

# NORTH MACEDONIA: GUN-JUMPING IN M&A TRANSACTIONS IN NORTH MACEDONIA

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In merger control, the standstill obligation requires that the parties refrain from implementing a concentration before obtaining the required merger clearance. This duty represents a cornerstone of many merger control regimes and is intended to protect the structure of the market and the consumers from any damage that could result from a transaction that had not been properly examined and could turn out to be anti-competitive.

The Macedonian Law on Protection of Competition (the “Law”) also prohibits parties from implementing a concentration before receiving a green light from the Macedonian National Competition Authority.

The standstill obligation is limited to the boundaries of the very concept of a concentration, meaning that refraining from implementing a transaction means refraining from acquiring control over the target undertaking. Any other transaction that contributes to the implementation of a concentration or, following the preliminary ruling of the European Court of Justice in *Ernst & Young*, which represents a direct functional link to the implementation of a concentration and contributes, in whole or in part, in fact or in law, to a change of control over the target undertaking can constitute gun-jumping.

## Filing Thresholds

When discussing gun-jumping, it is also important to consider what triggers the notification requirement. The Law sets rather low merger filing thresholds, which can be triggered even in cases where neither of the parties is active in North Macedonia (*i.e.*, in foreign-to-foreign deals); one party having an affiliated company registered in North Macedonia can be enough to trigger a duty to file. Even though the Law formally recognizes the domestic effect doctrine, according to which acts undertaken abroad fall within the scope of the Law only if they produce effects on the local territory, the NCA’s practice suggests that this provision of the Law is not observed and the only criterion when determining whether a duty to notify the NCA that a transaction exists remains the merger filing thresholds.

## Enforcement

The track record of the National Competition Authority on gun-jumping consists of three cases involving the issuance of fines. The first case sheds some light on the issue at the moment of imple-

mentation, and the other cases are relevant to the way foreign-to-foreign deals are handled.

The first gun-jumping case occurred in 2007, when the NCA fined Top Investment Group for acquiring joint control over Zegin without notifying it of the transaction or obtaining merger clearance. The NCA had a clear-cut case here, but it nevertheless examined in detail how and when control was acquired and found that the moment of implementation occurred not when Top Investment Group obtained ownership of a share in Zegin, but when it gained the effective right to block strategic decisions at Zegin.



The other two cases involve Slovenia Broadband and United Media, both members of the Mid Europa Partners Group at the time of the acquisitions in question. The acquirers failed to notify the NCA of transactions involving foreign targets with either negligible or no turnover in North Macedonia. Still, due to the rather low merger filing thresholds prescribed by the Law, the acquirers managed to trigger the filing duty on their own. Following late merger notifications at the end of 2013, the NCA fined Slovenia Broadband and United Media for their failure to notify it of the transactions and for implementing them before obtaining merger clearance, effectively confirming that the NCA is unlikely to consider the domestic effects doctrine for foreign to foreign transactions. The NCA took as mitigating factors the fact that the concentrations did not give rise to any competition concerns and that the parties voluntarily reported the non-notified concentrations and cooperated with the NCA during its proceedings.

## Conclusions

The NCA’s practice in gun-jumping cases implies that undertakings cannot rely on a domestic effects defense in merger control cases. All three cases, in general, serve as evidence of a very formalistic and strict approach by the NCA, which poses an increased risk of enforcement actions against companies that fail to notify it of their acquisitions and respect the North Macedonian waiting period, even in situations that involve targets with no activities or turnover in North Macedonia. ■