and the transfer of control. By waving the consideration irreversibly and paying the purchase price in advance, the acquirer may show its intetion to gain control over the target irrespective of the issuance of the antitrust permits and the actual result of the transaction.

3. What are the grey areas of gun-jumping and is there any space for clarification from the Commission?

Identification of whether the premerger conduct does grant the acquiring undertaking the possibility of exercising decisive influence over the target and therefore results in change of control on a lasting basis is likely to be the most complicated and tricky issue. In the *Ernst & Young* decision, the termination of a cooperation agreement was not found to meet these criteria and did not amount to gun-jumping even though such measure was found to be ancillary and preparatory to the transaction. On the other hand, as illustrated on the case law analysis of the various types of gun-jumping conduct, almost any kind of merger related conduct can be found by the Commission to grant the acquirer the possibility of exercising decisive influence.

While there has been a certain level of guidance provided by the recent gun-jumping rulings, it continues to be quite impossible to draw the exact lines as to what kind of undertakings' actions are considered acceptable and do not stand in the way of the standstill obligation and which conduct may already equal to gun-jumping. This will be true especially regarding the veto rights and information exchange between the acquirer and the target. Although some leads were already given, for example by the *Altice* decision, the boundaries remain blurred. However, as repeatedly stressed out in the decision-making practice, the Commission will always approach the gun-jumping issues on a case-by-case basis and will always examine the specific details, factual circumstances, and nuances of the given case.

What also remains a bit unclear is the relationship between the gun-jumping provisions under the EUMR and Article 101. While it has been repeatedly suggested by the Commission and the CJEU that change of control on a lasting basis shall be the main criterion on whether to apply the EUMR provisions or Article 101, further guidance might be welcome to increase the level of legal certainty, as some of the standard merger conduct is highly likely to result in a behaviour prohibited by Article 101 TFEU.

Repeatedly there have been calls both from the undertakings contesting the Commission's decisions as well as the competition law experts for further clarifications of the whole topic of gun-jumping. There have been arguments made pointing out to the non-existence of any guidelines on the topic. The importance of soft law for determining the nuances and shedding light on some of the more intricate and subtle issues is evident. This was shown, for example, by the Consolidated Jurisdictional Notice that addresses also the topic of warehousing, or by the Ancillary Restraints Notice that offers some guidance on the permissibility of veto rights over the target undertaking. In a similar manner, it would be therefore useful for the Commission to state its position of other types of merger conduct that poses the risk of gun-jumping.

However, in my opinion, the need of adopting some explanatory guidelines is the most evident regarding the sanctioning of gun-jumping. As the more recent fines imposed for gun-jumping have increased massively and all signs show that this tendency seems to remain unchanged for the future, it is very desirable to lay down some methodology on how the Commission approaches the imposition of the sanctions and the nature of the infringements. This need is even more apparent as certain discrepancies might be identified in the Commission's decisions, for example with regards to differentiating between deliberate and accidental breaches and considering the aggravating and mitigating circumstances.

List of Abbreviations

AG	Advocate General
CEO	Chief executive officer
CJEU	Court of Justice of the European Union
CNR	Compagnie Nationale du Rhône
Commission	European Commission
ECtHR	European Court of Human Rights
EU	European Union
EUMR	Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings
EUR	Euro
FTC	Federal Trade Commission
M&A	Mergers and acquisitions
NCA	National competition authority
NDA	Non-disclosure agreement
Regulation No 4068/89	Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings
SPA	Share purchase agreement
TFEU	Treaty on the Functioning of the European Union
TMSC	Toshiba Medical Systems Corporation
US	United States of America
USD	United States dollar

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List of Annexes

Annex I. – Merger Statistics[174]

21 September 1990 to 30 April 2023

I.) NOTIFICATIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	21	22	April 23	Total
Number of notified cases	11	64	59	59	95	110	131	168	224	276	330	335	277	211	247	318	356	402	348	259	274	309	283	277	303	337	362	380	414	382	361	405	371	78	8816
Cases withdrawn - Phase 1	0	0	3	1	6	4	5	9	5	7	8	8	3	0	3	6	7	5	10	6	4	9	4	1	6	6	8	7	10	12	7	9	8	2	189
Cases withdrawn - Phase 2	0	0	0	1	0	0	1	0	4	5	5	4	1	0	2	3	2	2	3	2	0	1	1	0	0	2	1	2	2	0	2	3	4	0	53

II.) REFERRALS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	21	22	April 23	Total
Art 4(4) request (Form RS)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	14	13	5	9	8	6	10	13	11	16	13	16	13	8	12	15	18	12	3	217
Art 4(4) referral to Member State	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	11	13	5	9	6	7	10	12	9	14	12	11	14	6	9	17	12	9	2	190
Art 4(4) partial referral to Member State	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	2	0	2	4	1	0	2	1	5	2	0	21
Art 4(4) refusal of referral	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1
Art 4(5) request (Form RS)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	20	28	38	51	23	23	26	18	22	13	19	20	23	15	15	16	15	26	14	3	428
Art 4(5) referral accepted	0	0	0	0	0	0	0	0	0	0	0	0	0	0	14	26	39	49	22	26	24	17	22	11	19	19	22	15	15	16	16	26	14	2	414
Art 4(5) refusal of referral	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	2	0	0	1	0	1	0	0	1	0	0	0	0	0	0	0	0	7
Art 22 request	0	0	0	1	0	1	2	1	0	0	0	0	2	1	1	4	4	3	2	1	3	1	3	1	1	1	0	2	3	2	1	2	2	1	46
Art 22(3) referral (Art 22. 4 taken in conjunction with article 6 or 8 under Reg. 4064\89)	0	0	0	1	0	1	2	1	0	0	0	0	2	1	1	3	3	2	3	1	2	2	2	1	1	1	0	1	3	3	1	2	2	1	43
Art 22(3) refusal of referral																1	1	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	0	0	4
Art 9 request	0	1	1	1	1	0	3	7	4	9	4	9	8	10	4	7	6	3	5	3	11	2	2	2	2	3	3	2	5	3	3	4	2	2	132
Art 9.3 partial referral to Member State	0	0	1	0	1	0	0	6	3	2	3	6	7	1	1	3	1	1	2	0	3	0	1	0	0	1	1	0	1	1	0	0	1	0	47
Art 9.3 full referral	0	0	0	1	0	0	3	1	1	3	2	1	4	8	2	3	1	1	2	1	4	2	1	0	0	0	0	0	3	0	4	4	0	1	53
Art 9.3 refusal of referral	0	1	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	1	0	1	1	0	0	0	3	3	1	1	1	0	0	0	0	0	15

III.) FIRST PHASE DECISIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	21	22	April 23	Total
Art 6.1 (a) out of scope Merger Regulation	2	5	9	4	5	9	6	4	4	1	1	1	1	0	0	0	0	0	0	0	0	0	0	0	1	1	1	0	0	0	1	0	0	0	56
Art 6.1 (b) compatible	5	47	43	49	78	90	109	118	196	225	278	299	238	203	220	276	323	368	307	225	253	299	254	252	280	297	327	353	366	343	334	384	354	82	7875
Art 6.1(b) compatible, under simplified procedure (figures included in 6.1(b) compatible above)	0	0	0	0	0	0	0	0	0	0	41	141	103	110	138	169	211	238	190	143	143	191	171	166	207	222	246	280	302	283	278	309	291	66	4639
Art 6.1 (b) in conjunction with Art 6.2 (compatible w. commitments)	0	3	4	0	2	3	0	2	12	16	26	11	10	11	12	15	13	18	19	13	14	5	9	11	12	13	19	18	17	10	13	7	10	1	349

IV.) PHASE II PROCEEDINGS INITIATED

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	21	22	April 23	Total
Art 6.1 (c)	0	6	4	4	6	7	6	11	11	20	18	21	7	9	8	10	13	15	10	5	4	8	10	6	8	11	8	7	12	8	8	7	8	3	299

V.) SECOND PHASE DECISIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	21	22	April 23	Total
Art 8.1 compatible (8.2 under Reg. 4064/89)	0	1	1	1	2	2	1	1	3	0	3	5	2	2	2	2	4	5	9	0	1	4	1	2	2	1	1	0	4	0	1	0	0	0	63
Art 8.2 compatible with commitments	0	3	3	2	2	3	3	7	4	7	12	9	5	6	4	3	6	4	5	3	2	1	6	2	5	7	6	2	6	6	3	4	2	1	144
Art 8.3 prohibition	0	1	0	0	1	2	3	1	2	1	2	5	0	0	1	0	0	1	0	0	0	1	1	2	0	0	1	2	0	3	0	0	2	0	32
Art 8.4 restore effective competition	0	0	0	0	0	0	0	2	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	5

VI.) OTHER DECISIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	21	22	April 23	Total
Art 6.3 decision revoked	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
Art 8.6 decision revoked	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Art 14 decision imposing fines	0	0	0	0	0	0	0	0	1	4	1	0	1	0	1	0	0	0	0	1	0	0	0	0	1	0	0	1	1	2	0	1	0	0	15
Art 7.3 derogation from suspension (7.4 under Reg. 4064/89)	1	1	2	3	3	2	4	5	13	7	4	7	14	8	10	6	2	3	6	5	1	3	2	1	1	1	0	5	5	1	3	3	4	2	138
Art 21	0	0	0	0	0	1	0	1	0	1	1	0	1	0	0	0	2	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	9

[174] Statistics on Mergers cases. In: European Commission [online]. [cit. 2023-04-30]. Available at: https://competition-policy.ec.europa.eu/system/files/2023-04/Merger_cases_statistics.pdf

Gun-jumping and EU merger control

Abstract

This thesis deals with the issue of gun-jumping under the EU Merger Regulation. On the EU level of competition law, gun-jumping is an infringement of the obligation to notify a concentration and the obligation not to implement such concentration before receiving Commission's clearance. Gun-jumping was, for a long time, a marginal and undeveloped topic within the context of EU competition law. However, over the years, the Commission has significantly tightened its grip over the undertakings that do not respect the basic principles of EU merger control procedures and imposed heavy penalties for such infringements. Over the last few years, gun-jumping has thus become one of the leading issues within the EU competition law.

The first objective of the thesis is to examine the evolution of the gun-jumping enforcement on the EU level. Furthermore, it aims to identify the various types of gun-jumping conduct from the undertakings' point of view and their subsequent assessment by the Commission. Finally, the thesis also seeks to identify the problematic and unclear areas of gun-jumping and the possible clarifications to be made by the Commission. To achieve these objectives, the author researches the academic literature on gun-jumping and examines the decision-making practice of the Commission and the CJEU.

The thesis is structured into four chapters. First chapter focuses on the legal context of gun-jumping on the EU level and introduces the application and interpretation scope of the relevant EUMR provisions. The second chapter then analyzes in detail the various types of gun-jumping actions as identified in the Commission's decisions and the case-law of the CJEU. Third chapter deals with the exemptions from the general prohibition of gun-jumping and examines multi-step transaction schemes and their relation to gun-jumping. The fourth chapter then identifies the consequences of gun-jumping, its relation to Article 101 TFEU and analyzes the evolution of the sanctioning policy. Finally, the author's findings are synthesised in the conclusion by providing answers to the research questions.

Keywords: gun-jumping, EU merger control, EU competition law

Gun-jumping a kontrola spojování podniků v EU

Abstrakt

Tato práce se vějuje tématu gun-jumpingu v kontextu Nařízení o kontrole spojování podniků. Na úrovni evropského práva hospodářské soutěže je gun-jumping přestupek spočívající v porušení povinnosti notifikovat spojení podniků a povinnosti neuskutečňovat spojení do doby schválení transakce Evropskou komisí. V rámci evropského soutěžního práva byl gun-jumping po dlouhou dobu spíše okrajovým tématem. Evropská komise nicméně v posledních letech výrazně zpřísnila svůj postup vůči podnikům, které nerespektují základní mechanismy unijní kontroly spojování podniků a v řadě případů uložila velmi vysoké pokuty. Gun-jumping je tak v současnosti jedním z předních problémů v rámci soutěžního práva Evropské unie.

Práce si klade za cíl prozkoumat vývoj vymáhání gun-jumpingu na evropské úrovni. Vedle toho cílí také na identifikaci jednotlivých typů chování, které lze považovat za gun-jumping a jejich následné posuzování ze strany Evropské komise. V neposlední řadě práce také identifikuje problematické a sporné aspekty gun-jumpingu a hledá případný prostor pro vyjasnění ze strany Evropské komise. Za účelem dosažení těchto cílů autor pracuje s akademickou literaturou a zkoumá rozhodovací praxi Evropské komise a Soudního dvora EU.

Práce je rozdělena do čtyř kapitol. První z nich zasazuje gun-jumping do právních souvislostí evropského soutěžního práva a zkoumá také aplikaci a interpretaci příslušných ustanovení Nařízení o kontrole spojování podniků upravujících gun-jumping. Ve druhé kapitole jsou následně detailně rozebrány jednotlivé typy gun-jumpingu tak, jak je identifikuje ve svých rozhodnutích Evropská komise a Soudní dvůr EU. Ve třetí kapitole je věnována pozornost výjimkám z obecného zákazu gun-jumpingu a také složitějším vícestupňovým transakčním mechanismům a jejich přípustnosti z hlediska gun-jumpingu. Čtvrtá kapitola se zabývá následky gun-jumpingu, jeho vztahem s článkem 101 SFEU a zkoumá blíže sankcionování tohoto přestupku. V závěru práce jsou následně shrnuty autorovy poznatky a zodpovězeny jednotlivé výzkumné otázky.

Klíčová slova: předčasné uskutečnění spojení podniků, kontrola spojování podniků v EU, evropské soutěžní právo