Gun Jumping in Selected SEE Countries – an Obvious Risk in M&A Transactions

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CONTENTS

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Abstract

Gun jumping is a term which describes the premature realization of a merger before obtaining a merger clearance from the relevant competition authorities. In the last years, the European Commission and national competition authorities have demonstrated an increased interest in investigating and punishing gun jumping cases. Recognizing this interest and the need for practical guidance, the article first gives an overview of gun-jumping evolution through case law. It then points to different merger filing thresholds in the region, and implications they could have for gun-jumping issues, to show that despite the commercial and historical common ground in the region, merger filing thresholds do differ significantly between the countries, in a way which requires a cautious and sometimes challenging structuring of M&A activities with regional reach. Based upon an overview of individual gun-jumping cases in the region, but taking into account the EU precedents, the article provides recommendations how to avoid gun-jumping risks.

Résumé

« Gun jumping » est un terme qui décrit la réalisation prématurée d'une fusion avant d'obtenir l'autorisation des autorités de la concurrence compétentes. Au cours des dernières années, la Commission européenne et les autorités nationales de la concurrence ont montré un intérêt accru pour les affaires de « gun jumping ». Reconnaissant cet intérêt et le nécessité d'une guidance pratique, l'article donne d'abord un aperçu de l'évolution du « gun-jumping » à travers la jurisprudence. Il souligne ensuite les différents seuils de notification des fusions dans la région, et les implications qu'ils pourraient avoir pour les questions de « gun jumping », pour montrer que malgré les points de convergence dans la région, les seuils de notification des fusions diffèrent sensiblement d'un pays à l'autre, d'une manière qui exige une organisation prudente et parfois difficile des activités de fusion et d'acquisition à portée régionale. Sur la base d'une vue d'ensemble des cas particuliers de « gun jumping » dans la région et en tenant compte des précédents de l'UE, l'article fournit des recommandations sur la manière d'éviter les risques de « gun jumping ».

Key words: competition law; antitrust; gun-jumping; mergers & acquisitions; administration; Central and Eastern Europe; Croatia; Serbia; Slovenia.

JEL: K21, K22, K42, L40, L44

I. Introduction

Gun-jumping[1] as a competition law issue continues to attract interest among practitioners and scholars for more than 20 years in the EU and 30 years in the US. Hence, one could say that this topic is anything but new. Yet, the lack of sufficiently detailed case law and guidance from the authorities was a characteristic of the discourse. In recent years however, a line of EU precedents clearly address some of the most important issues associated with the gun-jumping topic, such as the actual meaning and scope of the standstill obligation, and the relation between the merger control regime and the cartel prohibition when it comes to cases of premature coordination.

Nevertheless, the gun-jumping issue remains relatively invisible in the Balkan region. In spite of the national regulations mirroring EC Regulation 139/2004[2] (hereinafter; EUMR), there seem to be only few cases and no clear guidance from the authorities. Considering the regional dimension of many transactions happening in the Balkans, we found it interesting to shed some light on this topic from a regional perspective. This article will therefore give a brief background of gun-jumping and the most recent EU precedents, explain common risks and consequences gun-jumping cases raise, and provide an overview of local practice and recommendations what to do to avoid gun-jumping risks.

II. Definition of Gun-Jumping

1. (Historical) Background

Gun-jumping is a practitioners' term, stemming from US practice. It is commonly used to describe a breach of the standstill obligation that represents a corner stone of the merger control regime in the EU and of a great majority of other merger control regimes in the world. This term adequately describes

[1] The use of the term 'gun-jumping' first came up in the scope of a number of debates in the years 1989 and 1991, which focused on the question if information exchange in the context of a due-diligence would represent a violation of antitrust rules *„[…] where information about future business plans, obtained during pre-merger talks, allows companies to 'jump the gun' and cease acting as competitors before they have consummated the deal"*. Steptoe, Mary Lou, Deputy Director, Bureau of Competition, Federal Trade Commission, Remarks before the National Health Lawyers Association, 14.02.1991 (Blumenthal, 1994, p. 9).

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 24/1.

the tension that exists between the *ex ante* merger control, on one hand, and merging companies' desire to implement the merger as soon as possible, on the other hand[3].

From this perspective, gun-jumping is typically defined as a premature implementation of a notifiable concentration, that is, its implementation before or without a merger clearance (Linsmeier/Balssen, 2008, p. 742; Raysen/Jaspers, 2006, p. 603; Gottschalk, 2005, p. 905; Modrall/Ciullo, 2003, p. 424; Bosch/Marquirer, 2010 113). This definition typically covers cases of premature acquisition and/or exercise of control. A somewhat wider definition of gun-jumping includes also a breach of notification requirements (for example the one under Article 4 EUMR). Actually, some of the first European gun-jumping cases were cases centered on the lack of a merger notification.[4]

Until recently, there were not that many gun-jumping cases in Europe. The few European cases typically referred to as gun-jumping cases in a more distant past were *Samsung/AST*[5], *Bertelsmann/Kirch/Premiere* (European Commission, 1997), *A.P. Møller*[6] and *Electrabel*[7], on the EU level and *Mars/Nutro Products* (Klauss/Germany, 2009, 63; Gromotke, 2008; Immenga, 2009, 57; Bischke/Brack, 2009, 298; Bundeskartellamt, 2009, p. 69) and *Druck- und Verlagshaus Frankfurt a.M. (DuV)* (Bundeskartellamt, 2011, p. 96) on German soil. Although these cases offered some guidance, they were not particularly useful in understanding what types of pre-merger integration and coordination are exactly allowed.

Obviously, the most important question when it comes to gun-jumping is what exactly 'premature implementation' means, since Article 7(1) EUMR and its counterparts in EU national merger control regimes have not explained that. Another question is whether gun-jumping includes also cases of premature coordination, where all sorts of competition-sensitive coordination between the merging parties is considered, including most importantly exchange of sensitive business information (Reysen/Jaspers, 2006, 603; Linsmeier/Balssen, 2008, 742; Gottschalk, 2005, 905; Modrall/Ciullo, 2003, 424).

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[3] There are of course variations in the use of the term 'gun-jumping' (Rudowicz, 2016, p. 35 et seq.).

[4] European Commission, decision from 10.2.1999, IV/M.969, OJ. 1999 EC No. L 183/29, Para. 1, 7, 12, 19 – *A.P. Møller*.

[5] European Commission, decision from 18.2.1998, IV/M.920, OJ. 1999 EG No. L 225/12, Para. 7 – *Samsung-AST*.

[6] European Commission, decision from 10.2.1999, IV/M.969, OJ. 1999 EG No. L 183/29, Para. 1, 7, 12, 19 – *A.P. Møller*.

[7] ECJ, Decision from 03.07.2014, C-84/13 P, *Electrabel/Kommission.*

2. Current Situation

Thanks to three important recent cases we now have a much clearer picture as to the scope and meaning of the standstill obligation[8]

The *Ernst & Young* judgment clarifies how the concept of a standstill obligation, that represents the core of the gun-jumping issue, should be interpreted. First of all, according to the CJEU, the implementation of Article 7(1) EUMR is limited to the boundaries of the concept of concentration as defined in Article 3 EUMR.[9] Article 7(1) EUMR, which prohibits the implementation of a concentration, limits that prohibition only to concentrations (as defined in Article 3 EUMR) and thus excludes the prohibition of any other transaction which cannot be regarded as contributing to the implementation of a concentration.[10]

Secondly, an important clarification offered by the *Ernst & Young* judgment is that any partial implementation of a concentration is also covered by Article 7(1) and may therefore amount to gun-jumping. Otherwise, the system of preventative merger control would be undermined because the merging parties could have effectively implemented the transaction by successive partial operations.[11] Building upon that, the Commission concluded in *Canon/Toshiba Medical Systems Corporation* that, in line with paragraph 35 of the European Commission's Consolidated Jurisdictional Notice[12], interim transactions, which even in themselves do not entail an acquisition of control on a lasting basis, do constitute a breach of Article 7 EUMR when they form a first step of a single concentration. Thus, genuine warehousing schemes, typically considered for the purpose of avoiding waiting periods (in some or all countries where the notification duty is triggered), are therefore considered as breaching the standstill obligation under EUMR.

Thirdly, whether ancillary or preparatory transactions between merging parties before a merger clearance can produce certain effects on the market is irrelevant for the existence of an Article 7(1) breach.[13] This is a practically very

[8] The CJEU judgment in case C-633/16 of 31.05.2018 – Ernst & Young, the European Commission decision in case M.7993 of 24.04.2018 – Altice/PT Portugal and the European Commission decision in case M.8179 of 27.06.2019 – Canon/Toshiba Medical Systems Corporation. Decisions in *Altice/PT Portugal* and *Canon/Toshiba Medical Systems Corporation* are under appeal before the General Court.

[9] C-633/16 of 31.05.2018 – Ernst & Young, para. 43.

[10] C-633/16 of 31.05.2018 – Ernst & Young, para. 46.

[11] C-633/16 of 31.05.2018 – Ernst & Young, para. 47.

[12] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, Official Journal C 95/1, 16.4.2008.

[13] C-633/16 of 31.05.2018 – Ernst & Young, para. 50.

important message, considering the number of different activities that happen between signing and closing and the urge to make things run as smoothly as possible from day one after closing.

Since the key concept underlying the definition of concentration in Article 3 EUMR is the 'change of control on a lasting basis', a concentration arises as soon as the merging parties implement operations contributing to a lasting change in the control of the target undertaking.

Hence, according to *Ernst & Young*, a transaction that represents a direct functional link with the implementation of a concentration, that is, which contributes, in whole or in part, in fact or in law, to a change of control over the target undertaking, constitutes a gun-jumping.[14] Contrastingly, a transaction that despite having been carried out in the context of a contemplated concentration, that is, despite being ancillary or preparatory to the concentration, does not represent a direct functional link with the implementation of a concentration, that is, which does not contribute, in whole or in part, in fact or in law, to a change of control over the target undertaking, does not constitute an implementation of a concentration, that is, a breach of Article 7(1) EUMR.

In this respect, the termination of the contract by the target company (as in *Ernst & Young* that of KPMG DK and KMPG International) in view of the contemplated merger between the target company (KPMG DK) and the acquirer (EY), was not in breach of the standstill obligation since, by such termination of the contract, the acquirer (EY) has not acquired the possibility of exercising any control over the target company (KPMG DK).

Another important message of the *Ernst & Young* judgment is that it delineates cases of premature coordination between the merging parties from cases of premature implementation of the concentration. Coordination cases, which have been, especially in the US doctrine, regarded as gun-jumping cases, are not covered by Article 7(1) EUMR and cannot be regarded as breaches of the suspensory obligation. Such cases can only be assessed under Article 101 TFEU.[15]

Contrary to KPMG's termination of the contract with KPMG International in *Ernst & Young*, *Altice/PT Portugal* could serve as an example of a classical gun-jumping case and the European Commission's decision in this case offers an extensive guidance for many of the typically used interim covenants and practices between signing and closing. In short, the most important takeaways from this case are as follows:

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[14] C-633/16 of 31.05.2018 – Ernst & Young, paras. 49, 50 and 59.

[15] *Ibidem*, para. 57. Although this stance is derived from CJEU judgment in case C-248/16 of 7.9.2017 – *Austria Asphalt*, para. 33, it seems to be used (for the first time) in the context of the interpretation of a standstill obligation.

First, the interim covenants agreed between the buyer and the seller, such as the ones requiring the seller to run the target business in the ordinary course, and ask for the buyer's consent for any out-of-the-ordinary measures, are appropriate and do not breach the standstill obligation as long as they are strictly limited to what is necessary to ensure that the value of the target business is maintained.[16] However, if the buyer is by virtue of the transactional agreement afforded the possibility to exercise decisive influence over the target on matters that are not necessary for the preservation of the value of the target, this is not justified and represents a breach of the standstill obligation[17].

Secondly, *de facto* involvement of the buyer in the decision-making process of the target pre-closing can very easily amount to a gun-jumping situation. This was the case in *Altice/PT Portugal* with Altice influencing a number of PT Portugal's day-to-day business decisions (e.g. giving consents to the conclusion of commercial contracts and giving instructions how to negotiate contracts).[18]

Thirdly, and perhaps most interestingly, is the issue of exchange of business sensitive information between the merging parties before the clearance. Two things seem important in this respect. First, the Commission seemingly looked at exchange of granular and business sensitive information between Altice and PT Portugal as an evidence of Altice effectively exercising decisive influence over PT Portugal, and did not qualify this as a breach of Article 101 TFEU.[19] Second, the Commission explicitly referred to lack of any safeguards, such as Non-Disclosure Agreements and Clean Team Arrangements, which makes the *Altice/PT Portugal* decision a very good guidance on such arrangements.[20]

III. The Threshold Question

The most obvious case of gun-jumping arises if parties implement a notifiable concentration without filing a merger notification at all. Although this risk seems to be manageable to avoid, mistakes do occur. One reason is that parties to the transaction are often not aware of their obligation to file for a merger clearance in various countries. Another reason is that there are

[16] European Commission decision M.7993 of 24.04.2018 – Altice/PT Portugal, paras. 70–72.

[17] For example, this can be the case if the materiality thresholds, above which the consent of the buyer has to be sought, are set too low to effectively cover also contracts and other activities typically falling within the ordinary course of business.

[18] European Commission decision M.7993 of 24.04.2018 – Altice/PT Portugal, see section 4.2.

[19] *Ibidem*, see for example paras. 423 and 473.

[20] *Ibidem*, see for example paras. 423 and 471.

situations susceptible to mistakes involving, for example, filing thresholds that are relatively subjective (e.g. when it comes to market share based thresholds). A third possible scenario involves thresholds that are difficult to comply with, for example due to very low financial turnover thresholds requiring multinational companies with activities, subsidiaries and assets all over the world to file each and every foreign-to-foreign transaction.

In this respect, the gun-jumping issue becomes relevant in transactions triggering merger filing and waiting periods in Serbia, Montenegro and North Macedonia. Because of very low jurisdictional thresholds, many foreign-to-foreign transactions with no ties to these jurisdictions have to be notified and postponed until after the merger clearance has been granted. For example, all three sets of jurisdictional thresholds can very often be triggered by only one merging party.[21] A particularly burdensome situation arises in Montenegro where no typical Phase I proceedings exist and where the waiting period, which lasts up to 105 working days (depending on how fast the Montenegrin NCA issues clearance), applies.

All of these three competition law systems formally recognize the domestic effects doctrine, according to which acts undertaken abroad fall within the scope of local competition law provided they have domestic effects. Yet, the practice of all three local competition authorities seems to deny domestic effects in merger control cases. Namely, all three NCAs accept notifications, decide upon them on merits and issue merger clearances relating to transactions that although fulfilling jurisdictional thresholds have neither actual nor foreseeable effects in either country.

For the obvious reasons one of the practical questions in such foreign-to-foreign deals is whether the closing of the transaction elsewhere, potentially with some sort of formal carve-out arrangement concerning Serbian, Montenegrin and/or Macedonian operations of one merging party, would amount to a gun-jumping in Serbia, Montenegro and North Macedonia. With the view to the above mentioned territorial scope of all three competition law system, the answer to that question would be negative, assuming no effects are caused in either of these three country. Such effects would, indeed, be practically very unlikely, considering that the transactions we are referring to are often concerning targets active in other continents and non-related markets.

Yet, considering the apparent approach of the local NCAs to disregard the absence of domestic effects when it comes to accepting jurisdiction to decide on foreign-to-foreign transactions, absence of domestic effects could also be very likely disregarded by the local NCAs when it comes to interpreting whether or not the closing of the foreign-to-foreign transaction (even with

[21] In case of North Macedonia, even without any turnover being generated there.

carve-out arrangement in place) represents a gun-jumping case. From this reason, caution is highly advisable.

Unlike in other countries in the region, generally applicable jurisdictional thresholds in Croatia are quite high[22]. As a result, it is logical that the number of transactions constituting a notifiable operation in Croatia[23] is not big either.

There are also specific rules applicable to the media sector, triggering the notification obligation in all cases where media publishers act as parties to the concentration, regardless of their turnovers (i.e. the aforementioned turnover thresholds do not apply to such concentrations)[24]. As it will be presented further below, the majority of gun-jumping case in Croatia is related to the specifics that govern the media sector.

In addition to the 'clear' matter of the turnover threshold, some countries consider the relevant market share of the companies participating in a concentration as relevant. This is initially in itself a problem, as it requires an in depth knowledge and assessment of the relevant market. Companies in a merger proceeding have therefore to allocate a certain amount of time and money in order to adequately assess their own market share as well as that of their competitors in order to identify if a merger has to be notified. In the case of Slovenia, the matter becomes even further complicated. While reaching the turnover threshold[25] automatically triggers the notification duty, the undertakings involved in a merger must inform the Slovenian

[22] The combined aggregate annual worldwide turnover of all parties to the concentration of at least HRK 1bn (approx. EUR 132m), and the combined aggregate annual turnover of each of at least two parties to the concentration generated on the Croatian market of at least HRK 100m (approx. EUR 13m). The thresholds are prescribed by Article 17 (1) of the Competition Act (*Zakon o zaštiti tržišnog natjecanja*; Official Gazette No. 79/09, 80/13).

[23] Even though the number of notifiable concentrations might be bigger than the number of notified concentrations, the statistics help get a general picture. Just for an example, according to the Annual Report of the Croatian Competition Agency for 2018, overall 29 concentrations have been notified in 2018 (Agencija za zaštitu tržišnog natjecanja, 2019).

[24] Article 36 (2) of the Croatian Media Act (*Zakon o medijima*; Official Gazette No. 59/04, 84/11, 81/13). It should be noted that the relevant provision refers to the 'wrong' number of the article of the Competition Act, which was applicable at the time the Media Act was adopted (i.e. the number of the relevant article of the Competition Act changed in the meantime, which has not been reflected in the Media Act).

[25] According to Article 42 (1) of the Slovenian Competition Act (*Zakon o preprečevanju omejevanja konkurence*, Official gazette No. 36/08, 40/09, 26/11, 87/11, 57/12, 39/13, 33/14, 76/15, 23/17), a concentration must be notified if:

– The combined turnover of the undertakings concerned (including undertakings belonging to the same group) exceeded EUR 35 million in Slovenia; and
– Either the turnover of the undertaking acquired (i.e. the target), including undertakings belonging to the same group, exceeded EUR 1 million in Slovenia, or in the case of the creation of a full-function joint venture, the turnover of at least two undertakings concerned (including undertakings belonging to the same group) exceeded EUR 1 million in Slovenia.

NCA[26] if their combined market share exceeds 60% in Slovenia. This means that (i) a potentially too broadly defined market would increase the risk of exceeding the market share value and therefore the information obligations and that (ii), due to the wording of the law, the Slovenian NCA will consider if a notification is necessary based on the information on the transaction and the market share. Such uncertainties aggregate the risk of companies implementing a merger too soon and exposing themselves to potential fines.

IV. Gun-Jumping Cases in the Balkan Region

1. Serbia

So far the only gun-jumping case in Serbia concerned the non-notified change of control from joint to sole by the company Prointer IT Solutions and Services d.o.o. over the company Alti d.o.o. The Serbian NCA learned about it only after this change was registered with the commercial registry. Hence, in this case, breached was not only the standstill obligation but also the notification duty. As a consequence, the NCA fined Prointer 2.5% of its 2015 turnover (approximately EUR 60,000)[27].

Apart from this case, the Serbian NCA has been also investigating the acquisition by a Russian company of the Serbian newspaper Politika a.d. (Komisija za zaštitu konkurencije, 2015). Most recently, the NCA opened an investigation against the Croatian company Fortenova for apparently acquiring control over some very prominent companies active in Serbia, that is Firkom, IDEA and Mg Mivela, that were previously part of Agrokor Group (Komisija za zaštitu konkurencije, 2019).

There are a couple of important messages from the Serbian case law concerning gun-jumping. First, the Serbian NCA does read newspapers and pay attention to the commercial registry, probably with somewhat higher scrutiny in case of companies already in the loop or whose transactions have been previously cleared by the NCA.[28] Second, gun-jumping cases will no longer be tolerated in Serbia. Third, the NCA is also investigating foreign companies.

[26] Similarly North Macedonia as well as Bosnia and Herzegovina include provisions which stipulate that a merger notification is triggered once market thresholds are met.

[27] Considering the typical duration of infringement proceedings, this case was closed rather quickly – in less than seven months.

[28] In case of *Prointer/Alti*, the preceding acquisition of joint control over Alti in 2015 was notified to and cleared by the Serbian NCA. In case of the *Fortenova* investigation, Frikom and IDEA have been already investigated and fined for different antitrust infringements.

Fourth, Serbian gun-jumping experience does not provide any guidelines as to what constitutes an implementation of a concentration, since the available precedents concerned clear-cut implementations of concentrations without the requisite merger notifications and clearances.

2. North Macedonia

The gun-jumping experience in North Macedonia consists of three cases in which the Macedonian NCA issued fines, including in a case of a foreign-to-foreign transaction.

The first gun-jumping case in North Macedonia dates back to 2007, where the Macedonian NCA fined the company Top Investment Group B.V. for acquiring joint control over the company Zegin d.o.o. without notifying it and obtaining a merger clearance. Although this was a clear-cut case, it is interesting because the NCA nevertheless examined in detail how and when the control was actually acquired and, consequently, found that control was acquired only at the moment when the acquisition of 7.76% of the shares, in addition to the already owned 20% of the shares, enabled Top Investment Group to block strategic decisions of Zegin d.o.o.[29]

The other two cases involve Slovenia Broadband S.a.r.l. and United Media Ltd.[30] that notified the Macedonian NCA in October 2013 of their past non-notified but implemented acquisitions of Solford Trading Limited and IKO Balkan S.r.l, respectively. Slovenia Broadband S.a.r.l. and United Media Ltd. were at the time of the relevant acquisitions and merger notifications controlled by Mid Europa Partners LLP, which also controlled another company registered in North Macedonia (Total TV doo). IKO Balkan generated a relatively low turnover in North Macedonia in the relevant financial year, whereas Solford Trading Limited was not active in North Macedonia at all.

Following the late merger notifications from October 2013, the NCA issued fines in May 2014 to Slovenia Broadband S.a.r.l. and United Media Ltd. for failing to notify the above mentioned transactions and for implementing them before a merger clearance. The NCA considered the following circumstances as mitigating: the concentration did not give rise to any competition concerns and the parties voluntarily reported the non-notified concentrations and cooperated with the NCA during the proceedings. The exact coefficients used on account of mitigating circumstances are not publicly available. From the reasoning of the NCA's decisions it is evident that the NCA concluded

[29] Macedonian NCA decision no. 09-195/17.

[30] The authors are aware of the cases because they were actively involved at that time. Unfortunately, a public version is no longer available at the web site of the Macedonian NCA.

that both transactions were reportable in North Macedonia because the jurisdictional thresholds were exceeded.

Hence, based on the decision in the case of the transaction involving Solford Trading Limited, it may be reasonably concluded that the Macedonian NCA in practice does not recognize the domestic effects doctrine in merger control cases. All three cases in general serve as evidence of a very strict approach of the Macedonian NCA, which poses an increased risk of its enforcement actions against companies that do not notify transactions (even involving targets with no business presence in Macedonia).

3. Croatia

The vast majority of gun-jumping cases in Croatia[31] concern the failure to notify a concentration in the media sector (as explained under Section 3 above, this is because the notification obligation is triggered whenever media publishers act as parties to the concentration, regardless of their turnovers). The fines imposed in those cases were quite low – mostly in the range of HRK 10,000–30,000 (approx. EUR 1,320–3,960).

Generally speaking, the amount of the fine depends on two main elements: (i) if the concentration in question is deemed prohibited or not, and (ii) the aggregate turnover of the undertaking in question generated in the last year for which financial statements have been completed. For example, in two recent cases – case *Maca LM d.o.o./Radio Trsat d.o.o./Vanga za radijsku djelatnost d.o.o./Miroslav Kraljević d.o.o./Radio Brod-informiranje i marketing*

[31] For example: case Maca LM d.o.o./Radio Trsat d.o.o./Vanga za radijsku djelatnost d.o.o./Miroslav Kraljević d.o.o./Radio Brod-informiranje i marketing d.o.o. from June 2019 (Class (*Klasa*): UP/I 034-03/18-02/015, Admin. No. (*Urbroj*): 580-11/107-2019-017, case Extra FM d.o.o./Hit FM d.o.o. from November 2018 (Class (*Klasa*): UP/I 034-03/2018-02/005, Admin. No. (*Urbroj*): 580-11/107-2018-014), case H.B. (Antena FM d.o.o.)/Obiteljski radio d.o.o. from November 2017 (Class (*Klasa*): UP/I 034-03/17-02/008, Admin. No. (*Urbroj*): 580-11/107-2017-017); case K.K. (UMA FM d.o.o.)/Croatia radio d.o.o. from November 2017 (Class (*Klasa*): UP/I 034-03/2017-02/007, Admin. No. (*Urbroj*): 580-11/107-2017-017); case I.j.K. (Sedam Savjetovanja d.o.o.)/Radio Dalmacija d.o.o. from September 2017 (Class (*Klasa*): UP/I 034-03/17-02/003, Admin. No. (*Urbroj*): 580-11/107-2017-021); case UMA FM d.o.o./Radio Croatia d.o.o. from December 2016 (Class (*Klasa*): UP/I 034-03/2016-02/004, Admin. No. (*Urbroj*): 580-11/107-2016-016); case Tahia Projekti (Narodni FM d.o.o.)/Radio Croatia d.o.o. from December 2016 (Class (*Klasa*): UP/I 034-03/2016-02/002, Admin. No. (*Urbroj*): 580-11/107-2016-021); case M.K./Novi radio d.o.o. from December 2015 (Class (*Klasa*): UP/I 034-03/15-02/008, Admin. No. (*Urbroj*): 580-11/41-2015-017); case Capital FM d.o.o./Radio

Velika Gorica d.o.o. from November 2015 (Klasa (Class): UP/I 034-03/2015-02/006, Admin. No. (*Urbroj*): 580-11/41-2015-021).

d.o.o.[32] and case *Extra FM d.o.o./Hit FM d.o.o.*[33] – the Croatian Competition Agency (*Agencija za zaštitu tržišnog natjecanja*; hereinafter; AZTN) imposed a fine of 0.71% of the aggregate turnover of the concerned undertakings, on the ground that both (un-notified) concentrations were assessed as permissible, and that there were other mitigating circumstances (e.g. recognition of the breach, cooperation with the AZTN). Ultimately, the specific amounts of the fines imposed on each undertaking differed due to differences in their respective aggregate turnovers. Concretely, the undertaking Maca ML d.o.o. was obliged to pay an amount of HRK 24,000 (approx. EUR 3,200), while the fine for the undertaking Extra FM d.o.o. amounted to HRK 1,000 (approx. EUR 130). If a concentration was not notified / was implemented before obtaining a clearance, but it would not have been deemed as prohibited, the fine can reach up to 1% of the aggregate turnover (generated in the last year for which financial statements have been completed)[34]. If, on the other hand, a concentration which has been implemented would have been considered prohibited, the fine can reach up to 10% of the aggregate turnover (generated in the last year for which financial statements have been completed)[35]. In establishing the exact amount of the fine, the Agency takes into consideration other (aggravating and mitigating) circumstances.

In the media sector cases, the turnovers which form the basis for the fine calculation were not that big and the AZTN took into consideration that the concentrations have not created any negative effects on the market, the relatively short duration of the breach (i.e. the time period between the implementation of the transaction and the notification, which was less than 1 year in many cases), that the individuals / undertakings in question cooperated with AZTN, etc. Such low fines should not be expected in all gun-jumping cases, especially in those where the generally applicable jurisdictional thresholds apply, that is, where the undertakings in question usually generate higher turnovers. The same applies to the cases where the concentration would be considered prohibited, for which the law envisages a much higher maximum fine (10% of the aggregate turnover).

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[32] Case Maca LM d.o.o./Radio Trsat d.o.o./Vanga za radijsku djelatnost d.o.o./Miroslav Kraljević d.o.o./Radio Brod-informiranje i marketing d.o.o. from June 2019 (Class (*Klasa*): UP/I 034-03/18-02/015, Admin.No. (*Urbroj*): 580-11/107-2019-017).

[33] Case Extra FM d.o.o./Hit FM d.o.o. from November 2018 (Class (*Klasa*): UP/I 034-03/2018-02/005, Admin. No. (*Urbroj*): 580-11/107-2018-014).

[34] Article 62(1) and (5) of the Competition Act (*Zakon o zaštiti tržišnog natjecanja*; Official Gazette No. 79/09, 80/13).

[35] Article 61(3) of the Competition Act (*Zakon o zaštiti tržišnog natjecanja*; Official Gazette No. 79/09, 80/13).

One should also bear in mind that the AZTN may impose measures aimed at restoring efficient competition[36], such as (i) order the sale or transfer of the acquired shares, (ii) prohibit or restrict the exercise of voting rights related to the shares or interest in the undertakings parties to the concentration, (iii) order to terminate the joint venture or any other form of control by which a prohibited concentration has been put into effect, etc. (Pecotić Kaufman, Butorac Malnar andAkšamović 2019, para. 556) As these are just examples of the measures, the AZTN could also impose other measures they find appropriate to address the competition concerns they identify.

As explained, the vast majority of gun-jumping cases in Croatia concern the failure to notify a concentration in the media sector, due to which the fines were imposed against the undertakings concerned. Nevertheless, some older cases, such as the case *Globus grupa d.d.-Diona d.d./Dalma-Maloprodaja d.o.o./Jadrantekstil d.d./Koteks d.d.* from 1998[37] show that the AZTN also imposes measures they find appropriate to address the identified competition concerns, when applicable. For example, in *Globus grupa d.d.-Diona d.d./Dalma-Maloprodaja d.o.o./Jadrantekstil d.d./Koteks d.d., the* AZTN established that the concentration should be prohibited because of the strong dominant position of the Globus group which was created thereby. As the concentration had already been implemented, the AZTN adopted certain structural measures, based on which the Globus group had to decrease the number of its sale stores by 1/3 and enter into exclusivity arrangement in regard to another 1/3 of the stores as well as enable the relevant counterparties to have at least 20% of its distribution channels with other customers. Also, certain behavioural measures had been imposed, which obligated the Globus group to notify the AZTN of any planned arrangement regarding the new business premises (i.e. purchase, lease, etc.). Although this case was decided under (different) law applicable at that time[38], it may serves as an example of different measures which may be expected in the case of a breach of the gun-jumping rules.

Finally, it is important to bear in mind that the AZTN has not had the same powers in the past as it has nowadays. Namely, it was not until 2009 that the AZTN has the power to impose fines directly. For example, in the case *Gavrilović d.o.o./*

[36] Article 24 of the Competition Act *(Zakon o zaštiti tržišnog natjecanja*; Official Gazette No. 79/09, 80/13.

[37] This case is from 1998 (Class (*Klasa*): UP/I-030-02/97-01/2), which was decided under the law applicable at that time. The relevant decision is not available to the authors. This case is described in an article written by a member of the Croatian Competition Agency (Cerovac, 2012, p. 27–28).

[38] Competition Act from 1995 (*Zakon o zaštiti tržišnog natjecanja*, Official Gazette No. 48/1995, 52/1997).

Istracommerce d.d. from 2008[39], the AZTN established that the concentration in question (which was implemented before it was notified to the AZTN) should be cleared. Although the notification about the case says nothing about fines for breaching the gun-jumping rules, the AZTN clarified in its subsequent public announcement that the initiation of misdemeanour proceedings against both the undertaking and its responsible person was to follow (Agencija za zaštitu tržišnog natjecanja, 2012). This was in accordance with the law applicable at that time, which envisaged that, following an established breach of competition law, the AZTN files a request to initiate misdemeanour proceedings to the competent court[40]. Because of this, we are not familiar with the details of possible fines imposed for the breaches of gun-jumping rules at that time. In other words, the number of cases where the undertakings were fined for breaching the gun-jumping rules is probably higher than it seems if one takes a look only at the period from 2009 (when the AZTN gained the power to impose fines directly).

4. Slovenia

With the adoption of the Slovenian Competition Act in 2008, the approach of the Slovenian NCA to go after transactions which have not been notified became increasingly stricter and sometimes involving even higher fines.[41]

One of the biggest cases came in 2019 when the Slovenian NCA fined United Media Ltd., due to the late notification of their acquisition of United Media Distribution SRL.[42] The case in itself was a novum for the Slovenian competition law sphere as the NCA took a hard stance at the already conducted acquisition of the sport channel provider.[43] It ruled that the United Group must sell 13 programmes within six months and that it may not launch sports TV programmes for the next three years. Following this, the NCA opened

[39] Based on the notification about this case, which is publicly available (Class (*Klasa*): UP/I 030-02/2008-02/28, Admin. No. (*Urbroj*): 580-02-08-64-13).

[40] Article 60 of the Competition Act from 2003 (*Zakon o zaštiti tržišnog natjecanja*, Official Gazette No. 122/2003).

[41] Although the Slovenian NCA has issued in the past the maximum amount of possible fines under the then valid legislation, they can be considered low in regards to the value (i.e. EUR 25,000.00) in comparison with the effect they could have on a market. Se e.g. decision no.: 306-112/2007-9 dated 12.10.2007 (*Viator & Vektor*); no. 306-166 (2017-17) dated 13.8.2008 (*Cestno podjetje Ljubljana d.d.*).

[42] Adria Media Ltd./ Iko Balkan S.R.L, case no.: 3061-8/2013, decision dated 4.9.2018.

[43] It was reported that the NCA took the case under the microscope when subscribers of competing service providers temporarily lost the channels (*Sports Klub*) because Adria Media, which exclusively broadcasts these programmes and is part of the United Group, demanded better financial conditions from them (RTV SLO, 2018; Delo, 2019).

separate misdemeanour proceeding[44] and issued a then record fine of EUR 3.7m (Javna agencija Republike Slovenije za varstvo konkurence, 2019).

The NCA took especially into account the time between the conclusion of the acquisition and the notification, the form of guilt, the behaviour of the legal entity and other aspects. Under other aspects, it should be noted that the NCA wanted to raise general awareness and prevent future gun-jumping attempts. In other word, it wanted to set up an example that such violations will not be tolerated. However, the administrative court has annulled the order that United Media must sell its Sport Klub TV channels and returned the whole matter to the NCA to decide once again, since it established 'substantial procedural violations' (Dnevnik, 2020a).

What can only be described as an 'Agrokor-Shock', is the decision of the NCA to fine Agrokor d.d., a Croatian retail conglomerate, and its responsible person for their failure to notify the merger with Ardeya Global Ltd[45]. No one would have thought that when the NCA introduced ex officio concentration control proceedings, that they would lead to one of the biggest fines[46] on the local and regional market. By concluding a Forward Share Purchase Agreement, between Agrokor AG (which is 100% owned by Agrokor d.d.) and Alsafi Partners td., Agrokor d.d. became obliged to notify the merger to the NCA as Ardeya Global owned a 100% interest in Costella d.o.o., a Slovenian bottle company. Since Agrokor d.d. despite the Agency's request, did not notify the merger, the NCA opened the proceedings.

The 'hard-line' position of the NCA was further proven by the fact that the NCA confiscated 70% of the shares in Mercator d.d., a Slovenian multinational retail company owned by Agrokor. The NCA argued that "…*there is a fear and high probability that the fine imposed will not be enforced*…" when reasoning why such measures are being used (Javna agencija Republike Slovenije za varstvo konkurence, 2020a). It should be noted that at that time, Agrokor was undergoing a special insolvency procedure in Croatia and its business activities were being transferred to Fortenova grupa. Agrokor filed a request for judicial protection before the District Court in Ljubljana and also complained to the EU Commission about the decision, as it is considered that it has crossed the boundaries of legality and constitutionality with each of its decisions in the Agrokor's cases(Agrokor, 2020). While, the district court in Ljubljana upheld the decision of the NCA in regards to the confiscated shares(SiolNet, 2020), it nevertheless considered the

[44] Slovenia has a two-phase proceeding system for competition law infringements. The NCA must first establish an infringement in an administrative proceeding and a fine can later only be imposed in a misdemeanor proceeding.

[45] Agrokor d.d./ Ardeya Global Ltd., case no.: 3061-40/2018, decision dated 9.4.2019.

[46] The fine imposed on Agrokor d.d. amounted to EUR 53.9m and the fine imposed on the responsible person amounted to EUR 5,000.

amount of the fine, to be vastly too high and reduced it to EUR one million(RTV SLO, 2020). Furthermore, the Supreme court took the stance that the confiscation of shares was against the law (Dnevnik, 2020b). According to the Supreme court's position, the NCA had no legal basis for issuing a decision on the confiscation of Mercator's shares. Namely, the NCA could have decided on the confiscation of property if "there was a fear that the perpetrator would hide or go to an unknown place or abroad during the misdemeanour proceedings or until the execution of the decision", but this was in the Supreme court's view conceptually impossible, due to the fact that it was dealing with a legal entity. It also follows from the ruling that the NCA misapplied the provision of the Minor Offences Act, whose aim and purpose refers exclusively to natural persons for whom there is a possibility to "hide or go to an unknown place". Therefore, it was ordered that Mercator's shares should be returned to Agrokor immediately. The NCA's official statement showed concerns that in accordance with the applicable legislation it had no other instruments to enforce its decision, as the one taken (Javna agencija Republike Slovenije za varstvo konkurence, 2020b). It is therefore only a matter of time that legislative changes will be introduced, to provide the NCA with a proper set of enforcement mechanisms.

V. Avoiding gun-jumping risks in M&A transactions

As it has been presented in Section 4 above, the gun-jumping cases in the region mostly deal with rather simple situations where the acquisition of an undertaking constituting a notifiable concentration has not been notified to the competition authorities before its implementation. The awareness of the notification obligations in different countries should be increased, but it is equally important to become familiar with and keep track of the practice at EU level dealing with more subtle breaches of the gun-jumping rules (as it may be expected that national competition authorities pay more attention to such matters as well). The cases so far show the importance of the following main elements in M&A[47] transactions.

First, structuring of the transaction, which may include several interim transactions before the final implementation of the transaction. In *Canon/ Toshiba Medical Systems Corporation*, the transaction was structured in a way that Canon acquires 5% of the target company's share options (which were to be exercised after obtaining the merger clearance), while using an interim buyer to acquire the other 95% before the merger approval. The Commission found

[47] M&A stands for mergers and acquisitions.

this conduct to be a single notifiable merger and contributed to a change of control over the target company. Although the undertakings may have different reasons for structuring their transactions in different levels (i.e. avoiding the waiting period for a merger clearance is not necessarily their concern), it should be duly considered if the planned structure is compliant with the merger filing rules and at which stage the notification requirement is triggered.

Second, contractual rights in the interim period (between the agreement is signed and the transaction is implemented). The interim period depends on the circumstances of each transaction and it is quite usual that it lasts for several months to ensure that various conditions precedent to the implementation of the transaction agreed on between the parties are satisfied. The overall timing of a typical M&A transaction is even longer, as the signing of the agreement is usually preceded by a due diligence process over the target carried out by the buyer and lengthy negotiations of transaction documents. Bearing in mind that the status of the target's assets and business may significantly change in this period, it is logical that buyers want to ensure that the status established before the agreement has been signed is not significantly changed. As presented in Section 2.b, such concerns are taken into consideration by the competition authorities and as the findings in *Altice/PT Portugal* show, a proper balance in controlling arrangements is necessary to ensure compliance with the gun-jumping rules. The key takeaways for drafting interim covenants in share purchase agreements would be setting monetary thresholds high enough to not capture a broad array of influence over the target company, avoiding a veto power over management personnel, and generally, avoiding clauses that can be interpreted to allow the exercise of decisive influence over the target company.

Third, behaviour of competitors during transaction process, especially the exchange of information between them. Although certain flow of business information is necessary between the seller and the buyer, the parties to a transaction should never forget that the fact they are negotiating and implementing a transaction does not mean that they are free to do whatever they find necessary. Again, as in the case of interim covenants, a proper balance is necessary. The case *Altice/PT Portugal* is especially helpful in this regard as it mentions examples of appropriate safeguards (such as Non-Disclosure Agreements and Clean Team Arrangements) and provides further guidance on how to implement them. The definition of a clean team as "*a restricted group of individuals from the business that are not involved in the day–to-day commercial operation of the business who receive confidential information from the counter party to the transaction and are bound by strict confidentiality protocols with regard to that information*"[48] shows that the arrangements should especially focus on

[48] European Commission decision M.7993 of 24.04.2018 – Altice/PT Portugal, see footnote 221.

identifying the proper members of a clean team (i.e. employees and advisers of the buyer receiving sensitive information) and ensuring that additional safeguards such as strict confidentiality obligations apply to them as well.

VI. Conclusions

From the mentioned cases it has become obvious that the local competition authorities have taken a strict stance against gun-jumping in most cases.

Partially this is for good reason, since such transactions can have severely adverse effects on the local markets and the competition within if not properly evaluated by the authorities. Moreover, the awareness of the notification obligations in different countries should be increased. In addition, and considering the cooperation developed between the individual regional authorities, it can also be assumed that we will see an increase in such cases, since the information exchange between the offices is already in place. It will therefore be of crucial importance for companies active in the region to shift their focus even more on the competition assessment of their transactions. Companies will need to have proper policies and mechanisms in place to tackle potential breaches of gun-jumping rules at an early stage of their transaction planning. By doing so, they will avoid the risks associated therefore and secure, at least from the merger clearance part, a smooth transaction.

However, such highly publicized cases with their draconian penalties can have also an additional adverse effect. While it cannot be denied that authorities should conduct investigations of potential violations of competition rules, this still has to be done with a legally and economically traceable approach. When imposing penalties, the authorities should develop or implement guidelines[49] more thoroughly and in a structured way. The existing examples show significant differences in the amounts of fines imposed by the authorities in the region. Such an arbitrary approach could lead to even more uncertainties in an already sensitive legal sphere. It cannot be denied that the requirements of predictability and acceptability are the cornerstone of legal certainty. This means that parties who violated any rule, even competition rules, should be able to properly assess what kind of penalties they will face.

[49] Similar to the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, Official Journal C 210/2, 1.09.2006. Certain countries, such as Croatia, have adopted relevant local provisions (In Croatia, the Regulation on the method of setting fines (*Uredba o kriterijima za izricanje upravno-kaznene mjere*; Official Gazette No. 129/2010, 23/2015) applies).

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