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Gun jumping

Gun Jumping in Europe: An Overview of EU and National Case Law

Mergers, Notification (mergers), All business sectors , Foreword, Remedies (mergers), Prohibition (mergers), Merger (notion), Clearance Phase II (merger), Clearance Phase I (merger), Gun jumping

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Introduction

In the last few years, the European Commission and national competition authorities have demonstrated an increased interest in investigating and punishing gun jumping. This development is part of a broader effort by the Commission to tighten its review of compliance with procedural aspects of the EU's merger control regime. This increased enforcement is reflected in the staggering €110 million fine imposed on Facebook for providing incomplete and misleading information in connection with its acquisition of WhatsApp, [1] as well as the investigations recently opened against Merck and Sigma-Aldrich and General Electric on the same grounds. [2] As EU law on gun jumping is still not well developed, businesses face increased risk of incurring heavy fines even for inadvertent violations, and must proceed with greater caution than in the past.

This article aims to provide a general overview of the case law to date on gun jumping, and to indicate trends that may be relevant for practitioners. First, it lays out the basic legal framework establishing the prohibition against gun jumping under the EU merger control rules, and provides an overview of the general trends that have arisen in practice. It then highlights key gun jumping cases that have arisen at EU and Member State level over the past decade. Finally, it discusses briefly how the Commission's practice with respect to gun jumping may develop in the future, and offers suggestions for merger practitioners notifying a transaction to European competition authorities.

Trends in European Practice

Historically, the Commission and national competition authorities in Europe have not been active in detecting and punishing gun jumping, particularly when compared with their counterparts in the United States. The Commission signaled a greater interest in ensuring that parties comply with the procedural requirements relating to merger notifications when it fined Electrabel €20 million for gun jumping in 2009. [3] In announcing the fine, then Commissioner Neelie Kroes stated unequivocally that "[i]mplementing a transaction which has not received the clearance foreseen in EU law constitutes a serious breach of the Merger Regulation." [4] More recently, the Commission has adopted a much more aggressive enforcement policy on gun jumping violations. In 2014, it imposed a fine of €20 million on Marine Harvest for failing to notify a transaction on time. [5] In 2017, the Commission opened proceedings against both Altice [6] and Canon [7] for having taken steps to implement transactions prior to having received clearance. In issuing a Statement of Objections against Altice, Commissioner Margrethe Vestager announced "[i]f companies jump the gun by implementing mergers prior to notification and clearance, they undermine the effective functioning of the EU merger control system." [8] In a speech later that day, she emphasized that Commission takes gun jumping "very seriously indeed." [9]

The Commission's increased attention has helped clarify EU law and practice relating to gun jumping. Substantively, this has resulted in a better understanding of which transactions are notifiable under the EU Merger Regulation (EUMR), [10] and, in particular, there is greater clarity on the issue of when control is acquired. The pending cases against Altice and Canon are likely to yield additional guidance concerning what types of pre-closing activities constitute prohibited gun jumping. On a procedural level, the Commission's focus on gun jumping has led to the imposition of larger fines, and may also result in an increased use of its power to conduct dawn raids under Article 13 of the EUMR. These issues will be discussed below.

Broadly speaking, enforcement trends at EU level are also reflected in the practice of national competition authorities in Europe. As the Commission has focused attention on this area, many national authorities have elevated gun jumping from a minor procedural violation to the level of a serious infringement. [11] Over the last decade, many European jurisdictions have issued decisions finding gun jumping and imposed fines for the first time. [12]

EU Legal Framework

Under EU law, the term "gun jumping" includes two distinct, though closely related, violations of the EUMR: (1) failing to file a merger with the European Commission (a filing is called "notification" in EU parlance) meeting the EUMR thresholds, and (2) implementing a notified merger (called a "concentration" in the EUMR) before obtaining clearance. Article 4(1) EUMR requires that "[c]oncentrations with a Community dimension … be notified to the Commission prior to their implementation." Article 7(1) EUMR imposes a standstill requirement whereby a concentration with a Community dimension "shall not be implemented either before its notification or until it has been declared compatible with the common market." Consequently, the EUMR imposes both a positive obligation to notify before implementation, and a negative obligation to refrain from implementing before clearance or the expiration of the relevant administrative deadline. These obligations are designed to maintain the existing competitive conditions until the Commission is able to evaluate the likely effect of the transaction. Before a merger is cleared, the parties should therefore behave independently on the market, and refrain from any coordination of commercial behavior.

The EUMR provides limited exceptions to the standstill obligation. Article 7(2) creates an exception for certain public takeover bids as well as situations in which control is acquired gradually through a series of transactions with various sellers. Article 7(3) permits the Commission to issue a derogation allowing the parties to implement a transaction before clearance where doing so is in the public interest. Finally, Article 5 excludes certain acquisitions of shares by banks and other financial institutions from the EUMR altogether, which means that the notification and standstill requirements do not apply.

Under Article 14(2)(b), the Commission may impose fines of up to 10% of a company's aggregate turnover as well as interim measures for negligent or intentional violations of Articles 4(1) and 7(1). As discussed later in this article, the General Court has recently clarified that Articles 4(1) and 7(1) impose distinct obligations, even though the violation of the former necessarily violates the latter. [**13**] As a result, the Commission may impose fines under Art. 14(2)(b) on both grounds concurrently.

Failure to Notify

The most straightforward form of gun jumping occurs when the parties to a merger meeting the applicable jurisdictional thresholds do not notify the transaction to the relevant competition authority. Before 2009, the Commission treated such failures to notify leniently. It had imposed small fines in only two cases, [**14**] and, in multiple instances, it declined to impose fines at all. [**15**] For example, the Commission did not issue gun jumping fines in *Air France/Sabena*, though the transaction was implemented before notification, nor in *IPO/EnBW/Praha/PT*, in which notification only occurred nine years later. [**16**] The Commission's significantly higher fines of €20 million in *Electrabel* in 2009 and *Marine Harvest* in 2014 (discussed below) show an increased interest in punishing companies for gun jumping.

In rare instances, competition authorities have found that parties deliberately failed to notify a merger either to avoid the competition authority's scrutiny or to allow the closing of the transaction more quickly. For example, in 2009, the German Federal Cartel Office (FCO) fined the publishing house Druck- und Verlagshaus Frankfurt am Main GmbH €4.13 million for intentionally failing to notify a transaction. [**17**] Likewise, in 2013, the French Competition Authority (FCA) imposed a €4 million fine on the parent company of wine producer Castel Frères after it failed to notify so that it could finalize the acquisition of six companies that were members of a rival group as quickly as possible. [**18**]

In most failure-to-notify cases, however, the competition authorities have not found deliberate fault, but rather a misunderstanding of whether the merger notification requirements applied to the transaction. For instance, a company may have difficulty understanding how control is assessed or how turnover figures or market share should be calculated. [**19**] In *Torras/Sarrio*, the Commission did not issue a fine where the parties had difficulties calculating the turnover of the holding company involved in the transaction, and, consequently, in determining whether the EUMR applied. [**20**]

Acquisition of control through share purchases

The cases that have arisen most often involved situations where the parties to a merger misunderstood whether, or at what moment, a notifiable transaction had taken place, so that they then failed to notify the merger before implementation. Under Article 3(1) EUMR, a concentration arises where there is "a change of control on a lasting basis." The EUMR's definition of control is complex and can encompass a range of "rights, contracts or any other means which… confer the possibility of exercising decisive influence on an undertaking." Absent the acquisition of a clear majority ownership or share of voting rights, the analysis of decisive influence is fraught with difficulty as it is necessary to determine whether the minority shareholding gives rise to *de facto* control.

In some instances, the Commission has refrained from fining parties who failed to notify a transaction because they incorrectly assessed when a change of control occurred. In *Hutchison/RCP/ECT*, the Commission found that the parties jumped the gun by implementing a concentration that they had failed to notify because they had mistakenly believed it to be a cooperative agreement falling outside the EUMR. [**21**] The Commission concluded that, although each party controlled 35% of the voting rights in the target, the parties had in fact taken joint control as strong common interests would lead them not to vote against one another. More recently, in *RWE Energy/Mitgas*, the Commission found that RWE had failed to notify its acquisition of the outstanding minority shares in Mitgas. [**22**] RWE already controlled 60.1% of Mitgas' shares, and, therefore, believed it held sole control and was under no obligation to notify the transaction. The Commission, however, concluded that, as the holder of the remaining shares enjoyed certain blocking rights, it also had *de facto* joint control of the target, which meant that the transaction was indeed a notifiable merger because it involved a change in the nature of RWE's control. Although, in both instances, the parties technically jumped the gun by implementing the transactions before notification based on an incorrect assessment of control, the Commission allowed them to notify the transactions retroactively and without penalty.

The Commission took a less forgiving approach in response to the failure to notify the acquisition of minority shareholdings in *Electrabel* in 2009 and *Marine Harvest* in 2014. In *Electrabel,* the Commission fined the Belgian energy producer €20 million for failing to notify a series of transactions through which it had acquired a minority interest in Compagnie Nationale du Rhone. Although the Commission had cleared the merger in 2008, it had left open the issue of the date at which Electrabel had acquired control and, thus, the date on which the transaction became subject to the notification requirement. In a separate investigation, the

Commission concluded that Electrabel had in fact gained control in the sense of Article 3 EUMR at the moment it had acquired 47.92% of the target's shares, four years before notifying the merger. Although Electrabel remained a minority shareholder, the Commission considered that it nonetheless held *de facto* control as of that moment, as any attempt to block a decision would require 95.84% shareholder attendance at a vote and the unanimous opposition of all other shareholders, which was very unlikely to occur. The Commission's decision, upheld by both the General Court and the Court of Justice on appeal, rejected the notion that Electrabel would only have been able to assess the existence of *de facto* control once it had confirmed that it could achieve a consistent majority in a shareholder vote. [**23**] Rather, Electrabel should have assessed the existence of a notifiable concentration prospectively.

The Commission adopted a similarly strict assessment of control when it imposed a €20 million gun jumping fine in *Marine Harvest*. In that case, Marine Harvest, a Norwegian salmon producer, had acquired a substantial minority shareholding (48.5%) in Morpol through a private share purchase agreement that closed on 18 December 2012. The day before the transaction closed, Marine Harvest announced a public offer for Morpol's outstanding shares. Several months later, in March 2013, Marine Harvest acquired an additional 38.6% of Morpol's shares through that offer. Marine Harvest submitted a draft notification of its acquisition of Morpol in March 2013, noting that the 2012 acquisition of the minority shares had been completed, but that it would not exercise voting rights with respect to those shares until the Commission had cleared the acquisition of additional shares through the public offer. The Commission cleared the transaction with conditions, but subsequently issued a decision finding that, as Marine Harvest had acquired *de facto* sole control over Morpol with the 2012 acquisition, it had implemented the concentration before notifying the transaction in violation of Articles 4(1) and 7(1) EUMR. The Commission, in line with its decision in *Electrabel*, concluded that, Marine Harvest's 48.5% interest effectively gave it control over Morpol as the outstanding shares of Morpol were significantly dispersed. Moreover, the Commission found that, although Marine Harvest did not exercise its voting rights before clearance, there was nothing preventing it from doing so. It therefore imposed a €20 million gun jumping fine on Marine Harvest.

Exceptions to notification upon the acquisition of control

Marine Harvest also provides insight on the applicability of the Article 7(2) EUMR derogation to the standstill provisions. Article 7(2) allows the implementation of a merger before notification or clearance in the case of "a public bid or of a series of transactions in securities… by which control is acquired from various sellers" provided that the transaction is notified quickly and the acquirer does not exercise its voting rights. Marine Harvest contended that its 2012 acquisition of its 48.5% share was covered by this exemption because the 2012 purchase formed part of a larger transaction including the 2013 public bid, and because it constituted a series of transactions in securities. The Commission, and the General Court on appeal, rejected these arguments finding that the 2012 share purchase was in no way contingent on the later public offer and therefore could not form part of the same transaction. Moreover, although two companies were involved in the sale of Morpol shares, these companies were both controlled by the same individual and, thus, the sale did not involve "various sellers" as required under Article 7(2).

The General Court's analysis rested heavily on the Commission's prior practice in the 2007 *Yara/Kemira/GrowHow* case. [**24**] In that transaction, Yara acquired 30.05% of the shares of GrowHow from the Finnish state, giving it *de facto* control over the company. Yara asserted that the purchase was the first step in a public bid for that company and therefore fell under the Article 7(2) EUMR exception and, consequently, could be implemented before clearance. The Commission, however, rejected the application of Article 7(2) to sale of a controlling interest in a single transaction by one seller.

Article 5 EUMR, another provision providing an exception to the notification requirement, is now under Commission scrutiny in connection with the *Canon/Toshiba Medical Systems* transaction. [**25**] Under Article 5, the acquisition of securities by "credit institutions or other financial institutions or insurance companies" does not constitute a concentration provided the acquirer resells them within a year. The Commission informed Canon in July 2017 of its preliminary conclusion that the company had engaged in gun jumping with respect to the acquisition of Toshiba by using an interim buyer to avoid merger notification requirements. In a two-step "warehousing" transaction, the interim buyer first acquired 95% of the target's shares at a nominal price of €800. Canon then acquired the outstanding 5% shares and an option over the interim buyer's shares for €5.28 billion. This step was carried out without prior notification to the Commission. After notifying the transaction and obtaining clearance, Canon then exercised its option to purchase 100% of the shares. This case will clarify whether the Commission will consider whether control within the meaning of EUMR arises where the full exchange of payment and risk between buyer and seller occurs, or rather at the moment that the buyer actually exercises full control over the shares themselves.

As mentioned, Article 7(3) EUMR permits parties to request a special derogation from the notification and standstill requirements where the threat to competition posed by implementing the transaction immediately is outweighed by potential detriment to the parties of waiting until clearance to implement the transaction. This can occur when the target entity is facing financial instability that could threaten its viability. [**26**] For example, in the 2008 *STX/Aker Yards* merger, the risk of the target's insolvency prompted the Commission to grant a derogation although the merger was in the midst of a Phase II investigation. [**27**] In 2011, the Commission laid out its reasoning behind the grounds for issuing such derogations in *SC Johnson/Sara Lee*. [**28**] It noted that the provisions of Article 7(3) EUMR apply only exceptionally, and require the parties to demonstrate that waiting for the transaction to clear would pose a real rather than hypothetical risk to the business involved.

Various national competition authorities have granted derogations under similar exceptional circumstances. [**29**] The Italian competition authority (ICA) nevertheless pointed out in *Banca Sviluppo/BRC* that the presence of such financial difficulties does not provide the basis for self-granted derogations. [30] In that case, the target bank was in insolvency proceedings, and in the midst of negotiations with numerous different national regulators and public agencies. Banca Sviluppo argued that it did not need to notify the acquisition because the economic predicament of the target was dire and interfacing with various regulators created organizational challenges that would have made notification difficult. The ICA disagreed and imposed a nominal fine.

Level of asset acquisition resulting in a notifiable concentration

Whereas EU cases have largely concerned when the purchase of *shares* confers sufficient control to constitute a notifiable transaction, national competition authorities have considered whether the purchase of *assets* under a variety of circumstances is sufficient to trigger the obligation to notify.

In *Lukoil/Okseta,* the Lithuanian Competition Council (Council) found that Lukoil had failed to notify two concentrations that had arisen within the context of a joint venture agreement between the parties. [31] Lukoil and Okseta had entered into an agreement to jointly sell fuel and other products through petrol stations owned by Okseta. The Council considered that, because each petrol station was a fixed asset subject to its own lease and earning its own turnover, it was a stand-alone business unit. The Council found that, in implementing the agreement, Lukoil was able to fully control three of Okseta's petrol stations. Although the parties retained the right to terminate the overall joint venture agreement, the Council determined that, in practice, the degree of cooperation between the parties had increased during the joint venture's nine years of operation. Therefore, there was a change of control over the petrol stations that occurred on a lasting basis. As a consequence of failing to notify the concentrations, the Council fined Lukoil €340,000.

The Polish Competition Authority has recently imposed similar gun jumping fines for failure to notify concentrations. In *Fermy Drobiu Woźniak*, the Authority fined an egg producer €78,000 for failing to notify the takeover of a portion of a competitor's assets by way of a lease provision. [32] The Authority likewise fined a grocery wholesaler in *Bać-Pol* for failing to notify a concentration consisting of a set of agreements, customer and supplier contacts, goods and a workforce. [33]

In 2008, the German Federal Cartel Office (FCO) imposed a €4 million fine on Mars in connection with its failure to notify the acquisition of Nutro Products. [34] Mars and Nutro had entered into an agreement to carve out Nutro's product distribution rights in Germany, and therefore Mars argued it was not under any obligation to notify its acquisition of Nutro. The FCO, however, found that, because Mars had acquired the assets, trademark rights, and production sites, Mars had acquired the ability to compete successfully on the German market even if distribution rights had been carved out. Notably, this was the first gun jumping fine applied to a merger involving two non-German companies. The fine was also a departure from the FCO's previously more relaxed approach to the enforcement of gun jumping provisions, and was followed shortly thereafter by the FCO's €4 million fine in *Druck- und Verlagshaus Frankfurt am Main GmbH*, noted above. In 2011, the FCO imposed a smaller fine on the ZG Raffenstein agricultural cooperative for failure to notify its 2009 acquisition of a crop protection storage site. [**35**] The FCO considered that the site was a key business asset to which turnover could be attributed.

Pre-Clearance Implementation

The distinction between cases imposing gun jumping fines for failure to notify a transaction versus for implementation of a transaction before clearance is not always clear. In both situations, the question of whether the concentration took effect before either notification or clearance often turns on whether the acquirer exercised control over the target. In other cases, the implementation of a concentration may not involve the transfer of control, assets or risk between parties, but rather the operational integration of the acquiring business with the target prior to clearance. Such activities can take many forms – from an exchange of personnel, to joint planning, to the exchange of sensitive information. If the parties involved are competitors, these actions may not only violate the gun jumping provisions of the applicable merger control legislation, but may also constitute horizontal agreements or concerted practices prohibited under the more general competition rules on restrictive agreements. At EU level, such activities would therefore risk violating both Article 7(2) EUMR and Article 101 TFEU.

There is sparse EU case law on pre-clearance partial implementation of a notified transaction. In 1997, in *Bertelsmann/Kirch/Premiere*, the European Commission investigated the implementation of a joint venture relating to the launch of a digital pay-TV channel before the transaction had been cleared. [**36**] The Commission found that the parties had breached the standstill obligation by engaging in joint marketing activities. Specifically, Kirch allowed Premiere to provide its digital decoder to customers for use with Premiere's television services. While the Commission acknowledged that these activities were not inherently anticompetitive, it maintained that they nevertheless constituted a procedural violation and should be suspended until the joint venture was cleared. The parties agreed to cease the activity and the Commission did not impose a fine.

After twenty years without bringing a partial implementation gun jumping case, on 18 May 2017, the Commission announced that it had issued a Statement of Objections in connection with *Altice/PT Portugal*. The Commission has reason to believe that Altice had begun to implement the merger before clearance was granted for the Dutch telecommunications company's acquisition of PT Portugal in 2015, and indeed possibly before it had notified the transaction. The Commission contends that the terms of the purchase agreement allowed Altice to exercise decisive influence over the target. In addition, the Commission maintains that Altice also began to act as an owner of PT Portugal, in that it "gave instructions on how to handle commercial issues, such as contract negotiations" and received sensitive information from the target. [**37**]

The Commission's investigation of Altice's conduct with respect to PT Portugal may indicate whether the Commission intends to pursue involvement in the business of a competitor before clearance purely as a violation of the EUMR, or also as potential infringement of Article 101 TFEU. The Commission has previously suggested that such conduct might be investigated under both instruments. In its 2008 gun jumping investigation of the *Ineos/Kerling* transaction, the Commission suspected that Ineos might be interfering with the management of the target and exchanging sensitive information. While the Commission suggested that such conduct could violate both the EUMR and Article 101, its investigation ultimately revealed that the parties had not engaged in any infringing conduct.

The Court of Justice is currently considering a request for a preliminary ruling regarding the criteria to be used to assess what kind of conduct may constitute the implementation of a concentration in violation of Article 7(1) EUMR. [**38**] The questions are referred from a Danish court which is assessing a case of potential gun jumping identified by the Danish Competition and Consumer Authority (DCCA). In 2014, the DCCA approved a merger between Ernst & Young Europe and KPMG Denmark. However, it later ruled that the parties had violated the standstill obligations by requiring that KPMG Denmark terminate an agreement with KPMG International the day it signed the agreement to join Ernst & Young. The DCCA considered that, as the termination was directly related to and would not have occurred but for the merger, its implementation would constitute a partial implementation of the merger. As the termination of the agreement was irreversible, the DCCA argued, it would therefore bring about a lasting change on the market. The Danish court hearing the case has requested that the European Court of Justice assess whether "implementing action within the meaning of Article 7(1) EUMR presuppose[s] that the action, wholly or in part, factually or legally forms part of the actual change of control or merging of the continuing activities of the participating undertakings." [**39**] The Court of Justice's assessment of this question may provide clarity on the relationship between implementation involving a change of control and one involving other integration activities – such as the exchange of information or joint activities – that do not bear directly on whether the transaction has effectively taken place.

While EU precedent remains thin pending the outcome of these cases, national competition authorities have brought a number of cases finding infringements for implementation conduct breaching merger standstill obligations. In 2008, the German courts considered a question similar to that referred to the Court of Justice by the Dutch court. [**40**] Gruner + Jahr and RBA Germany had participated in a joint venture for the publication of the German edition of *National Geographic Magazine*. The joint venture had been managed through the appointment of a committee of four members, two by each of the parties. In 2003, the parties concluded an agreement allowing Gruner + Jahr to buy back RBA's shares. Before the Federal Cartel Office (FCO) had cleared this return to sole control, the two committee members appointed by RBA resigned and were replaced by Gruner + Jahr appointees. The FCO fined one of the new Gruner + Jahr appointees for gun jumping. The German Regional Court overturned the fine, holding that the change in appointment could not constitute the implementation of a change of control within the meaning of the

German merger legislation because it was not permanent, as RBA could reappoint its own executives under the terms of the joint venture agreement. The public prosecutor, by contrast, argued that such actions could constitute completion related activities, even absent any change in control. The German court confirmed that a change in control must exist on a lasting basis, but overturned the fine on other procedural grounds and did not address the question of whether gun jumping required that such a change in control take place.

In 2014, Norway's competition authority fined the supermarket group NorgesGruppen €2.9 million for gun jumping with respect to the acquisition of a rival store chain. [**41**] The authority found that the acquirer had in fact purchased and begun to operate most of the target's stores before the transaction had been cleared.

In 2016, the FCA issued the largest gun jumping fine in the EEA to date – €80 million – on Altice (trading as Numericable) in connection with its 2014 purchase of competing companies, SFR and OTL. [**42**] French merger control rules impose standstill obligations similar to those found under the EUMR. The FCA had initially learned of the potential gun jumping through tips from competing businesses and had verified these claims through dawn raids at the parties' premises. The FCA concluded that, while there had been no transfer of assets during the suspension period, Altice had breached French merger control regulations through actions allowing it to exercise a decisive influence over the targets and to access sensitive information.

In connection with the SFR acquisition, the FCA found that Altice's senior management had been directly involved in a number of strategic decisions concerning SRF's business. For example, Altice's chief executives reviewed and approved a bid for the development of fibre optic cable as well as the renegotiation of a mobile network sharing agreement between SFR and another telecoms company. Altice also directly intervened in setting SFR's internet rate policy, for instance by prompting SFR to suspend a promotional offer. Altice also closely coordinated its subsequent purchase of OTL with SFR's management. Similarly, the FCA found that Altice had begun to merge its strategic decision making with OTL, and that indeed the general manager of OTL had begun to exercise a role developing new projects within Altice. The FCA observed that the size of the fine imposed on Altice reflected the scope and duration of the infringing activities, the fact that these activities related directly to competition concerns identified in the FCA's clearance decision, the size and impact of the infringements on the telecoms sector, and their deliberate character.

Procedural Issues

Fines

The Commission's decision in *Marine Harvest*, and its confirmation by the General Court, provides some additional light on its fining policy in gun jumping cases. While the standstill obligation under Article 7(1) – which applies to the implementation of a concentration either before notification or clearance – appears to subsume the requirement in Article 4(1) to notify a concentration prior to implementation, the General Court recently held that these are indeed two distinct obligations. In *Marine Harvest*, the Commission fined the acquiring party €10 million for failing to notify the concentration in violation of Article 4(1) and another €10 million for implementing the concentration without clearance in violation of Article 7(1). On appeal, Marine Harvest argued that imposing a fine under each Article was a violation of the principle of *ne bis in idem*, as the violation of the former article necessarily entailed a violation of the latter, and thus it was being punished twice for the same conduct. The Court rejected Marine Harvest's arguments, and sustained the Commission's imposition of two fines. In particular, it noted that Article 14(2)(b) provides each violation as a distinct ground for a fine, and that a violation of Article 7(2) does not necessarily entail a violation of Article 4(1). [**43**] Furthermore, the Court confirmed the Commission's characterization of a violation of Article 4(1) as a single infringement (at the moment the transaction should have been notified) and of Article 7(2) as a continuous infringement (lasting from the time of implementation until clearance is granted). As a consequence of these differences, if the fines could not be imposed cumulatively, the legislation might have the perverse effect of punishing a partial implementation before clearance more severely than a failure to notify at all. Nonetheless, the Court acknowledged the awkwardness caused by the overlap between the two articles, observing: "[T]he current framework is unusual, in that there are two articles in [EUMR] infringement … punishable by fines on the same scale of penalties, but where an infringement of the first necessarily entails an infringement of the second. It must, however, be pointed out that this is the legal framework the Commission had to apply and that the applicant has not raised an objection of illegality in respect to particular provisions of [the EUMR]." [**44**] This language indicates that there may be scope to contest the legality of Article 14(2)(b), if the Commission imposes fines under both Articles in the future. Any revision of the EUMR will likely correct this tension.

Dawn Raids

Article 13 EUMR authorizes the Commission to conduct "all necessary inspections" in the context of its review of mergers. The Commission's powers of inspection under this Article mirror those it enjoys in the context of Regulation 1/2003 to investigate violations of Articles 101 and 102 TFEU. The Commission has occasionally exercised these powers to detect instances of gun jumping under the EUMR. In both *Ineos/Kerling* and *Caterpillar/MWM,* the Commission conducted dawn raids on the suspicion of a violation of standstill provisions, but ultimately found that no gun jumping had occurred in either case. [**45**] As the Commission's attention is now focused on enforcing procedural compliance with the EUMR, it is probable that it will make greater use of the power to conduct inspections in future.

Many national authorities have also made use of dawn raid powers under domestic law to uncover evidence of gun jumping. The FCA made significant use of this tool, discovering highly detailed evidence of pre-merger coordination in *Altice/SFR*. In other instances, such as in the case of *Advent/Ozone Laboratories* in Romania in 2009, the dawn raids exonerated the parties of any wrongdoing. [**46**]

Conclusions and Suggestions

The Commission is growing more vigilant on gun jumping, and, as the case law is still uneven in this area, businesses must tread carefully. The Commission's increased focus on gun jumping should provide practitioners with additional clarity on the application of the EUMR – particularly when the *Canon* and *Altice* cases are decided. As can be seen in its past decisional practice, the Commission's exercise of discretion in fining companies for even inadvertent breaches of the EUMR notification rules can be rather fickle. All companies contemplating a merger should therefore take added precautions to ensure that they do not risk a potentially heavy fine either by failing to notify a merger falling under the EUMR or by engaging in conduct that could be seen as implementing a transaction before clearance.

Companies should, at a minimum, continue to follow the precautionary measures they would normally adopt to avoid gun-jumping allegations, including ensuring that the acquirer does become involved in the target's business or in its strategic decisions before clearance is granted, and that the parties continue to act as independent entities on the market and do not coordinate their behavior. In light of the recent Commission decisions, acquiring companies should pay close attention prospectively to whether an acquisition – particularly one accomplished in stages or involving a minority share – will result in *de facto* control over the target that would require notification. In addition, the Commission has shown a willingness to conduct dawn raids if it suspects any infringement of the EUMR notification or standstill requirements. Merging parties should therefore ensure that all communications regarding the merger – including with internal counsel – clearly express the intentions of the parties to abide by the EUMR's procedural rules and are not easily open to misinterpretation.

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[**1**] See European Commission Press Release, "Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover," Brussels, 18 May 2017, IP/17/1369, at http://europa.eu/rapid/press-release_IP-17-1369_en.htm ↗, see **François-Charles Laprévote, Maurits Dolmans, Thomas Graf, Nicholas Levy, Francisco Enrique González-Díaz, Christopher Cook**, The EU Commission fines a company for providing incorrect or misleading information during its investigation on a merger (Facebook / WhatsApp), 18 May 2017, e-Competitions Bulletin May 2017, Art. N° 84276.

[**2**] See European Commission Press Release, "Mergers: Commission alleges Merck and Sigma-Aldrich, General Electric, and Canon breached EU merger procedural rules," Brussels, 6 July 2017, IP/17/1924 at http://europa.eu/rapid/press-release_IP-17-1924_en.htm ↗, see **Porter Elliott**, The EU Commission sends three separate statements

of objections to companies alleging procedural breaches of the EU Merger Regulation (Merck / Sigma-Aldric, GE / LM Wind, Canon / Toshiba Medical Systems), 6 July 2017, e-Competitions Bulletin July 2017, Art. N° 84747.

[3] Case COMP/M.4994 – *Electrabel/Compagnie Nationale du Rhône*, Commission decision of 10 June 2009, see **John Gatti**, The EU Commission imposes a fine of € 20 M on electricity producer and retailer for acquiring control of a French electricity producer, without having received prior approval under the EU Merger Regulation (Electrabel / Compagnie Nationale du Rhône), 10 June 2009, e-Competitions Bulletin June 2009, Art. N° 37599, **Bruno Alomar, Sophie Moonen, Gorka Navea, Philippe Redondo**, The EU Commission fines Belgian electricity undertaking for infringing the standstill obligation under Merger proceedings (Electrabel / CNR), 10 June 2009, e-Competitions Bulletin June 2009, Art. N° 35017, and **Marcus Pollard, Vincent Brophy, Scott McInnes**, The EU Commission imposes a twenty million euros fine against Belgian electricity supplier for failure to notify a merger (Electrabel / CNR), 10 June 2009, e-Competitions Bulletin June 2009, Art. N° 33785.

[4] European Commission Press Release, "Mergers: Commission fines Electrabel 20 million euros for acquiring control of Compagnie Nationale du Rhône without prior Commission approval," IP/09/895 Brussels, 10 June 2009 at http://europa.eu/rapid/press-release_IP-09-895_en.htm ➚

[5] Case COMP/M.7184 – *Marine Harvest/Morpol*, Commission Decision of 23 July 2014, see **Juliette Goyer, Jérémie Jourdan**, The European Commission find that the largest salmon farmer and processor in the European economic area had implemented an acquisition without prior notification (Norway Marine / Morpol), 23 July 2014, e-Competitions Bulletin July 2014, Art. N° 79571, **Jean-Christophe Mauger, Massimiliano Kadar**, The EU Commission fines a leading company in salmon farming €20 million for breaching the standstill obligation and failing to meet notification requirements (Marine Harvest / Morpol), 23 July 2014, e-Competitions Bulletin July 2014, Art. N° 69953, and **Porter Elliott**, The EU Commission fines a compagny for late notification of a merger (Marine Harvest), 23 July 2014, e-Competitions Bulletin July 2014, Art. N° 68709.

[6] European Commission Press Release, "Mergers: Commission alleges Altice breached EU rules by early implementation of PT Portugal acquisition," Brussels, 18 May 2017, IP/17/1368 at http://europa.eu/rapid/press-release_IP-17-1368_en.htm ➚, see **Geert Goeteyn, Matthew Readings, James Webber**, The EU Commission sends a statement of objections to a company to investigate whether a merger was implemented prior to the Commission's clearance (Altice), 18 May 2017, e-Competitions Bulletin May 2017, Art. N° 84212.

[7] *Supra*, n. 2.

[8] *Supra*, n. 6.

[9] Margrethe Vestager, "Competition and the rule of law," speech delivered at the Romanian Competition Council Anniversary Event, Bucharest, 18 May 2017 at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-rule-law_en ➚

[**10**] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, (OJ 2004 L 24, p. 1) ("EUMR").

[**11**] See e.g. the Latvian Competition Council, which elevated gun jumping to the status of a "grave infringement" in 2012 following the Commission's practice, see **Paulus Mencas**, The Lithuanian Competition Authority fines petrol stations operator for infringement of merger control rules (Lukoil), 18 April 2013, e-Competitions Bulletin April 2013, Art. N° 51805.

[**12**] See, e.g. *RS Platou ASA*, decision of the Norwegian Competition Authority of 30 January 2009, imposing a gun jumping fine for the completion of a merger before clearance for the first time, see **Porter Elliott**, The Norwegian Competition Authority imposes first fine for gun-jumping (NOK, RS Platou), 30 January 2009, e-Competitions Bulletin January 2009, Art. N° 43786; see also *ANF/Farminveste*, Portuguese Competition Authority Decision of 28 December 2012, imposing an unusually large gun jumping fine and signaling that procedural enforcement had become a priority, see **Porter Elliott, Johan Van Acker**, The Portuguese Competition Authority imposes record fine for gun-jumping (Farminveste), 28 December 2012, e-Competitions Bulletin December 2012, Art. N° 56788.

[**13**] See *Marine Harvest ASA v European Commission*, Case T-704/14 (ECLI:EU:T:2017:753), paras. 292-374, see **Porter Elliott**, The EU General Court dismisses an appeal against a Commission decision for implementing acquisition of sole control without first obtaining approval under the EU Merger Regulation (Marine Harvest / Morpol), 26 October 2017, e-Competitions Bulletin October 2017, Art. N° 85297.

[**14**] In 1988, it fined A.P. Moller €33,000 in connection with three transactions that had not been notified, and it fined Samsung €229,000 in 1998 in connection with the *Samsung/AST* merger. See Case IV/M.969 – *A.P. Møller*, Commission Decision of 10 February 1999, C(1999) 247; Case IV/M.920 – *Samsung/AST*, Commission Decision of 18 February 1998, C(1998) 392, see **Geraldine Emberger, John Kemp**, The European Commission fines a Korean electronic equipment manufacturer for failing to notify a concentration (Samsung), 18 February 1998, e-Competitions Bulletin February 1998, Art. N° 39433.

[**15**] See, e.g., Case IV/M.166 – *Torras/Sarrio*, Commission Decision of 24 February 1992, paras. 2-3 (parties had difficulty calculating turnover and assessing the applicability of the EUMR); Case COMP/J.V.55 – *Hutchison/RCP/ECT*, Commission decision of 3 July 2001, para. 7 (parties mistakenly notified the transaction as a cooperative agreement rather than a joint venture), see **Kay Parplies, Carina Joergensen, Neil Marshall**, The EU Commission approves, subject to remedies, an acquisition in the stevedoring services sector (Hutchison / RMPM / ECT), 3 July 2001, e-Competitions Bulletin July 2001, Art. N° 39014; Case COMP/M.2650, *Haniel/Cementbouw/JV*, Commission Decision of 26 June 2002, paras. 28-32 (parties mistakenly believed the merger to be part of another transaction authorized by a national authority and therefore not notifiable), see **Kay Parplies, Mary Loughran, Roosmarijn Schade**, The EU Commission grants retroactive clearance to the acquisition of a Dutch sand-lime joint venture CVK by a German and Dutch companies after they undertook to terminate their joint venture agreement (Haniel / Cementbouw / JV), 26 June 2002, e-Competitions Bulletin June 2002, Art. N° 38927; Case COMP M.5802 –

RWE Energy/Mitgas, Commission Decision of 17 June 2010, para. 7 (acquiring party mistakenly believed it already held full control over the target and no notification was necessary).

[**16**] In both cases, the Commission's decision was based, in part, on the fact that the transactions at issue raised little competition risk. See Case IV/M.157 – *Air France/Sabena*, Commission Decision of 5 October 1992, para. 21 (the Commission had already evaluated the agreement underlying the transaction in light of (now) Article 101 TFEU); Case COMP/M.5365 – *IPO/EnBW/Praha/PT*, Commission Decision of 17 June 2010, paras. 7, 36 (the affected market was local and in a highly regulated sector).

[**17**] *Druck- und Verlagshaus Frankfurt am Main GmbH*, German Federal Cartel Office, Decision of 13 February 2009, see **Porter Elliott**, The German FCO fines publishing company € 4.13 M for gun-jumping (DuV), 13 February 2009, e-Competitions Bulletin February 2009, Art. N° 43785.

[**18**] *Castel Frères/Patriarche*, Décision No 13-D-22 du 20 décembre 2013 relative à la situation du groupe Castel au regard du I de l'article L. 430-8 du code de commerce, para. 37, see **Laura Castex**, The French Competition Authority imposes a steep sanction on the head of wine producer group, for failing to notify a concentration (Copagef / Castel), 20 December 2013, e-Competitions Bulletin December 2013, Art. N° 68836.

[**19**] See, e.g., the € 76,000 gun jumping fine imposed by the Spanish National Competition Commission (CNC) on Bergé in 2010, which arose when the CNC received a complaint that the concentration in fact reached the relevant notification thresholds, and was subsequently overturned by the Spanish court in *Bergé v Comisión Nacional de la Competencia*, Case No. 3736/2012, 28 September 2012, see **Alberto Escudero**, The Spanish National Court annuls a fining decision in a gun-jumping case (Bergé), 28 September 2012, e-Competitions Bulletin September 2012, Art. N° 57366; see also the arguments raised by Castel in *Castel Frères/Patriarche*, *supra* n. 18, paras. 20-21.

[**20**] Case IV/M.166, *Torras/Sarrio*, Commission Decision of 24 February 1992, *supra* n. 15, paras. 2-3.

[**21**] Case COMP/J.V.55 – *Hutchison/RCP/ECT*, Commission Decision of 3 July 2001, *supra* n. 12, para. 7. The parties had originally notified the transaction as a cooperative agreement in order to receive an exemption under the notification regime applicable to restrictive agreements.

[**22**] Case COMP M.5802 – *RWE Energy/Mitgas*, Commission Decision of 17 June 2010, para. 7.

[**23**] See Case T-332/09, *Electrabel v European Commission* (ECLI:EU:T:2012:672), para. 39 (affirmed in Case C-84/13 P, *Electrabel v European Commission* (ECLI:EU:C:2014:2040)), see **Kyriakos Fountoukakos, Molly Herron**, The EU General Court upholds fine imposed on energy corporation for failing to notify a transaction highlighting the importance of compliance with EU merger control filing requirements (Electrabel), 12 December 2012, e-Competitions Bulletin December 2012, Art. N° 50284.

[**24**] Case COMP/M.4730 – *Yara/Kemira/GrowHow*, Commission Decision of 21

September 2007, paras. 6-7, see **John Gatti, Mary Loughran**, The European Commission conditionally clears a merger in the fertilizers industry (Yara/Kemira GrowHow), 21 September 2007, e-Competitions Bulletin September 2007, Art. N° 37721.

[25] *Supra*, n. 2.

[26] See, e.g. Case COMP/M.7120 – *Ecomn Agroindustrial Corporation/Armajaro Trading*, Commission Decision of 19 December 2013.

[27] See Final Report of the Hearing Officer in Case COMP/M.4956 – *STX/Aker Yards*. About this case, see **John Gatti, Mary Loughran**, The European Commission clears an acquisition in the shipbuilding construction sector (STX / Aker Yards), 5 May 2008, e-Competitions Bulletin May 2008, Art. N° 37705.

[28] Case COMP/M.5969 – *SC Johnson/Sara Lee*, Commission Decision of 11 February 2011, paras. 26-34, see **Porter Elliott**, The EU Commission publishes decision refusing derogation from standstill obligation in merger case in the consumer goods industry (SC Johnson / Sara Lee), 11 February 2011, e-Competitions Bulletin February 2011, Art. N° 58281.

[29] See, e.g., *Transilvania Bank/Volksbank Romania*, Consiliul Concurentei, Decision of 29 January 2015, see **Romanian Competition Authority**, The Romanian Competition Council clears a merger in the banking sector although the parties have realized the merger before clearance (Transilvania Bank / Volksbank Romania), 29 January 2015, e-Competitions Bulletin January 2015, Art. N° 71475; see also the French Competition Authority's most recent approval of a derogation for the acquisition of the processed meats division of Financière Turenne Lafayette by Cooperl Arc Atlantique in October 2017, at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=662&id_article=3050&lang=fr

[30] Case C-12049, *Banca per lo Sviluppo della Cooperazione di Credito/Banca Romagna Cooperativa*, decision of 29 September 2016, paras. 9-10, 13-15; see **Michele Giannino**, The Italian Competition Authority fines a bank for gun-jumping in a merger (Banca Sviluppo / BRC), 24 September 2016, e-Competitions Bulletin September 2016, Art. N° 81977.

[31] Case N. 2S-4, Lukoil/Okseta, decision of the Lietuvos Respublikos Konkurencijos taryba of 18 April 2013, see **Paulus Mencas**, The Lithuanian Competition Authority fines petrol stations operator for infringement of merger control rules (Lukoil), 18 April 2013, e-Competitions Bulletin April 2013, Art. N° 51805.

[32] DKK-145/2017, *Fermy Drobiu Woźniak*, decision of the Polish Office for Competition and Consumer Protection of 19 September 2017, see **Tomasz Feliszewski, Kamil Klopocki**, The Polish Competition Authority imposes a fine of more than EUR 78,000 on a consumer eggs producer for gun-jumping (Fermy Drobiu Woźniak), 19 September 2017, e-Competitions Bulletin September 2017, Art. N° 84912

[33] DKK-86/2017, *Bać-Pol*, decision of the Polish Office for Competition and Consumer Protection of 5 June 2017, see **Tomasz Feliszewski, Kamil Klopocki**, The Polish Competition Authority imposes a fine of more than EUR 124,000 for gun-jumping (Bać-

Pol), 5 June 2017, e-Competitions Bulletin June 2017, Art. N° 84365.

[34] *Mars/Nutro*, German Federal Cartel Office, Decision of 15 December 2008, see **Carsten Gromotke**, The German Cartel Office imposes "Gun Jumping" fine against a leading U.S. candy manufacturer for failure to comply with German premerger notification (Mars, Nutro Products), 15 December 2008, e-Competitions Bulletin December 2008, Art. N° 32014.

[35] *ZG Raffenstein*, German Federal Cartel Office, Decision of 28 January 2011, see **Porter Elliott**, The German Competition Authority imposes fine for gun-jumping (ZG Raiffeisen), 28 January 2011, e-Competitions Bulletin January 2011, Art. N° 41241.

[36] Case IV/M.993, *Bertelsmann/Kirch/Premiere*, Commission Decision of 27 May 1998, see **Geraldine Emberger, John Kemp**, The European Commission prohibits mergers in the German pay-tv sector (Bertelsmann/Kirch/Premiere and Deutsche Telekom/Betaresearch), 27 May 1998, e-Competitions Bulletin May 1998, Art. N° 39377.

[37] *Supra*, n. 9.

[38] Case C-633/16, *Ernst & Young P/S v Konkurrencerådet*, Request for a preliminary ruling from the Sø-og Handelsretten (Denmark), lodged on 7 December 2016 (O.J. 2017 C 46, pp. 17-18), see **Sam MacMahon Baldwin**, The Danish Maritime and Commercial Court requests the EU Court of Justice to provide guidance on gun-jumping test (Ernst & Young / KPMG), 7 December 2016, e-Competitions Bulletin December 2016, Art. N° 83312.

[39] *Id.*, question 1.

[40] Case KRB 47/08 – *Gruner + Jahr III*, Decision of the German Federal Court of Justice of 11 November 2008, see **Frank Röhling, Bertrand Guerin**, The German Federal Court confirms that a change of control must occur on a lasting basis in order to be qualified as a “concentration” but leaves open the question which actions can constitute “gun-jumping” infringements (G+J/RBA), 11 November 2008, e-Competitions Bulletin November 2008, Art. N° 26223.

[41] See Konkurransetilsynet Annual Report 2014, p. 8 at www.nsd.uib.no/polsys/data/filer/aarsmeldinger/AE_2013_1168.pdf ↗

[42] 16-D-24, *Altice*, Decision of the Autorité de la Concurrence of 8 November 2016, see **Eric Paroche, Flora Oriot**, The French Competition Authority fines a group and its recently-acquired subsidiaries 80 M € for having coordinated their business strategies and commercial behaviour prior to merger control clearance (Altice), 8 November 2016, e-Competitions Bulletin November 2016, Art. N° 83755.

[43] Court also observed that the prior to the implementation of the current EUMR, the distinction between the two violations would have been more pronounced as Article 14(1)(a) of the earlier Regulation 4064/89 required notification within a week. It would therefore have been possible to violate the provision requiring notification without having also implemented the concentration.

[**44**] *Marine Harvest ASA v European Commission*, Case T-704/14 (ECLI:EU:T:2017:753), para 306, see **Porter Elliott**, The EU General Court dismisses an appeal against a Commission decision for implementing acquisition of sole control without first obtaining approval under the EU Merger Regulation (Marine Harvest / Morpol), 26 October 2017, e-Competitions Bulletin October 2017, Art. N° 85297.

[**45**] See Case COMP/M.4734 – *Ineos/Kerling* discussed in "Investigations of Consummated and Non-Notifiable Mergers," OECD, DAF/COMP/WP3/WD(2014)19, para. 19, about this case see **Lucia Bonova, Denis Corriveau, Kamila Kloc-Evison, Enrique Sepulveda-Garcia**, The European Commission approves acquisition in the petrochemicals sector after in-depth investigation of the relevant geographic market (Ineos, Kerling), 30 January 2008, e-Competitions Bulletin January 2008, Art. N° 35279, and **John Gatti, Mary Loughran**, The European Commission clears an acquisition in the production of PVC (Ineos/Kerling), 30 January 2008, e-Competitions Bulletin January 2008, Art. N° 37716; Case COMP/M.6106 – *Caterpillar/MWM*, Final Report of the Hearing Officer, about this case see **Sergio Sorinas, Estelle Jegou**, The European Commission unconditionally clears an acquisition in the genset sector (Caterpillar/MWM), 19 October 2011, e-Competitions Bulletin October 2011, Art. N° 51790.

[**46**] *Advent/Ozone Laboratories*, decision of the Consiliul Concurentei of 19 November 2009, see **Porter Elliott**, The Romanian Competition Council carries out dawn raid on suspicion of "gun-jumping" infringement (Advent, Ozone Laboratories), 19 November 2009, e-Competitions Bulletin November 2009, Art. N° 41690.