Gun-Jumping in EU Law: Echoes From A National Competition

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Abstract

This paper explores the recent developments in Gun-Jumping resulting from the case of Altice. After the unprecedented fine imposed by the French Competition Authority (FCA), the European Commission (COM) issued a separate statement of objection for breach of Gun-Jumping again to Altice for another merger. This case is a reminder to companies involved in merger that they must comply with European Union Merger Regulation and guarantee that the parties are functioning independently prior to receiving clearance. So far there have been only a handful of cases in the field of Gun-Jumping within the EU.

In terms of structure, part 1 deals with the Reasoned opinion issued by the COM and that from the FCA; part 2 deals with former violations on Gun-Jumping, and part 3 considers the fines and the possible future avenues following the Altice case.

Keywords: EUMR, Altice, Gun-Jumping, Mergers, Acquisitions, Fines, EU Competition Law.

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1. Introduction

Based on European Union Merger Regulation (EUMR), those undertakings[1] merging shall notify their acquisition to the European Commission (COM) in a timely manner without implementing it before. Previously, the enforcement of Articles 4 (1) and 7 (1) and on the other hand article 14 EUMR on the fines were only reactive and symbolic in merger cases. The undertakings[2] notifying their concentrations were expecting to be controlled only on the basis of restricting competition and, if so, justified (or not) on efficiency grounds only. A question therefore arises: is there a new gate of supervising and scrutinizing mergers, triggered more effectively than before?

So far, the term Gun-Jumping is not clearly defined neither in EU Competition Law nor in US Antitrust Law.[3] Based on the EUMR, it is prohibited for a company acquiring control of another company, to have their transaction into effect before approval that the transaction meets the EUMR threshold. Gun-Jumping occurs where the parties implement a notifiable concentration without filling a notification. Until recently, the EU Commission (compared to US antitrust agencies) had reviewed only few violations.[4] Whereas, Gun-Jumping is a long established mechanism in the US,[5] in EU competition law has not yet attracted a lot of attention.[6] Businesses negotiating a merger in the US, or conducting pre-closing due diligence and planning may violate US Federal Law.[7] Broadly speaking, in the EU, Gun-Jumping refers to the partial or total implementation of a merger or acquisition earlier than permissible under EUMR. Gun-Jumping indicates the unlawful premerger coordination

(1) The words "undertaking" and "company" are interchangeably used in this paper. The notion of "undertakings", has been clarified by relevant case law, see in particular: Case C-T-99/04 AC-Treuhand v Commission [2008] ECR II – 1501, para. 1444;

(2) In Hofner and Elser the ECJ defined the notion of "undertaking" as one that encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which is financed, see Case C-41/90 [1991] ECR I-1979, para 21.

(3) As the practice shows so far, (see fn. 2. it is in the hands of the EU Courts to fill the gaps in explaining terms which are not defined elsewhere.

(4) Morse, M. H. (2002). Mergers and acquisitions: Antitrust limitations on conduct before closing. The Business Lawyer, 1463-1486.

(5) Gotts, I. K. (2006). The merger review process: A step-by-step guide to US and foreign merger review. American Bar Association.

(6) M. James R, and S. Ciullo. 'Gun-Jumping and EU Merger Control', European Competition Law Review 24 (9)(2003) at 424.

(7) L. Richard, 'Gun-Jumping: Antitrust Issues Before Closing the Merger'. August 2003. P. 09. Availbale at http://www.pillsburylaw.com/siteFiles/Publications/16ADC9E2C53CF6E9F97E3F0A3F6F3242. pdf>

between the parties to a merger or acquisition transaction.[8] Parties are not supposed to coordinate the price, the production and research activity of any form or joint advertisement, which is also defined below dealing with the French Competition Authority (FCA) decision.[9]

2. General Synopses- Methodology and Delimitations

In this paper, the researcher applied qualitative and analytical methods based on the Primary and Secondary EU Law, European Commission's Decisions and scholarly publications on Gun-Jumping.

The paper analyses the actions of the European Commission in EU merger procedural rules. However, this research is not limited only to the Commission, it goes further on elaborating the National French Decision on the case of Altice. These echoes form a National Competition Authorities are considered an impulse for the European Commission to also act in the same line.

One of the main duties of the COM is to safeguard the application of EU Law and the general interest of the Union.[10] The current Commission is more focused on the proper application of the EUMR in comparison to the previous one.[11] Based on Margaret Vestager's (the EU Competition Commissioner) interview concerning the Decision on Facebook, she expressed her view on the case of Altice as well. Vestager explicitly stated that the COM has taken a more firm position to crack down on any breaches of the EUMR. She specified that if undertakings jump the gun by implementing mergers prior to notification or clearance they deteriorate the effective functioning of the EU merger control system.[12] This statement should be of permanent nature. Their main goal is the prevention of concentrations that would significantly impede

(8) Coordination is not only prohibited under mergers, but also under article 101 TFEU, which will be briefly mentioned below, although not being under scrutiny in this paper.

(9) COM Dec. Ineos/ Kerling (M.4734).

(10) The consolidated version of Treaty on the European Union (TEU) Article 17, and The Consolidated version of the Treaty on the Functioning of the European Union (TFEU) Articles 234, 244 to 250, 290 and 291.

(11) D. Gotz, T. Chellingsworth and H. Hyrkas. 'Recent Developments in EC Merger Control', Journal of European Competition Law & Practice 1, (1) (2009) at 12-26.

(12) Scott, A. (2006). Tweedledum and tweedledee?: regime dynamics in US and EC merger control (pp. 72-108). Edward Elgar Publishing. See also: United Nations. 2017. Audio-visual Library of International Law. Eleonor Fox, International Economic Law, Competition Law, Developing Countries, Markets and Competition Laws: How Developing Countries Are Trying to Improve Their Economic Wellbeing by Harnessing Markets to Work for Them. 2017. http://legal.un.org/avl/ls/Fox_E_IEL.html#.

effective competition in the EU, EEA or any substantial part of it.(13) So far, the majority of notified concentrations, however, are mostly motivated by efficiency gains and pro-competitiveness.(14) At least this is what the Guidelines on the Assessment of Horizontal Mergers (Guidelines on Horizontal Mergers) contains and what the concentrations declare before being notified.(15) With the strict enforcement of the articles on Gun-Jumping and Standstill Obligation, the COM is activating another gate where the concentration would be 'caught'.

The COM considers this prior scrutiny to be measured as the cornerstone of the EU merger control system, as it allows the COM to identify whether the transaction 'raises competition concerns' and, if the companies do not submit commitments that address them, to prohibit the transaction".(16) Even though the COM might clear the transaction as compatible with the internal market, they might open a separate investigation issuing a Statement of Objection related to Gun-Jumping. This was done in all the EU Cases and the same applied to Altice in front of FCA.(17) It is obvious that the COM is taking firm actions against procedural violations of the merger control rules, not limited only to cases of failure to file a notification.

Analyzing Altice, the general rules to be respected by all undertakings were made noticeable. From the Electrabel case, followed by the case of Marine Harvest and today Altice, an alarm bell is ringing, alerting merging companies that they should be quite vigilant for the most common rules to be respected, as follows: merging companies of any kind have to be aware of their obligation—before notification—that they assess their merger filing obligations and ensure that they obtain clearances from relevant authorities prior to completing the transactions.

(13) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1, 29 January 2004, Article 1.

(14) R. Lars-Hendrik, J. Stennek, and F. Verboven. 'Efficiency gains from mergers'. (2000): 134. See also R. Lars-Hendrik, J. Stennek, and F. Verboven, 'Efficiency gains from mergers', European merger control: do we need an efficiency defense (2006): 84-201.

(15) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5 February 2004, p. 5.

(16) European Commission. 2014. Press Release, Mergers: Commission fines Marine Harvest € 20 million for taking control of Morpol without prior EU merger clearance. Juky 2014. http://europa.eu/rapid/press-release_IP-14-862_en.htm.

(17) From the moment a transaction is notified, the Commission generally has a total of 25 working days to either grant approval (Phase I) or refuse an in-depth investigation (Phase II). European Commission. 2013. M.6850 - Marine Harvest/Morpol. September 2013. http://europa.eu/rapid/press-release_IP-13-896_en.htm.

Before gaining regulatory clearance the mergers must continue to act independently on the market and respect the restrictions of any kind of cooperation between them. Procedures must be put in place to ensure competitively sensitive information such as prices, plans and strategies. As a rule undertakings, except for implementing formally the merger, should not in any case be engaged in a cooperation, coordination or synchronization of subjects such as: price, research strategies, marketing plans, production and so on.(18) The merging companies must review all information provided to both the COM and NCAs within notification forms checking the accuracy and consistency. The inconsistencies, discrepancies and different variations between data notification forms and responses in the internal documents submitted to the COM should be explained and clarified if necessary. If any possible breach is identified, steps should be promptly taken. Merging companies must also ensure that during the merger review process and before obtaining clearance, they conduct business as usual and avoid any conduct that could compromise the acquired company's competitiveness.

3. The statement of Objections in Article

In May 2017, A Statement of Objection was issued in respect to Altice, as a formal step in an investigation, where the COM informed Altice of the objections raised against them.(19) The company, examining the documents in the COM's file, has a right to reply in writing and to request an oral hearing to present their comments on the case to representatives of the COM. Altice announced that they would raise their concerns regarding the Statement of objections. So far such a step has not been made. The duration of the investigation depends on a number of factors, including the complexity of the case, the extent to which the companies concerned co-operate with the COM and the exercise of the rights of defence.

This specific Statement, in a clear and explicit way, emphasized the fines under article 14 2(a)(b) which are found below in detail stating that the Commission might act in accordance with this provision if Altice, either intentionally or negligently, had failed to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorized

(18) D. Frederic, and S. Lalart, 'Standstill Obligation in the ECMR', « World Competition 33 (2010) at 103.

(19) European Commission. 2017. Press Release, Mergers: Commission alleges Altice breached EU rules by early implementation of PT Portugal Acquisition, European Commission. Available at: http://europa.eu/rapid/press-release_IP-17-1368_en.htm.

to do so by Article 7(2) or by a decision taken pursuant to Article 7(3) or implement a concentration in breach of Article 7. Tactfully, both articles 4(1) and 7(1)—on which in the previous case Marine Harvest was fined—are mentioned in the Altice Statement. This company risks a fine of as much as 10 % of Altice's Annual Worldwide sales (but the EU's conditional clearance of the PT Portugal deal in 2015 won't be affected).

The provisions of the sale agreement on conduct prior to completion will need to be scrutinized carefully for competition compliance and clear practical guidance will need to be given to the teams involved on what is and what is not permissible. A key risk area in this context is information sharing.(20) While it is inevitable that parties will need to share some information in the course of their negotiations and due diligence process, as well as in relation to integration planning, procedures will need to be put in place to ensure competitively sensitive information, in particular current or future prices, marketing plans or strategies.(21) Not only is integration prohibited, but also planning must be tightly controlled to avoid the risk of Gun-Jumping.

Since the COM in Marine Harvest took the view in its Clearance Decision that an infringement of the standstill obligation in Article 7(1) and the notification requirement in Article 4(1) of the Merger Regulation could not be excluded, this also was mention in the COM's statement regarding Altice.(22) The COM noted within the Statement that it might examine in a separate procedure whether a sanction under Article 14(2) of the Merger Regulation was appropriate.(23)

Vestager, during her speech in Romania this year, stressed the influence over PT Portugal before notification or clearance of the transaction and that in certain instances Altice had exercised decisive influence over PT Portugal. Vestager underlined that Altice's agreement to buy PT Portugal 'seems' to have allowed it to control its competitor even before the merger was approved by

(20) Vigdor, W. J. (2006). Premerger Coordination: The Emerging Law of Gun-Jumping and Information Exchange. American Bar Association.

(21) F. M. Horwitz, K. Anderssen, A Bezuidenhout, S. Cohen, F. Kirsten. K. Mosoeunyane , N. Smith, K. Thole and A. Van Heerden, 'Due diligence neglected: managing human resources and organisational culture in mergers and acquisitions', South African Journal of Business Management, 33(1) (2002) at1-10. See also J. R. Carleton 'Cultural due diligence', Training 34 (11) (1997).

(22) Supra note 12.

(23) European Commission. 2014. Commission Decision addressed to: Marine Harvest ASA, of Council Regulation (EC) No. 139/2004 (Case M.7184 – Marine Harvest / Morpol Clearance Decision, para. 9. July 2014 http://ec.europa.eu/competition/mergers/cases/decisions/m7184_1048_2.pdf.

the COM.[24] Based on the COM's statement regarding Altice, it appeared that the undertakings had been acting as though it already owned PT Portugal.[25]

Even though she explicitly underlined that the companies were given instructions on how to handle commercial issues such as contract negotiations and sensitive information, that hasn't been taken into consideration."[26] The COM's decision on this point will be scrutinized carefully as there is relatively little precedent in the EU as to what type of pre-competition conduct amounts to Gun-Jumping and what is tolerated as acceptable protection to preserve the values of the target pre-completion.

The COM stated that the purchase agreement as a legal tool between undertakings put Altice in a position to exercise decisive influence before notification or the clearance. Vestager raised her voice in relation to telecommunications: 'Telecoms play an essential role in our digital society. My wish is to ensure that the merger will not lead to higher prices and less competition for Portuguese consumers. The commitments offered by the parties address this concern.'[27]

As to the facts: Altice operated via two subsidiaries in Portugal, Cabovisão and ONI. Cabovisão provides pay TV, fixed Internet access and fixed telephony services, essentially to residential customers. ONI provides services to business customers, including fixed telecommunication services, in particular voice, data and internet access services as well as IT services. These markets include the wholesale markets for leased lines and for call transit services, the provisions of fixed voice services, fixed Internet access services and pay TV services to residential customers and the provision of telecommunication services to business customers.

The COM expressed their concern regarding this merger, that this concentration might remove a strong competitor from the telecommunication market, with the risk of leading to higher prices and less competition in Portugal. In order to remove these fears, Altice offered to sell its Portuguese subsidiaries Cabovisão and ONI. These clear-cut structural commitments completely removed the

(24) Romanian Competition Council Anniversary Event, 2017. Competition and the rule of law. Romanian Competition Council. May 2017. https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-rule-law_en.

(25) Ibid.

(26) Ibid.

(27) See supra note 16.

overlap between the activities of Altice and PT Portugal within Portugal being therefore appropriate to address the initial competition concerns identified by the Commission. Therefore, the COM concluded that the transaction, as modified by the commitments, would raise no competition concerns. The decision was conditional upon full compliance with the commitments.(28) The COM cooperated closely with the Portuguese Competition Authority, and they issued a green light to the concentration and subsequently opened another investigation related to Gun-Jumping and Standstill Obligation.(29)

It is most obvious that the narration from the past of this case helps for clarification when considering the present occurences. The EU merger review process may at times be very accommodating and helpful not only to other companies but to NCAs as well.(30) PT Portugal is a telecommunications and multimedia operator with activities extending across all telecommunications segments in Portugal: fixed line, mobile, multimedia, data and business solutions. In February 2015 Altice, Netherlands notified the COM of the intention to acquire PT in Portugal. Two months later, on 20 April 2015, the COM decided not to oppose the above-notified concentration and to declare it compatible with the internal market. This decision is based on Article 6(1) (b) in conjunction with Article 6 (2) of Council Regulation and was made public after it is cleared of any business secrets it may contain.(31) After the COM cleared the transaction subject to conditions, it found information that Altice had visited PT Portugal premises, which triggered it to reopen the investigations. The COM finally approved the proposed acquisition of the Portuguese telecommunications operator PT Portugal by the multinational cable and telecommunications company Altice.

4. Altice in The French Competition Authority

NCAs of the Member States are also requested to demonstrate an increased

(28) Altice / PT Portugal COM Dec. (M.7499).

(29) This transaction was qualified for review under the EU Merger Regulation, based on the threshold, even though the Acquirer asked to do the same in front of the Portuguese NCA but not allowed from the COM, see also: M. Ottanelli, 'Cooperation between National Competition Authorities and National Regulatory Authorities' Issues of Network Interaction at the EU Level. 12 (1) 2016).

(30) M. Heim, 'Problems and process: European merger control and how to use it.' Journal of Public Affairs 4(1), (2004).

(31) European Commission, Mergers: Altice/PT Portugal. M.7499. http://ec.europa.eu/competition/mergers/ cases, April 2015 http://eur-lex.europa.eu/homepage.html?locale=en.

willingness to impose significant fines if confronted with Gun-Jumping.(32) It is indispensable to include a brief summary of the case of Altice from FCA. FCA made a huge step ahead by fining Altice four times more than the last COM decision, for 80 million euros. This decision was a great surprise to the Competition Community, not only in France. However, lately, advice from the President of the French Competition Authority expressed their suggestion to the French enforcer to review lawyers' Gun-Jumping guideline proposals, taking into consideration the controversial decision of the 80 million euro penalty on Altice for breaching the French merger rules.

However, in an interview, the President of the French Competition Authority, Isabelle De Silva, stated that the exchange of information is the key aspect.(33) Although the exchange of information per se is not a cause for imposing a fine for Gun-Jumping, she underlined that it is strictly prohibited that they act as a single unit before the approval has been given. The president of FCA clearly specified that the shared information between the companies were highly strategic, very recent, and very detailed about all business and strategic matters. On December 9, 2014, Altice announced that it had signed an ultimate agreement to purchase its rivals SFR and OTL in France. Altice, which then operated in France through its subsidiary Numéricable, notified two concentrations to the French Competition Authority: the acquisition of the SFR group - the second French telecom operator - and the acquisition of the OTL group, a virtual mobile phone operator operating under the Virgin Mobile brand.

Since the transaction met the thresholds set by the French Commercial Code, Altice was required to notify and obtain clearance before implementing it.(34) Under this code, Gun-Jumping infringements can be fined up to 5% on the total turnover of one year.(35) The FCA, subject to commitments, cleared the two concentrations. FCA, in Altice, addressed important practices as to how the undertaking restricted the competition in the market while constituting Gun-Jumping. Three features were underlined: the restrictions based on the contractual conditions, the amount of shared information, and the future

(32) Based on the previous articles 3(1)(g) TFEU, stating that EU must ensure that Competition is not distorted, now placed in Protocol 27.

(33) French Autorité de la concurrence. 2017. Isabelle de Silva, President, An interview about a historic Gun-Jumping case in the country. November 2017. https://www.womenat.com/w-at-competition.

(34) French Commercial Code, Article L430-3 and L430-4.

(35) Ibid, paras. I and II.

operational integration. It is clear that, while the parties are preparing themselves for a concentration, they need to meet. This communication should be done in order to carry out the due diligence assessments and identify the synergies.(36) This should all be within the boundaries, in as much as the parties continue to act independently in the market until approval has been obtained.

The teams partaking in the communication process should be external and anonymous.(37) But, in Altice, the FCA concluded that the parties had violated the rules in exchanging the information regarding their offers, information on the future plans regarding price and marketing strategies, the ongoing tenders, sharing the list of the consumers and their data, etc. Based on the decision form of the FCA, Altice signed a Memorandum of Understanding (MoU) with SFR, where a clause stated that Altice could review the purchase price if the indicators show the differences between the budget and the spending at the time of closing the transaction.

The MoU established clauses teaching the target company how to plan the future budget. FCA didn't consider that this was a violation per se. However, the parties admitted that Altice was allowed to approve a series of investments and expenditures, interfering with SFR strategic and commercial decisions participating together in a tender and in the process of signing different cooperation agreements with their competitors. All of these and other non-permitted actions were done before obtaining clearance. Regarding the second company, OTL, FCA noted that based on the MoU, Altice was controlling the expenditures as well, and they prohibited OTL from opening new branches or concluding important contracts with other operators in the market.(38) The FCA concluded that Altice interpreted the provisions of the MoU with the 'language' of control in different circumstances, such as sharing the information, joint purchasing, preparation of operational integration, etc.(39)

Regarding joint purchasing, the FCA in Altice explicitly underlined the fact that the parties willing to concentrate should not in any case make joint orders or even coordinate jointly in relation to third parties, which includes the customers. Regarding the preparation of operational integration, FCA reaffirms

(36) Décision n° 16-D-24 du 8 novembre 2016 relative à la situation du groupe Altice au regard du II de l'article L. 430-8 du code de commerce, para. 260.

(37) Ibid, para.318.

(38) Ibid. paras. 200-204.

(39) Ibid, paras. 259, 260.

that the parties must behave as competitors as long as the transaction has not been cleared. The FCA found out that Altice negotiated and prepared with its target to launch a new range of high-speed broadband Internet access, having in mind to unveil this plan a few days after the FCA gave them the green light. The FCA established in the decision that this project between Altice and SFR marked a turning point in the whole strategy of SFR, forced by Altice.(40) The FCA suggestion was that the merging parties could impose general obligations on the target company only if they are necessary and proportionate to protect the interest of the consumers until and if the green light is given. This paper uses the FCA decision as a linking bridge with the on-going circumstances and upcoming occurrences regarding Altice in front of the doors of the COM.

5. Pre-Altice Violation of Gun-Jumping Within The EU

So far, there are only four cases of fines imposed for infringement of Gun-Jumping within the EU. The very first case is the Samsung fine of 33,000 euros.(41) In this case the COM explained that the ECMR explicitly sets fines to be imposed in both intentional and negligent circumstances.(42) The COM in Samsung imposed a fine for notifying about the acquisition of AST 14 months after the transaction was closed. The second case where a fine was imposed was in the amount of 219,000 euros and was for Moller,(43) for notifying three reportable concentrations later, two years after the merger. These were the first cases on which the European Commission found infringement of the standstill obligation based on the former Merger Regulation.(44) The amount of these fines is considered insignificant from the current perspective. But with a decade pause these changed radically when the COM issued the decisions in Electrabel(45) and Marine Harvest(46) each levied 20 million euros.

(40) Ibid, paras. 113-117.

(41) COM Dec. Samsung / Ast (M. 920). See also, D. L. D. Bruno, and F. V. B. Morselli, 'Clarifying Gun-Jumping Through Guidelines: The Brazilian Experience', Journal of European Competition Law & Practice (2015)at lpv083.

(42) Supra note. 42, M.920, para.10.

(43) COM Dec. AP Moller (M.969).

(44) Council Regulation (EC) 4064, 30 DEC. 1989, On the Control of Concentration on Undertakings (former ECMR).

(45) Electrabel / Compagnie Nationale Du Rhone (M.4994) imposing a fine for putting into effect a concentration in breach of Article 7(1) of. The former regulation see supra note 39.

(46) Supra note 11, M6850, see supra note 17, imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) ECMR, see supra note 8.

Marine Harvest Com's decisions will in particular be under scrutiny in this paper, serving as the ultimate pattern on mirroring the future of Altice.[47] However, first we shall briefly mention 'Electrabel' and the main principles of this decision, comparing it with Marine.

The Electrabel decision came after the company increased its shareholding in Compagnie Nationale du Rohne (CNR) the largest electricity operator in France from 16.88% to 47.92% of the voting rights in December 2003. Only five years later, Electrabel made notification of the acquisition of de facto control (over CNR) to the COM. The COM cleared this concentration unconditionally. However, they did open a separate investigation regarding the breach of standstill obligation. In 2009 the COM concluded that Electrabel implemented the concentration prior to obtaining formal authorization, violating the standstill obligation.[48] The ECJ ruled that the appeal for Elecrabel on whether the COM's decision was wrong classifying this transaction as serious infringement of competition was inadmissible, because the company had not made this argument before the General Court. However, one should emphasize that both ECJ and the General Court reaffirmed the importance of infringements of this so called 'key principle' of EU Merger control, known as standstill obligation, namely the duty for undertakings not to implement the transactions before receiving the COM's approval.[49]

Only some weeks after the ECJ upheld the COM's fine imposed for Gun-Jumping in Electrabel, the exact same fine amount was announced in another Gun-Jumping case, this time in Marine. In general, the suspensory obligation within EU must explicitly prohibit failure to notify and Gun-Jumping, prescribing fines for breaching them.[50]

This also gave birth to the thoughts that this practice would grow into a standard, and the FCA, through Altice, 'busted' this belief for the time being.

(47) M. Kadar and J. Ch. Mauger, 'Harvesting Salmon, jumping guns: The Marine Harvest early implementation case' Competition merger Brief 1/2004, available at www. ec.europa.eu/competition/publications/cpn. See also, H. Pierre, and G. Vatin. '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) (2017) at 314-320.

(48) Supra note 40, (M.4998), The COM imposed the penalty after finding that Electrabel, a Belgian energy company, had purchased a stake in CNR that gave it de facto control of the French energy company, which according to the 2012 General Court decision, CNR had previously been owned solely by French government-controlled agencies and businesses.

(49) GC Case T-332/09 Electrabel v Commission (not yet reported), para. 246 (the «Electrabel Judgment»), as confirmed by the Court of Justice in its Judgment of 3 July 2014.

(50) J. Alison and B. Sufrin. EU competition law: text, cases, and materials. Oxford University Press, 2016.

5.1. The Case of Marine Harvest

Marine Harvest ASA (Marine Harvest), a Norwegian company with a leading position in salmon farming bought its competitor Morpol ASA (Morpol), the largest Norwegian salmon producer and processor both operating in EEA. Marine acquired a 48.5 % stake in Morpol in December 2012. On 18 December of the same year they closed the transaction. Three days after, Marine informed the COM that, although the acquisition was closed, they would not exercise the voting right until the clearance would be issued (a fact not being taken into the consideration from the COM, based on the non-relevance). After some months, Marine bought the remaining shares in a public offer, ending up with 87.1 %. Ultimately, Marine notified the COM on August 2013. On 30 September 2013, the COM declared the transaction as being compatible with the internal market.

This clearance was conditional upon the divestment of approximately three quarters of Morpol's salmon farming activities in Scotland. The COM had concerns that the transaction, as originally notified, would have significantly reduced competition in the market for farming and in particular processing of the Scottish salmon.(51) The proposed transaction, as originally notified, was a combination of two of the largest farmers and primary processors of Scottish salmon. The merged entity would have had high market shares and its rivals would have been unable to exercise a sufficient restriction on it. It is obvious that the acquisition would likely have led to price increases, which could have ultimately harmed consumers.

The COM's investigation showed that there is a certain group of consumers with a clear preference for salmon farmed in Scotland as compared to salmon farmed in other countries such as Norway. As an outcome, the possibility for customers to switch to salmon from other origins would not have been sufficient to defeat a possible price increase of Scottish salmon. Finally, high regulatory barriers make entry in the market for Scottish salmon unlikely in the predictable future and insufficient to remove the identified competition problem.

(51) European Commission. 2013. Press release: Mergers: Commission approves acquisition of salmon processor Morpol by salmon farmer Marine Harvest, subject to conditions. European Commission. September 2013. http://europa.eu/rapid/press-release_IP- 13-896_en.htm.

In order to address the COM's concerns, Marine committed to separate the largest part of Morpol's salmon farming operations in Scotland. These divestments address the competition concerns created by the concentration, because they remove a substantial part of the overlap between the parties' activities in the relevant market. The COM therefore, after the adjustments followed, decided that the proposed transaction, as modified by the commitments, would not raise competition concerns. The decision in Marine is conditional upon full compliance with the commitments. Even though this procedure was closed, the COM opened a separate investigation regarding breach of the standstill obligation principle.

5.2 The Application of Merger Control Rules in Marine

The Marine case is a fascinating example to be taken as a pattern, because first it clarifies the standstill obligation in bids and creeping takeovers.(52) Second, this case has been the only one of being fined for effectively implementing a transaction establishing a reportable concentration before making notification of it and before obtaining approval.

The main provisions on which Marine breached EUMR rules are articles 4(1) and 7(1). Article 4(53)(1) of EUMR states that: "Concentrations with a Union dimension defined in this Regulation shall be notified to the COM prior to their implementation and following acquisition of a controlling interest". Article 7(1), on the other hand, states that "A concentration with Union dimension as defined in Article 1, or which is to be examined by the COM pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market, pursuant to a decision under articles 6(1)(b), 8(1) or 82) or 10(6)." Although, the COM in Lingus described Gun-Jumping based on article 7(1) as one of the founding principles of ECMR,(54) there was a case also when acquisition(55) was notified within the EU but COM approved it without objecting at all to the Gun-Jumping.(56)

(52) See supra note. 42.

(53) S, Piet Jan, and M. Farley. An Introduction to Competition Law. Bloomsbury Publishing, 2017.

(54) GC Case T-411/07 Aer Lingus Group v Commission [2010] ECR II-3691, para 80.

(55) At this instant, the need to define the acquisitions is indispensable. Acquisitions arise when one undertaking acquires all or the majority of the shares in the second undertaking or even the minority shareholding will be sufficient sometimes to qualify as acquisition. Sometimes, and also, occasionally only buying a brand name can amount to acquisition, W. Richard, and D.Bailey. Competition law. Oxford University Press, USA, 2015.

(56) COM Dec. CAI/Platinum, (IV/M.1580).

The new principle introduced in Marine was that the COM assessed the two infringements separately.

On the one hand, an infringement of Article 4(1) an instantaneous breach, which is committed by failing to notify the concentration.(57) On the other hand, the infringement of Article 7(1) is considered a permanent violation, which remains on-going for as long as the COM in accordance with the EUMR does not declare the transaction compatible with the internal market.(58) Given that, as discussed in more detail below, an infringement of Article 7(1) comes to an end only with the COM decision declaring the proposed transaction is compatible with the internal market.(59) Marine Harvest has recently been involved in several merger control filings at the European and national levels.(60)

This company, as well as other companies, during the time of 'Pan Fishhas'(61) had been already fined in 2007 by the FCA for infringement of the standstill obligation (article 7(1)) with respect to its acquisition of 'Fjord Seafood'(62)excluding article 4(1). This argument is a confirmation that this is not the first time an undertaking, in this case the same one, infringes the standstill obligation in the context of merger control proceedings and is fined from both NCA and the COM.(63) In Marine, as mentioned above, the COM considers that the company infringed both Article 4(1) and Article 7(1).

Therefore, based on the two previous COM decisions (Electrabel and Marine), the assumptions are that Altice will share the same destiny. In this regard, the COM records that EUMR has already been in force for more than ten years.

(57) As such, Marine Harvest (supra note11) infringed Article 4(1) on the day of closing, December 18, 2012.

(58) See supra note 44. See also B. Alomar, S. Moonen, G. Navea and Ph. Redondo 'Electrabel/CNR: the importance of the standstill obligation in merger proceedings' Competition Policy Newsletter 58, (3) (2009).

(59) Marine Harvest's infringement ended on the date of the Clearance Decision, i.e. 30 September 2013.

(60) See Case Nutreco/Stolt Nielsen/Marine Harvest JV (M.3722). See also C2006-47 / Lettre du ministre de l'économie, des finances et de l'industrie du 1er décembre 2006, aux conseils de la société Pan Fish, relative à une concentration dans le secteur du saumon and UK Competition Commission.

(61) Pan Fish ASA – Competition Commission to report by 20 December. http://marineharvest.com/about/news-and-media/news/pan-fish-asa---competition-commission-to-report-by-20-december/.

(62) Decision of 20 July 2001 amending Decision 97/634/EC accepting undertakings offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of farmed Atlantic salmon originating in Norway; Commission Directive 2003/119/EC of 5 December 2003 amending Council Directive 91/414/EEC to include mesosulfuron, propoxycarbazone and zoxamide as active substances.

(63) See supra note 55.

Compared to the previous decision, Electrabel, the COM based their decision only on article 7 (1) ECRM whereas 4(1) was not under the radar. In other words, the COM fined Electrabel only for implementing the concentration without prior approval (article 7(1)) but it didn't take into the consideration the failure to make notification of the concentration in the first place (article 4(1)). This is considered another novelty in Marine, where the Regulation concerning limitation periods was applied and clarified as well.(64) Based on this Regulation, there is a distinction made between infringement of a procedural nature related to notification of obligation with limitation period of three years, and infringements related to the substantial changes of the condition of competitions with limitation period five years.

In Electrabel, both, the General and ECJ, considering that the infringements of article 7(1) are subject to a five year limitation period and they are permanent because the limitation period starts only at the end of the infringement, upheld the COM's decision. Because of the limitation period, the application of article 4(1) was not mentioned there but explicitly and clearly explained in Marine, based on the regulation concerning the limitation period. In this case, the COM clarified that article 4(1) is subject to a three-year limitation period and they are of instant nature: once you acquire the other company, that moment the duty of notification starts. It is worth mentioning that similar provisions regarding the standstill obligation existed in the preceding Regulation.(65) However, focusing on the new EUMR, the COM had already proceeded against other companies and imposed fines on them for breach of Article 7(1) of the Merger Regulation. This proves the fact that Marine should have been fully aware of the legal framework and the application of EUMR by the COM.

Analyzing the Marine Harvest decision is crucial to comprehend and predict Altice in this stage of development. In Marine Harvest, reference was made as well on the COM's Consolidated Jurisdictional Notice, providing useful guidance under EUMR to enable undertakings to establish communication with the COM regarding their control.(66)

(64) Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitations periods in proceedings and the enforcement of sanctions under the rules of EEC related to transport and Competition.

(65) Council Reg. (EEC) 4064/89 (OJ 1989 L395/1, 30.12.1989), as amended by Council Reg. (EC) 1310/97 (OJ 1997 L180/1, 9.7.1997; corrigendum OJ 1998 L40/17, 13.2.1998).

(66) Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) paras. 43 and 44.

Concepts such as control, control by shares, acquirer, target etc. are explicitly and clearly defined in the Notice.(67) Both the notice, and a case such as 'Cementbouw,' will be useful regarding the Altice case. (68)

5.3 The Derogation in Article 7(2)

Under article 7(2) ECMR the standstill obligation can be waived. It states:

'Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that: (a) the concentration is notified to the Commission pursuant to Article 4 without delay; and (b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.'

The COM had used the power to grant derogation, when the conditions had been fulfilled, in particular for rescuing a closure from a financial crisis. First, the COM considered that the acquisition is a not public bid because sole control was acquired before the launch of the pubic bid and it was obvious that Marine did not acquire control from various sellers either.(69) Marine Harvest also submitted that such an interpretation is confirmed by the fact that in Yara/ Kemira GrowHow, another decision where a situation similar to this case arose, the COM did not issue any fines.(70) The COM stressed that Yara should not be taken into consideration in Marine, but whether that will be a reflection in Altice the practice will show. The existence of a margin of discretion for the Commission to pursue an infringement implies that third parties are not entitled to rely on the Commission's decision in a specific case not to open proceedings pursuant to Article 14 of the Merger Regulation.(71) This is particularly the case where a final COM decision declaring a concentration compatible with

(67) Ibid. paras. 43 & 44 and paras 11-17.

(68) Case T-282/02 Cementbouw v. Commission [2006], ECR II-00319, paras 105 and 106.

(69) Schneider/Leegrand (M.2283), and Case T-310/01, Schneider Electric SA v Commission [2002] ECR II-4071.

(70) Yara/Kemira GrowHow (M.4730).

(71) See by analogy Case T-332/09 Electrabel v Commission judgment [2012] ECR II-0000, para. 63, Case T-210/01 General Electric v Commission [2005] ECR II-5575, paragraphs 118 to 120, and Sun Chemical Group and Others v Commission, [2007] ECR II-2149, paragraph 88 and the case-law cited.

the internal market states that an infringement of the standstill obligation in that case could not be excluded.(72) Paragraph 3 of article 7 gives the COM discretion to decide on derogation in case of urgency.(73)

In conclusion, COM considers that Marine Harvest, by implementing this concentration prior to the notification and clearance, infringed the notification requirement in Article 4(1) and the standstill obligation in Article 7(1). In both cases, Electrabel and Marine, a minority shareholding resulted in the acquisition of control. According to the Commission, the wide dispersion of remaining shares and previous attendance rates at shareholders' meetings led both Electrabel and Marine gain sole control in their respective transactions.

Finally, only few days before this paper was completed, the General Court informed Marine Harvest that the COM decision to fine Marine 20 million euros is maintained. Marine, after Electrabel, becomes the second case in the field of Gun-Jumping where the General Court holds the COM's decision.

6. The Future After Altice

In the past few months the European Commission has paid a great deal of attention to (alleged) breaches of procedural rules in the field of merger control. Being anxious about the COM decision on Altice and assuming a similar outcome from Electrabel and Marine, on July 6th 2017 the COM announced new Statements of Objections sent to Canon/Toshiba Medical Systems alleging it had Gun-Jumped.(74) Another significant development expected with eager anticipation is the ECJ's preliminary ruling on interpretation of 'Gun-Jumping' regarding the Danish case Ernst & Young.(75) Will consistency be preserved first from one case to the other and second between the COM and the European Court? These are questions to be answered in the future. So far, the few number of cases shows that the derogation stands as a rule.

(72) Yara/Kemira Growhow see supra note 65, decision should have led Marine Harvest (see supra note 11) to the conclusion that it was at the very least possible that its planned acquisition would have been illegal. See fn. 65.

(73) Bradford & Bingley Assets (M.5363).

(74) European Commission. 2017. Statement by Commissioner Vestager on three Statements of Objections sent to Merck and Sigma-Aldrich, to General Electric, and to Canon for breaching EU merger procedural rules. European Commission. July 2017. http://europa.eu/rapid/press-release_Statement-17-1929_en.htm.

(75) Request for a preliminary ruling from the Sø- og Handelsretten (Denmark) lodged on 7 December 2016 — Ernst & Young P/S v Konkurrencerådet, (Case C-633/16) (2017/C 046/19).

7. Fines

The ability of the COM to impose fines in the event of a breach of Article 4(1) or/and 7(1) is laid out in Article 14(2) (a) and (b) of the ECMR. The COM explicitly underlines in Moller that these provisions are vital and imperative to be respected, and their violation deteriorates the effectiveness of the merger control rules.(76) Paragraphs (a) and (b) of article 14(2) state that the COM may impose fines up to 10% of the aggregate turnover of the undertakings concerned within the meaning of Article 5 on the persons referred to in Article 3(1)(b) or the undertakings concerned where, either intentionally or negligently breaching the above-mentioned rules.(77) In the Electrabel case, the COM took into consideration the longer period as well.(78) The COM imposed the same level on Marine as in Electrabel, even though the first was fined for breaching two articles and also carried serious concerns for competition. The fine in Marine, based on the COM's conclusions, reveals the serious nature of the breach of 'standstill obligation,' damaging in this way the effective competition in the market, although justifying it based on the pre-notification information regarding the use of voting rights. In the absence of rules or guidelines (being binding or soft) on the precise calculation of fines for procedural infringements of ECMR, the COM referred to the provision of article 14(2) taking into consideration the nature, gravity and the length of the infringement.(79)

- This paper highlighted the fact that the COM may impose fines even where the merger does not raise competitive concerns and even after the parties have received merger clearance. Meeting the one and only test is not enough anymore. The re-activation of this matter is on the table again.(80)
- The fact that both the European Commission and the NCAs are using their resources to track undertakings for Gun-Jumping indicates that there is a strong standpoint being taken as regards this principle.

(76) COM Dec. AP Moller, see supra note 38.

(77) A. Ezrachi, EU Competition Law, An Analytical Guide to the Leading Cases, Fifth edition, Hart publishing 2016, page 424.

(78) The COM has also adopted a number of other decisions on the basis of Article 14 EUMR, See Commission Decisions on Sanofi/Synthelabo (M.1543); KLM/Martinair (M.1608); Deutsche Post/ Trans-O-Flex (M.1610); Mitsubishi Heavy Industries (M.1634); BP/Erdölchemie (M.2624); Tetra Laval/Sidel (M.3255).

(79) The procedures and the amount will depend on how the infringement is characterized. See Guidelines on the methods of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006) OJ C 201, 1.9.2006, p. 2-5 (The Finning Guidelines).

(80) GÜNDÜZ, Harun. «FINES IN TURKISH COMPETITION LAW: HAS THE LOTTERY ENDED?.» Competition Journal/Rekabet Dergisi 13, no. 4 (2012).

8. Conclusion

The actions of the European Commission analyzed in this paper give clear signals to companies as well as to other competition players and consumers (at the bottom line) that EU merger procedural rules provided by the Regulation must be respected. The COM must be able to take decisions about merger's effects on competition in full knowledge of accurate facts. All undertakings acquiring each other should place COM's regulatory clearance on the top of their pre-merger steps. It would be wise for undertakings to keep track of all acquisitions, including minority shareholdings, and to check for any applicable merger filing obligations before implementing them.

Altice is only the fifth Gun-Jumping case the EU has reviewed so far. The fine levied by the FCA in Altice sends a warning to all mergers and acquisitions that penalties for Gun-Jumping and breach of Standstill Obligation can be severe, and should not be marked off as an insignificant comparable to the income they make. The FCA decision in Altice provides useful guidance to companies seeking to ensure compliance with competition rules in the context of their planned transactions and merger control investigations. It is about time to raise a clear and distinctive line between lawful and unlawful pre-merger coordination.(81)

There is a need for precise guidance either from the Commission or the Courts at the European level on Gun-Jumping.(82) Common guidance is needed in addressing issues with accurate and clear-cut definitions about what constitutes an infringement, including mechanisms of sharing sensitive information, joint operational integration and function, control of the target, etc.(83) Finally, there should be Guideline or any other form of law on the correct definitions of the length, nature and gravity of the infringement in accordance and perplexities with the fine of 'up to 10%' pursuant to article 14 (2) (a) and (b) of the EUMR.

(81) V. William J, 'Premerger Coordination: The Emerging Law of Gun-Jumping and Information Exchange', American Bar Association, (2006).

(82) Geradin, Damien, and David Henry. «The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts, judgments.» European Competition Journal 1, no. 2 (2005): 401-473. See also Wils, Wouter PJ. «European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis, The.» World Competition 30 (2007): 197.

(83) Smuda, Florian. «Cartel overcharges and the deterrent effect of EU competition law.» Journal of Competition Law and Economics 10, no. 1 (2013): 63-86.

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