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The concentration of companies within the European Union and the breach of the standstill obligation: Gun-Jumping & Canon/TMSC case

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Alla mia famiglia,

Ai miei nonni.

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INTRODUZIONE

Il presente elaborato analizzerà il fenomeno del Gun-Jumping nelle operazioni di fusione tra società facenti parte dell'Unione Europea, ed il suo trattamento ai sensi del Regolamento sulle concentrazioni. Il *focus* principale è quello di fornire un quadro unitario sul gun-jumping. Attraverso l'analisi di casi concreti si pone come obiettivo l'illustrazione delle *best practice* da seguire e delle operazioni strategiche da compiere per garantire la conformità alla normativa.

Prima di esplorare le caratteristiche del gun-jumping, è fondamentale comprendere l'evoluzione della normativa europea sulle fusioni. Verrà analizzato il processo di concentrazione tra imprese facenti parte dell'Unione Europea, con un *excursus* sul quadro normativo di riferimento, ovvero il Regolamento n. 139/2004/CE del Consiglio del 20 gennaio 2004, e l'interessante percorso compiuto ai fini dell'adozione della versione attualmente in vigore. Saranno forniti strumenti per comprendere le ragioni per le quali le disposizioni utilizzate dalla Commissione Europea negli anni Sessanta non erano sufficienti per il controllo sulle concentrazioni. Si fa riferimento è agli Articoli 81 e 82 del Trattato CE, che consentivano solo un controllo *ex post*, mentre una delle principali esigenze del controllo delle concentrazioni è quello di garantirlo *ex ante*.
La necessità di una normativa *ad hoc* ha portato all'adozione, dopo un lungo dibattito durato circa 16 anni, del primo Regolamento sul controllo delle concentrazioni n. 4064 del 21 dicembre 1989, entrato in vigore il 12 settembre 1990.
Tuttavia, va evidenziato come con l'avvento del nuovo millennio siano sorte nuove e diverse esigenze, le quali, non essendo state soddisfatte né dal primo regolamento né dal secondo (entrato in vigore nel 1997), hanno visto il loro esaudimento con l'approvazione del nuovo Regolamento 139/2004/CE, con il quale sono state introdotte modifiche fondamentali, tra cui l'adozione del principio dello "sportello unico".

In questo quadro normativo, sarà evidenziato come i soggetti che realizzano le concentrazioni devono rispettare rigorosi standard di rendicontazione e aderire alle regole prescritte per il controllo delle fusioni. L'introduzione di sanzioni pecuniarie in caso di inadempienza sottolinea la necessità di una rendicontazione accurata e di un'adesione tempestiva ai protocolli normativi nel corso dei processi in questione. Verrà quindi esposta la procedura, nell'ambito delle fasi I e II, che la Commissione Europea deve seguire nella valutazione della notifica delle parti coinvolte nella fusione.

Saranno analizzati i vari aspetti della disciplina del controllo sulle fusioni, tra cui i test sostanziali per valutare l'entità dell'impatto sulla concorrenza, le sfide di conformità procedurale, come il "gun jumping", e l'evoluzione del panorama giuridico alla stregua di casi emblematici come *Marine Harvest* e *Altice Europe*.
In particolare, verrà posta attenzione su alcuni dei diversi tipi di concentrazione, tra cui l'acquisizione del controllo, le fusioni, le *Joint Venture* e le *Ancillary Restraints*. Inoltre, saranno contemplate anche le violazioni del Regolamento, tra cui il Gun-Jumping.

La genesi del termine "Gun-Jumping" deriva dallo sport e si manifesta in ambito giuridico nella situazione in cui vi è una violazione del Diritto Antitrust in una operazione di concentrazione. In particolare, si tratta del comportamento delle parti coinvolte in una fusione o acquisizione che violano l'obbligo di *stand-still*, sia attuando prematuramente la transazione, sia omettendo di notificare l'operazione alle Autorità competenti. Verranno analizzate le differenze tra il gun-jumping sostanziale e procedurale, le sanzioni ivi applicabili, i termini di prescrizione e le sfaccettature del principio del *ne bis in idem* che emergono dal rapporto tra le stesse. È di fondamentale importanza comprendere la differenza tra le due tipologie, data la potenziale sovrapposizione tra sanzioni procedurali e sostanziali, come dimostrato in casi come *Marine Harvest v Commissione Europea*.

Al termine della lettura, dopo aver affrontato le complessità dell'argomento, con i dovuti approfondimenti sul Diritto della Concorrenza, e attraverso l'analisi di casi concreti da cui estrarre principi generali applicabili a casi particolari, sarà possibile pervenire ad una più limpida comprensione della *compliance* nelle transazioni commerciali complesse.
Il rispetto dell'obbligo di *standstill* previsto dal Regolamento sulle concentrazioni è fondamentale, in quanto impone che le operazioni siano approvate dalle Autorità competenti prima della loro attuazione. Si tratta di un concetto imprescindibile, nocciolo del controllo sulle concentrazioni, che impone alle imprese tale astensione per prevenire potenziali distorsioni del mercato e preservando l'integrità del gioco concorrenza. Il riconoscimento del suo significato da parte di Margrethe Vestager ne sottolinea ulteriormente l'importanza nel Diritto Antitrust.
Si vedrà che il *waiting period* è una fase critica per le imprese, poiché, nel lasso di tempo in questione, le stesse raccolgono informazioni sensibili che potrebbero dare luce a concertazioni, essendo problematica la distinzione in concreto tra condotte legittime e

comportamenti anticoncorrenziali. Verrà enfatizzata l'importanza di strategie come la formazione di "*clean teams*" per supervisionare gli scambi di informazioni strategiche, definendo l'ambito di quelle consentite, affinché siano mitigati al meglio i rischi.
Verrà inoltre analizzato l'articolo 7, paragrafo 3, del Regolamento n. 139/2004, che consente di derogare all'obbligo di *standstill* in circostanze eccezionali. I criteri per la concessione di tale deroga prevedono una valutazione approfondita della compatibilità dell'operazione con il mercato comune, garantendo che la concorrenza non venga danneggiata nonostante l'implementazione anticipata della concentrazione.

Verrà chiarito che vi possono essere due scenari distinti rispetto alle conseguenze di una fusione, in base alla decisione della Commissione: l'autorizzazione o il blocco della stessa. Nel primo caso, le operazioni procedono senza essere invalidate, ma possono dare luogo a sanzioni pecuniarie. Al contrario, se la Commissione respinge l'operazione, richiede lo scioglimento della fusione, in base alla gravità delle violazioni. Tuttavia, il processo non è semplice. L'approfondimento del gun-jumping procedurale rivela complessità che vanno oltre le omissioni deliberate, spesso derivanti da incomprensioni circa i requisiti di notifica. La Commissione ha storicamente mostrato indulgenza, ma da allora ha inasprito le norme per scoraggiare la commissione di violazioni. In particolare, l'autorità della Commissione si estende all'imposizione di ingenti sanzioni a prescindere dall'impatto che le concentrazioni hanno sulla concorrenza, evidenziando l'importanza del rispetto delle procedure di pre-approvazione. Il presente elaborato si addentra in queste sfumature, facendo luce sulle complessità legali per garantire il rispetto della normativa e l'integrità delle transazioni nel panorama delle fusioni.

Il rapporto tra l'articolo 7 e l'articolo 14, paragrafo 2, del Regolamento del Consiglio n. 139 del 2004 mette a fuoco le conseguenze critiche per le fusioni che violano l'obbligo di *standstill*. In particolare, la Commissione ha il potere di annullare le transazioni e di imporre ammende che possono raggiungere il 10% del fatturato aggregato. L'analisi dell'articolo 14, paragrafo 2, approfondisce queste dinamiche sanzionatorie, delineando gli scenari in cui possono essere imposte ammende, sia per negligenza che per svista intenzionale nell'aderire ai protocolli di controllo delle concentrazioni. L'ammontare della sanzione è strettamente legato alla natura, alla gravità e alla durata della violazione, consentendo una certa flessibilità nella valutazione delle violazioni. La storica indulgenza nei confronti del gun-jumping è cambiata dopo il caso

Electrabel, con una posizione più severa nei confronti di tali violazioni. Le multe storiche che ne sono derivate, come quelle nei casi *Altice* e *Canon*, riflettono un approccio evoluto che enfatizza l'aderenza all'obbligo di *standstill*.
Tuttavia, persistono problematiche giuridiche, in particolare nel rapporto tra l'Articolo 4(1) e l'Articolo 7(1). Distinguendo tra gli obblighi di notifica e l'obbligo di standstill, la giurisprudenza recente e casi come *Marine Harvest* evidenziano i dibattiti in corso riguardo alle preoccupazioni di "doppia punizione" e al principio del *ne bis in idem*.
Le contestazioni alle sanzioni per le violazioni del gun-jumping invocano i principi di proporzionalità e di "doppia punizione", con dibattiti in casi come *Altice Europe*. I diritti di veto, come nel caso *Altice*, giocano un ruolo fondamentale nel determinare il controllo e l'influenza nelle *Joint Ventures*, evidenziando le complessità delle normative sul controllo sulle fusioni e della loro applicazione.

Insieme all'esame del caso *Canon/Toshiba Medical Systems Corporation* verranno fornite tutte le informazioni necessarie per comprendere perfettamente la violazione da gun-jumping e le conseguenze per le parti. Inoltre, sarà interessante l'ampliamento del campo di applicazione alle implicazioni globali delle ammende per il controllo sulle concentrazioni nell'UE, esaminando come entità come Canon hanno affrontato le ammende in diversi sistemi giuridici, tra cui Cina, Giappone e Stati Uniti. Attraverso la giustapposizione di queste prospettive internazionali, l'obiettivo è quello di fornire indicazioni sull'armonizzazione o la divergenza dell'applicazione del controllo delle concentrazioni nelle varie giurisdizioni, offrendo una comprensione completa delle complessità insite nei regolamenti sulle concentrazioni e del loro impatto sulle strategie aziendali e sui quadri di conformità. Attraverso casi di studio come quello di *Canon/Toshiba Medical Systems Corporation*, questo lavoro illumina le sfide reali del controllo delle fusioni e la natura in evoluzione dell'applicazione del controllo delle fusioni all'interno e all'esterno dell'UE, contribuendo così a una comprensione sfumata delle dinamiche del diritto della concorrenza globale.

INTRODUCTION

Starting from the following pages, it will be investigated the phenomenon of Gun-Jumping in merger transactions within the European Union and its treatment under the European Merger Regulation. The primary objective is to provide a comprehensive understanding of gun-jumping, including its definitions, implications, and regulatory responses within the EU context.

Through case analysis and regulatory insights, the aim is to illustrate best practices for compliance and strategic planning in merger transactions, providing a nuanced understanding of these intricate legal landscapes.

Before exploring gun-jumping specifics, understanding the evolution of EU merger regulations is crucial. It will be analysed the process of concentrations between companies within the European Union, with an *excursus* on the relevant legal framework, namely, the Council Regulation No. 139/2004/EC of January 20, 2004, and the interesting path it was made for adopting this final Regulation. In fact, there has been a lengthy process that led to the 2004 version, lasted approximately 40 years. The readers will understand the reasons why the provisions used by the European Commission in the sixties were not sufficient for the supervision over the concentrations. To give an insight, it will be stated that Articles 81 and 82 of the EC Treaty only permitted to have an *ex post* control; whereas one of the main goals of the merger control is to have it *ex ante*.

The need for a regulatory framework took to the adoption, after a long debate that lasted 16 years, of the first Merger Control Regulation No. 4064 of December 21, 1989, that entered into force on September 12, 1990.

However, it is to be explained how the turn of the Millennium brought some different and new needs. These were not complied either by the first merger regulation or by the second, entered into force in 1997. Hence, the goals only were achieved with the approval of the new European Merger Regulation established by Regulation 139/2004/EC. Fundamental changes were introduced, including the adoption of a "one-stop shop" principle.

Within this regulatory framework, it will be cleared that entities engaging in concentrations face rigorous reporting standards and adherence to prescribed merger control rules. The introduction of fines for non-compliance underscores the imperative for accurate reporting and timely adherence to regulatory protocols throughout merger

processes. Hence, it will be provided the procedure, under Phases I and II, that the European Commission must follow when analysing the notification of the merging parties.

Crucial are the various aspects of EU merger control that will be considered, including substantive tests for competition impacts, procedural compliance challenges, such as gun-jumping, and the evolving legal landscape shaped by landmark cases such as Marine Harvest and Altice Europe.

There will be a *focus* on some of the several types of concentration provided for by the legal framework governing the matter. Particularly, the acquisition of control, the merger, the joint venture, and the ancillary restraints. Moreover, there will be contemplated the violations to the Merger Regulation also, one of which is Gun-Jumping.

Gun-jumping is a term originating from sports. It illustrates violations in competition law during merger operations. The aim is to explore the breaches that can lead to gun-jumping, including intentional circumventions, interpretative uncertainties, and negligence. The European Commission's strict actions, in addition to specific cases, highlight the gravity of these infractions, leading to increased scrutiny of pre-emptive merger activities. Gun-jumping in competition law refers to different infringements. Particularly, the behaviour of the parties involved in a merger or acquisition that contravene the stand-still obligation, either by prematurely implementing aspects of the transaction or by failing to notify relevant competition authorities. It will be navigated on the distinctions between substantive and procedural types of gun-jumping, addressing penalties, statute of limitations, and the *ne bis in idem* principle's complexities that arise for the relation between the two types. It is of foremost importance to comprehend the difference, given the potential overlap between procedural and substantive sanctions, as exemplified in cases such as Marine Harvest v. European Commission. At the end of the reading, after having considered the intricacies of the subject, with the insights into competition law, it will be possible to have a clearer understanding of regulatory compliance in complex business transactions. Analysing specific cases renders it possible to extract general principles that are applicable to merger scenarios, thereby contributing to a deeper understanding of the gun-jumping violation in competition law.

The Merger Regulation's stand-still obligation is pivotal, mandating clearance before implementation. It is a core concept, having critical importance in merger control. This obligation compels undertakings to refrain from implementing concentrations until authorised, preventing potential distortions, and preserving competitive integrity. The European Merger Regulation underscores the leading role of this obligation in maintaining an effective merger control system. Margrethe Vestager's recognition of its significance further emphasises its importance in competition law. It will be delved into these fundamental concepts to examine their practical implications and enforcement dynamics within merger control frameworks, aiming to improve comprehension of regulatory compliance in intricate business transactions.

It will be seen that the waiting period post-agreement is a critical phase for companies, as they gather sensitive information that may incentivise coordinated actions, posing challenges in distinguishing lawful preparations from anticompetitive behaviours. The blurred lines between legitimate preparatory measures, and anticompetitive behaviours underscore the challenges faced during the waiting period before formal approvals. It will be explained the importance of strategies such as the formation of "clean teams" to manage information exchanges, crucial in mitigating risks. By limiting access to sensitive information and strictly defining the scope of permissible exchanges, companies can navigate this delicate phase while complying with competition regulations.

Additionally, it will be delved into Article 7(3) of Regulation No. 139/2004, which allows for derogation from the stand-still obligation in exceptional circumstances. The assessment criteria for granting it involve a thorough evaluation of the operation's compatibility with the common market, ensuring that competition remains unharmed despite early implementation.

It will be explained that the aftermath of a merger can unfold in two distinct scenarios based on the Commission's decision: clearance or blockage. In the former, transactions proceed without invalidity but may incur fines. Conversely, if the Commission rejects the operation, requiring the dissolution of the merger, it signals the gravity of gun-jumping violations. However, the process is not straightforward. Delving into procedural gun-jumping reveals complexities beyond deliberate omissions, often stemming from misunderstandings of notification requirements. The Commission historically exhibited

leniency but has since tightened regulations to deter violations. Notably, the Commission's authority extends to imposing significant sanctions irrespective of competitive impacts, emphasizing the seriousness of compliance with pre-approval procedures. It will be delved into these nuances, shedding light on legal intricacies to enhance regulatory adherence and transactional integrity in merger landscapes.

The interplay between Article 7 and Article 14(2) of Council Regulation No. 139 of 2004 unveils critical consequences for mergers breaching the standstill obligation. Notably, the Commission wields the power to nullify transactions, demand reversals, and impose fines, peaking at 10% of aggregate turnovers. Examining Article 14(2) delves deeper into these penalty dynamics, outlining scenarios where fines may be imposed, be it due to negligence or intentional oversight in adhering to merger control protocols. The level of sanction is intricately tied to the nature, gravity, and duration of the infringement, allowing flexibility in assessing violations. Historical leniency towards gun jumping shifted post-Electrabel case, signalling a stricter stance against such violations. The resulting landmark fines, like those in Altice and Canon cases, reflect an evolved approach emphasizing adherence to the standstill obligation. However, legal intricacies persist, notably in the relationship between Articles 4(1) and 7(1). Distinguishing between notification obligations and the standstill requirement, recent jurisprudence and cases like Marine Harvest highlight ongoing debates regarding double punishment concerns and the ne bis in idem principle.
Challenges to penalties for gun-jumping violations invoke principles of proportionality and double punishment, with ongoing legal debates seen in cases like Altice Europe. *Veto* rights, as seen in Altice, play a crucial role in determining control and influence in joint ventures, highlighting complexities in merger control regulations and their enforcement.

Along with the examination of the Canon/Toshiba Medical System Corporation case there will be provided all the necessary information to perfectly understand the gun-jumping violation and the consequences for the parties. Moreover, it will be interesting the expansion of its scope to the global implications of EU merger control fines, examining how entities such as Canon faced fines across different legal systems including China, Japan, and the USA. By juxtaposing these international perspectives, the aim is to

provide insights into the harmonisation or divergence of merger control enforcement across jurisdictions, offering a comprehensive understanding of the complexities inherent in Merger Regulations and its impact on corporate strategies and compliance frameworks. Through case studies like the Canon/Toshiba Medical Systems Corporation case, this work illuminates real-world merger control challenges and the evolving nature of merger control enforcement within and beyond the EU, thus contributing to a nuanced comprehension of global competition law dynamics.

I. THE CROSS-BORDER CONCENTRATIONS & ITS EFFECTS ON COMPETITION

1.1 **The cross-border concentrations**

The term "concentration" is employed in the merger control language to identify the legal combination of two or more undertakings[1] which are absorbed by, or merge into a single undertaking[2], where there is a change in control over an undertaking. It is also used in the situation where a "full-function joint venture" is created.[3] There have to be at least two entities, formerly independent, and it can be said that there is a concentration only whether there is an amalgamation or an acquisition, or change, of control. Moreover, when the operation is a cross-border concentration, the companies originate from at least two countries.

A concentration has an important impact on the structure of the involved companies. It forms a new legal structure that may determine the creation, or strengthen, of the market power through the different complementary legal scenarios.[4] Several different transactions and agreements concluded by undertakings could result in the unification of the independent undertakings' decision-making process. Therefore, it is essential for each jurisdiction to adopt a definition of what can be considered a concentration for the purposes of any merger control legislation.

In the European Union context, the regulatory framework to consider is the Council Regulation (EC) No 139/2004 of January 20, 2004 (henceforth, also referred to as the "Regulation", the "Merger Regulation" or "EUMR"). But, before its enforcement and precisely in 1989 (*infra*) the Council adopted a European Merger Control Regulation ("EMCR") which sought to regulate changes in the market structure within the European

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[1] The concept of "undertaking" is different for each field; for what concerns competition law, "undertaking" covers "any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Any activity consisting in offering goods or services on a given market is an economic activity". Cfr. Case C-222/04 Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA and Others.

[2] L. F. PACE, *European Antitrust Law: Prohibitions, Merger Control and Procedures*.

[3] A. JONES, B. SURFIN AND N. DUNNE, *Jones & Surfin's EU Competition Law: Text, Cases and Materials*, 1071.

[4] Mergers, Acquisitions, and creation of full functioning Joint Ventures.

Union (henceforth also only “EU”). It came into force in 1990 and was amended in 1997, then modified again to be finally consolidated into a new Regulation in 2004.[5]

1.2 **Legal framework: the evolution of the merger regulations leading to Regulation 139/2004/EC**

Nowadays it is enforced Regulation 139/2004/EC. Several modifications were made in order to establish this specific regulation. Furthermore, the turn of the millennium presaged a period of substantial change. These changes were also reflected in various legislations and thus Merger Regulation, characterised by notable advancements in the implementation of related policies. The Commission’s increasing prohibition of a growing number of concentrations led to the abandonment of numerous major operations by companies. In particular, one of the most cited examples is the one of 2001 when the Commission prohibited a concentration between General Electric and Honeywell,[6] (one of the most controversial merger cases in the history of merger control[7]) even though it had been approved by several other competition authorities, such as the US’ one. Consequently, faced with the high risk of bans, companies hesitated to invest resources without certainty. Thus, it was adopted a *Green Paper*[8] that announced the Commission decision to revise Regulation No. 4064 of 1989, as announced by then-Commissioner Mario Monti: «*The time has come to look at whether more mergers should benefit from the one-stop*[9] *review and to adapt the rules to the realities of an increasingly globalised business environment and to an enlarging Union*».[10]

However, several pivotal steps preceded this milestone. In the last forty years there has been a notable acceleration in European integration and global market globalisation, having a profound impact on companies’ strategies. These changes have influenced the structure of companies at the global level, encouraging them to embrace international approaches. Consequently, there was a growing trend towards cross-border concentrations as well as international strategic partnerships as means of expanding

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[5] JONES, SUFRIN, *Jones & Surfin’s EC Competition Law: Text, Cases, and Materials*.
[6] BURNSIDE, *GE, Honey, I sunk the Merger,* 107.
[7] Cfr. Commission decision in General Electric/Honeywell, Case No. COMP/M.2220 (2004), O.J. L48/1.
[8] European Commission, Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745 final, 11 December 2001.
[9] Strives to create a merger control system that efficiently identifies potentially anti-competitive mergers while minimising the burden on firms involved in pro-competitive and competitively neutral mergers.
[10] M. MONTI, press release of the Commission IP/01/1795, *Commission launches wide-ranging discussion on reform of merger control regime*, Bruxelles of December 11, 2001.

operations, research and development efforts, and market reach across borders. Thus, in order to remain competitive on global markets, undertakings have the possibility to pursue growth through internal and external means such as mergers, acquisitions, or the creation of joint ventures (*infra*). While, at a primordial phase, during the early stages of European integration, these strategies tended to focus within the borders of a single Member State. Afterwards, they gradually evolved towards more significant international dimensions, as early as the 1980s. This evolution has reflected the shifts in global economic integration and the strategic responses of the undertakings to these changes.

It is evident that the corporate reorganisations that take the form of concentrations allows companies to become more efficient and competitive, most of the times. This also benefits consumers by offering higher quality products and/or lower prices due to increased competition. However, there also are concentrations that can lead to, or reinforce, a dominant market position, conferring the undertaking more market power. The mentioned scenario can reduce competition, leading to higher prices, limited product choices, and ultimately, negative impacts on consumers. Recognising these potential outcomes, the EU legislature saw the necessity to regulate concentrations before they could cause harm, rather than waiting for their effects to materialise and become harder to address.

The initial step towards establishing a merger regulation can be traced back to 1966 when the Commission adopted a *memorandum*[11] assessing the feasibility of regulating corporate mergers through antitrust measures.[12] The Commission's primary purpose was to monitor such transactions, with the aim of preventing an excessive concentration of economic power among a limited number of entities, a scenario that could impede market efficiency [13].

From that moment on, a pressing urgency for *ad hoc* regulations arose, leading Member States to engage in a discussion that lasted nearly a decade.[14] At the same time, the Commission began exercising *de facto* control over mergers, relying on Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 of the Treaty on Functioning of the

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[11] Cfr. JONES, SUFRIN *Jones & Surfin's EC Competition Law: Text, Cases, and Materials*, 949.
[12] European Commission, *Memorandum* P-1/66, *Concentration of firms in the Common Market Memo* (1966).
[13] ADAMO, *Il quadro normativo delle concentrazioni: dalla legislazione europea a quella nazionale*, in Diritto civile e commerciale.
[14] Cfr. JONES, SUFRIN *Jones & Surfin's EC Competition Law: Text, Cases, and Materials*, 942.

European Union (TFEU)) to regulate mergers in the Union.[15] In Recital (7) of the EUMR, it is clearly stated that Articles 101 and 102, are of course applicable to certain concentrations, also according to the case-law of the European Court of Justice. Nevertheless, these are inadequate for controlling all operations that could be inconsistent with the framework of fair competition outlined in the Treaty. As a matter of fact, it is said that Regulation No. 139 «*should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives* […] » [16]. Actually, these rules soon proved inadequate for effectively regulating such cases. Upon closer examination, Article 81, concerning restrictive agreements,[17] was based on an assumption not reflected in the Merger Regulation, namely that the involved parties were to remain independent. Similarly, *Continental Can* judgement established that Article 82[18] applied only to acquisitions by undertakings in a dominant position before participating in the operation.[19] Furthermore, the use of abuse of a dominant position entailed *ex post* control; yet one of the primary objectives of merger regulations is to prevent the creation of dominant positions, a goal that is challenging to achieve through *ex post* control. Moreover, the use of the above-mentioned Articles seemed more complex after finalising the merger, making it challenging to restore the pre-merger conditions following a prohibition decision from the relevant antitrust authority. Adding to this scenario an increasing number of acquisitions by US and Japanese companies, policymakers in the EU decided to introduce specific legislation to regulate concentrations.

All of these factors led to the necessity of creating a regulation, step that was only achieved in 1989. On July 20, 1973, the Commission proposed the first regulation on the control of concentrations. But only after numerous amendments, the Council adopted Regulation No. 4064 on December 21, 1989. The EMCR came into force on September 12, 1990, with the aim of effectively controlling all concentrations concerning their

[15] Cfr. JONES, SURFIN AND DUNNE, *Jones & Surfin's EU Competition Law: Text, Cases and Materials*.
[16] Cfr. Recital (7), Council Regulation No. 139/2004/EC.
[17] As Article 101, it prohibited all agreements between undertakings, decisions by associations of undertakings and concerted practices which could affect trade between Member States, having as their object or effect the prevention, restriction, or distortion of competition within the common market, as incompatible with the latter.
[18] Governing the Abuse of a dominant position.
[19] TOSATO, BELLODI, *EU Competition Law, Volume I, Procedure*, 290.

impact on competition within the EU market. It established a system of prior notifications to the Commission. The regulation marked the first European Merger Control Regulation, and it was the result of a significant compromise among the Member States, lasted 16 years. This compromise helps explain the limited applicability of the concentration concept. Its design provided three major purposes: (i) to grant specific authority for the Commission for contesting mergers and acquisitions that would harm competition; (ii) to provide a structure for merger control, giving the Commission necessary market information and the power to stop anti-competitive mergers before their consummation (the stand-still principle); and (iii) to centralise merger enforcement in the hands of the Commission so that companies would not be subject to multiple and potentially inconsistent substantive standards, notice requirements and waiting.[20] Precisely, the regulation established the division of powers between the Commission and the Member States.[21] There still were many problems, such as the inadequate thresholds, so several operations having effects on the common market nevertheless ended up escaping the Commission control, as the involved companies did not reach the turnover thresholds. Regulation No. 1310 of 1997 changed the situation thereby reducing the frequency of multiple notifications. It, in fact, extended the Commission's jurisdiction also to mergers involving companies having lower turnovers, but still affecting multiple Member States.

In order to well interpret the regulations, since the adoption of EMCR, the Commission expanded and refined the legal framework through the adoption of interpretative notices. Specifically, in 1994, there were released four notices, later updated after the amendments introduced by Regulation 1310/97. These updates included notices on full-function joint ventures, concentrations, undertakings concerned, turnover calculations, and procedural alignment for merger processes. The objective behind these notices was to enhance the transparency of the merger control process. Transparency that enables companies to determine whether their planned transactions require prior review by the Commission and, if so, what the likely outcome of such a review would be.

There was anyway still a necessity to simplify the process of referring merger cases to national competition authorities. Only after the adoption of the Green Paper[22] the Commission proposed that simplification. This proposal instigated debates regarding the

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[20] FOX, GERARD, *EU Competition law, Cases, Texts and Context*, 235.
[21] Based on the "one-stop shop" principle (*infra*).
[22] Cfr. note 8.

replacement of the existing merger evaluation criterion[23] outlined in Article 2 of Regulation No. 4064/1989. Nevertheless, the Commission championed a shift towards a more dynamic approach focused on assessing the substantial lessening of competition, highlighting a broader concern for market dynamics and consumer welfare. The initiatives and revisions culminated in the eventual adoption of Council Regulation (EC) No 139/2004 of January 20, 2004, which entered into force on the 1st of May 2004. This Regulation was, as the prior ones, followed by interpretative measures; as a matter of fact, it was published the Commission Consolidated Jurisdictional Notice (2008/C 95/01)[24] and implemented to simplify the interpretation and application of the new rules in a single consolidated document after the Merger Regulation took effect.[25] Moreover, the Commission published Best Practices[26] on the conduct of EC merger control proceedings, in order to foster a better understanding of the Commission's investigation process, enhancing the efficiency and the transparency of the new proceedings.[27]

The new Regulation has modified the process of monitoring concentration operations originally outlined in Regulation No. 4064/1989. The Regulation has updated the notification process and strengthened the Commission's investigative capabilities, with a particular emphasis on increasing efficiency in gathering information for cases under its review. Moreover, the Commission has been granted the authority to require companies to undergo "de-concentration", involving the dissolution of existing concentration to restore effective competition in the relevant market.

But the main news was the positive outcomes to regulate more effectively the division of powers between itself and national authorities. In accordance with Regulation 4064/89, Member States delegated exclusive authority to the Commission to assess planned concentrations with a Community dimension. This principle is called "one-stop shop" and was maintained in Regulation 139/04. All concentrations falling under the Regulation's scope, i.e., those with a Community dimension, must be reported to the Commission, which holds exclusive jurisdiction to evaluate them. This system replaced

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[23] Historically, this criterion focused on assessing mergers based on their potential to create or strengthen a dominant market position.
[24] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).
[25] FAULL, NIKPAY, *The EC Law of Competition*, 424
[26] Published on DG Competition's website.
[27] TOSATO, BELLODI, *EU Competition Law, Volume I, Procedure*, 293.

numerous national systems that would have applied to the same transaction. To enable the Commission to effectively carry out its regulatory function, concentrations must be reported before their implementation, aiming to provide the Commission with necessary information to assess the concentration's compatibility with the common market. The new Regulation has also provided that, upon request from one or more Member States, the Commission may review a concentration without a Community dimension, but that is deemed to be of community interest. According to Article 22 of the Regulation, if a concentration lacking a Community dimension affects cross-border trade and significantly impacts competition within requesting Member States, the Commission may assert jurisdiction to review it. Furthermore, the Regulation allows for the same mechanism, but with opposite parties: it enables National Competition Authorities to review concentrations with a Community dimension, as provided for under Article 9. If the Commission believes a concentration affects a national market significantly and does not substantially impact the common market, it may refer the case to relevant Member State authorities. On the other side, the concentrations that do not meet Community thresholds may require notification to the National Competition Authorities (NCAs). Hence, Regulation 139/2004 grants the EC greater flexibility to exclusively review concentrations without a Community dimension; Article 4(5) allows undertakings, before notifying at national levels, to request Commission review for concentrations not meeting Community thresholds through a reasoned submission. The Commission must transmit such submissions to all Member States promptly. If any competent Member State disagrees within 15 working days, the case cannot be referred to the Commission, and national competition law applies. This system is provided so that there is a single notification to a single authority. The *ratio* is that multiple notifications for the same concentration not only increase legal uncertainties but also impose additional obligations and costs on undertakings, potentially leading to conflicting outcomes. Additionally, the Commission has issued a Notice on Case Referral for Concentrations, outlining principles guiding referrals to the Commission when it is deemed the best authority for non-Community dimension transactions. This mechanism aims to streamline the decision-making process without compromising the efficiency of merger control proceedings. The new rules reflect a clear philosophy aiming to balance procedural realities with effective

decision-making in merger assessments, maintaining a timely process while ensuring appropriate jurisdictional oversight.[28]

Regulation 139/2004/EC governs the so-called "Third pillar" of competition law, namely the merger control.[29] It refers to the control of concentrations between undertakings. It is based on the principle that concentration operations must be reported before they are carried out, so there can be an *ex ante* control[30]. Reporting has significant positive legal implications for the parties involved in the proposed concentration. Conversely, failure to meet this obligation constitutes a punishable offense, with fines and potential adverse legal consequences under civil law for the reporting parties. Therefore, to ensure legal certainty, it is crucial to precisely define the scope and content of the information required during the reporting process.

1.2.1 **The Community dimension**

Even though there is a concentration, and it is cross-border, it is not necessarily guaranteed that it has a broader impact on the internal market or in broader markets. Thus, it is not necessarily guaranteed that the Merger Regulation applies. As a matter of fact, there is another criterion that must be fulfilled in order for the Regulation to apply. A concentration falls under the Regulation, and it is subject to its requirements, such as the prior notification, only if it has a "Community dimension" as defined by the Regulation itself. It is indeed interesting, and perhaps curious, that the Regulation does not begin with the definition of concentration. Instead, its first article covers the "Scope" of the Regulation, stating that EUMR applies to all concentrations having a Community dimension as defined in that Article.[31]

Actually, according to Recital (10) EUMR, a concentration must meet specific thresholds in terms of aggregate turnover for it to have a Community dimension; moreover, it is irrelevant whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the European Union.[32]

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[28] TOSATO, BELLODI, *EU Competition Law, Volume I, Procedure*, pp. 300 ff.
[29] The purpose of merger control is to prevent the creation, or strengthening of a market structure that is detrimental to competition.
[30] Differently from the past, when the EC had to apply articles 81 and 82, having an *ex post* control.
[31] Article 1, paragraph 1 Council Regulation No. 139/2004/EC.
[32] Recital (10) Council Regulation No. 139/2004/EC.

The precise definition is offered by the subsequent paragraphs of article 1, which consider the combined aggregate worldwide turnover of all the relevant undertakings, settling limits to determine whether a concentration falls within the scope of the Regulation or not.

The turnover thresholds have a dual purpose: to identify the concentrations that are likely to influence the internal market, and to single out the most significant concentrations that are likely to have an appreciable impact on competition[33]. Furthermore, Article 1, paragraph 3 of Merger Regulation also considers of Community dimension those concentrations that, although not exceeding the thresholds indicated in paragraph 2, are nevertheless brought within the scope of the regulation and subject to the exclusive competence of the Commission, provided that the four conditions stipulated by the regulation are met.[34]

For clarity, under EUMR, "*a concentration has a Community dimension where:*

a) The combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

b) The aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;

b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

c) in each of at least three Member States included for the purpose of point b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

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[33] Because the Commission does not have infinite resources to review concentrations.

[34] GHEZZI, OLIVIERI, *Diritto Antitrust*, 260.

d) *the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,*
unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State".[35]

The thresholds established by Regulation are based on both worldwide turnover and Community-wide turnover. When these thresholds are met, the Regulation presumes that there can be a potential impact on competition, and thus the concentration must be scrutinised to prevent harm. Turnover is used as a test to assess the economic consolidation in a concentration, allocated geographically to reflect resource distribution accurately. After deducting certain items, turnover encompasses all sectors of the parties, extending beyond market-specific turnovers relevant to competition assessment.
In 1997, the EMCR introduced additional thresholds to determine Community dimension in mergers. These have been maintained in Regulation 139 for cases where the thresholds are not met. A concentration exceeding the Article 1, paragraph 3 threshold requires prior notification to the Commission, except in cases where both merging entities generate over two-thirds of their total turnover within a single Member State, leading to jurisdiction at the Member State level. Determining Community dimension depends on turnover generated by undertakings involved in the concentration and the calculation of the turnover is only provided once certain items are deducted, to accurately represent the economic significance of the involved entities. In group acquisitions, the entire group's turnover is relevant, while in acquisitions, only the target company or segment's turnover relevant to the seller is considered. The Commission jurisdiction over foreign undertakings requires immediate, substantial, and foreseeable effects, adhering to principles of non-intervention and proportionality. Moreover, the notification thresholds align with international public law principles, requiring notifications for transactions promising significant and direct economic impacts.

The primary purpose of the thresholds is to determine whether the European Union, in person of the Commission, has the jurisdiction over the concentration, or whether the jurisdiction is of the National Competition Authorities. As a matter of fact, it is important to point out that EU merger control has priority over single national legislations on

[35] Article 1, paragraph 2 and 3 Council Regulation No. 139/20014/EC.

mergers. Meaning that whether a concentration does not fall under the meaning of the Regulation, it will be subject to national merger control. Indeed, The forthcoming expansion of the European Union required a reconsideration of how cases were allocated between the Commission and national authorities. As a matter of fact, it can be said that the Regulation also responded to the need to revise the mechanisms for allocating jurisdiction between the Commission and national antitrust authorities[36] as provided for in the previous regulations.[37]

That is perhaps the main reason why it is crucial to provide a rule such as Article 5 EUMR that outlines how to calculate the turnover. The first paragraph asserts that the aggregate turnover includes revenue from products and services sold during the previous financial year by the involved undertakings, minus sales rebates, value-added tax, and related taxes. This turnover does not include sales or services exchanged between the mentioned undertakings. Turnover, whether in the Community or a Member State, consists of products and services sold to businesses or consumers in that area.

Exceptions to paragraph 1 apply when acquiring specific parts of one or more undertakings, considering only the turnover related to those parts. Repeat transactions within two years involving the same parties are treated as a single concentration, dated from the last transaction.[38] Afterwards, it provides how to calculate turnover for specific types of undertakings (such as insurance or credit ones).

1.2.2 **Violations**

The Merger Regulation outlines various scenarios that may result in violations[39], with Article 14 addressing fines and the circumstances under which they are imposed. This Article focuses on cases where undertakings, associations of undertakings, or individuals specified in Article 3(1)(b)[40], may commit violations.

Article 14 specifies that fines may not exceed 1% of the aggregate turnover of the relevant undertaking or association if they intentionally or negligently commit

[36] The authorities that act in the single member states as the Commission acts in the EU field.
[37] Cfr. note 12.
[38] Article 5, paragraph 1 Council Regulation No. 139/2004/EC.
[39] It is not provided a precise article in the regulation stating "Violations".
[40] That provides those "*persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings*". Cfr. Article 3(1)b, Council Regulation No. 139/2004/EC.

infractions. For instance, fines may be imposed when inaccurate or deceptive information is provided in submissions, certificates, notifications, or related supplements. Similarly, fines may apply when responding to Commission requests with misleading or incorrect information, or when failing to provide required information within stipulated timeframes.

Furthermore, fines may be imposed when, during inspections under Article 13 of the EUMR, the undertakings, associations of undertakings or the above-mentioned individuals present incomplete records or refuse inspection as ordered by a Commission decision.

The Commission has the authority to seek explanations from representatives or staff during inspections and record their responses. If inaccurate or deceptive responses are given, or if corrective action is not taken within set timelines, or if comprehensive responses regarding relevant facts are not provided or refused, violations of the EUMR may occur, leading to sanctions.

Additionally, fines not exceeding 10% of the aggregate turnover may be imposed where more serious are committed intentionally or negligently, such as:

a) Failure to notify a concentration prior to its implementation, without an express authorisation or a Commission decision;[41]
b) Implementation of a concentration in breach of Article 7;[42]
c) Implementation of a concentration declared incompatible with the common market or non-compliance with any measure ordered by;

[41] This breach will be further analysed in Chapter II, pp. 37 ff.
[42] *Ibidem*.

d) Failure to comply with conditions or obligations imposed by decisions pursuant to Articles 6(1)(b)[43], Article 7(3)[44] or Article 8(2), second subparagraph[45].[46]

In all these cases, fines are levied by the Commission according to the severity of the violation.

1.3 **The acquisition of control**

A concentration occurs in case of acquisition of control. Such control may be acquired by one undertaking acting alone, or by several undertakings acting jointly. [47] Control is normally acquired by persons or undertakings which are the holders of the rights or are entitled to rights conferring control under the contracts concerned.[48] This concept of control is crucial for analysing the anticipating the effects of concentrations during the stand-still period.[49]

The existence of a concentration can only be confirmed if an essential criterion is met: the structural changes have to be lasting. This is more evident in the Merger Regulation when outlining the definition of "concentration". Specifically, under article 3, paragraph 1 it provides that "*a concentration shall be deemed to arise where a change of control on*

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[43] Cfr. Article 6, paragraph 1, letter b Council Regulation No. 139/2004/EC, which states: «*The Commission shall examine the notification as soon as it is received.* […] *Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market. A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration*»..

[44] The Article states: "*The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction*" Cfr. Article 7, paragraph 3 Council Regulation No. 139/2004/EC.

[45] The Article states: "*The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market*" Cfr. Article 8, paragraph 2, second subparagraph Council Regulation No. 139/2004/EC.

[46] Cfr. Article 14, paragraph 2 Council Regulation No. 139/2004/EC.

[47] Specifically, control would be established through the possession of ownership or enjoyment rights over the entirety or portions of a company's assets, or through rights, contracts, or other legal relationships conferring a decisive influence on the composition, deliberations, or decisions of the company's governing bodies. Cfr. CASSANO, MARRAFFA. *La concorrenza*.

[48] Cfr. Paragraph 11 and Paragraph 13, *Concept of control,* of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

[49] The violation of which results in gun-jumping (*infra*, pp. 37 ff.).

a lasting basis results […]".[50] This concept of control is primarily based on the idea of "decisive influence",[51] which distinguishes control from forms of minor influence. And it is also harboured in Recital 20, stating that "*the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market*".[52] It should be noted that, according to European regulations, it is not so much relevant whether dominant influence is actually exercised or not. Rather, it is sufficient that there is the possibility of exercising such influence.[53] Therefore, one company controls another even if it does not exercise its powers.[54] Finally, the Merger Regulation does not apply to operations that result only in a temporary change of control. However, a lasting change of control cannot be ruled out solely because the relevant agreements are concluded for a specified period, provided that these agreements are renewable. Concentration may occur even when agreements specify a precise expiration date, as long as the specified period is sufficiently long to effect a lasting change in the control of the involved companies.[55]

Being clear the "long-lasting basis" concept, it is possible to go through the subsequent part of paragraph one. As per the Regulation, the change can occur in two distinct manners: through the merger of two or more independent undertakings, or parts of them; through the acquisition of direct or indirect control of one or more undertakings, or parts of them. Moreover, for the purposes of the Merger Regulation, the creation of a joint venture that performs on a lasting basis all the functions of an autonomous economic entity and which results in a change of control is deemed to constitute a concentration.[56] The consequence is that there is a concentration whenever someone acquires a direct or indirect control. Direct control exists when control is held by individuals or entities that possess rights (or other means) enabling them to exert decisive influence over the strategic decisions of the acquired company. On the other hand, indirect control occurs

[50] Art. 3 para. 1 Council Regulation No. 139/2004/EC.
[51] Decisive influence is demonstrated by the power to make strategic decisions beyond merely protecting the invested capital. These decisions include appointing management bodies, approving budgets and investments, drafting business plans, and selecting key personnel.
[52] Recital (20) Council Regulation No. 139/2004/EC.
[53] And this also significantly affects the evidentiary strategy: the EC must prove the potential for exercising dominant influence, even when it is not actively exercised.
[54] OSTI, *Diritto della concorrenza*, 163.
[55] Paragraph 28, *Concept of control,* of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).
[56] PACE, *European Antitrust Law: Prohibitions, Merger Control and Procedures*.

when the entities exercising direct control are themselves controlled by other entities: the latter hold indirect control over the acquired company.
Moreover, depending on the methods and means employed for the acquisition, control can be manifested as either sole[57] or joint. Sole control is acquired when one undertaking alone exercises decisive influence on an undertaking, thereby influencing[58] its strategic commercial decisions.[59] Joint control arises when two or more entities or individuals collectively possess the ability to exert decisive influence over another entity. This influence often includes the authority to veto actions that define the strategic commercial direction of the entity. Unlike sole control, which grants specific shareholders the power to dictate strategic decisions within an entity, joint control is characterised by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial policy of the joint venture and that they are required to cooperate.[60]

As a conclusion, in order to determine the presence of a concentration one must consider several main criteria. These include the authority to exercise decisive influence over a company's activities, and the enduring nature of this capability.

Therefore, it is necessary to inspect other different types of concentration, that may have a positive impact on the market, but also a negative consequence by restricting competition, creating, or strengthening a dominant position into the market. Within this context, the analysis will focus solely on specific forms of concentrations, and not to all the other types outlined in Article 3 of Regulation 139/2004, namely mergers, joint ventures, and ancillary restraints.

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[57] Sole control can be acquired on a *de jure* and/or *de facto* basis. Cfr. Paragraph 55, *Sole control*, of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).
[58] This is typically exemplified by the ownership of 50% plus one share of the share capital, having the authority to make pivotal strategic decisions for the company. However, even significantly lesser shareholdings can establish a stable control position in shareholder meetings. This phenomenon occurs when average meeting attendance falls considerably below 100% of the share capital. In such cases, stable control can be achieved even with share ownership well below the 50% mark.
[59] Paragraph 54, Sole control, of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).
[60] Paragraph 62, *Joint control*, of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

1.3.1 **Mergers**

The mergers are the most identifiable operation, being clearly delineated. In fact, it does not require a change in control and represents the most advanced form of "structural changes" as it entails the extinction of at least one legal entity. There are therefore two types of merger: merger by incorporation (A is incorporated into B); and mergers by creation of a new entity (A and B merge into C).[61] Sometimes the merger occurs *de facto*, where the parties maintain the separation of the legal personality of the two companies, but create one or more committees which, essentially, carry out the functions of the management bodies of the companies and therefore, they effectively manage them as a single company.[62] This situation can be strengthened by the provision of a system of compensation between losses and profits between the two (or more) companies, by the pooling of dividends, from the joint assumption of entrepreneurial risks.[63]

Unlike other transactions such as acquisitions, mergers do not necessitate the determination of a change in control. The concentration resulting from the merger of independent entities does not present notable hurdles in assessing its concentrative essence, and consequently, in applying the Merger Regulation.[64] The *ratio* is that control cannot be established within this context. It is to consider that in mergers there is always at least one of the entities that necessarily will cease all external activities. In the case of merger by incorporation, the entity is the incorporated company. Whereas, if the merger occurs through creation of a new company, the cessation will involve the activities of all companies involved.[65]

[61] This also applies to divisions: A and B can result from A (by spin-off), or two (or more) can result new companies, C and D.
[62] Cfr. OSTI, *Diritto della concorrenza*, 169.
[63] Paragraph 10, of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).
[64] CASSANO, CATRICALÀ, CLARIZIA, *Concorrenza, Mercato e Diritto dei Consumatori*, 682.
[65] PAPPALARDO, *Il diritto della concorrenza dell'Unione Europea*, 676.

1.3.2 **Joint Ventures**

"*The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)*[66]*"*.[67]

The joint venture represents an undertaking jointly controlled by two or more other undertakings (the "Parents"). In essence, for a joint venture ("JV") to exist, there must be joint control, which signifies that both parent entities can make decisions, having veto power over strategic decision-making processes. Conversely, if one parent wields more authority than the other, it results in sole control, constituting a restrictive agreement rather than a joint venture. While joint ventures were historically significant in the realm of concentrations, they have now been surpassed by acquisitions of control in prominence. This shift prompts an examination of the competition risks associated with joint ventures and why they are of concern. For instance, if C is the joint venture of A and B, the focus isn't primarily on the relationship between the parents and the joint venture itself, especially considering the various forms of vertical cooperation that exist without raising significant competition concerns. Instead, the paramount concern lies in the relationship between A and B. The risk is that the joint venture may lead to increased collaboration between the parents beyond the scope of the joint venture's activities. Essentially, there is a risk that the joint venture may evolve into a platform for collusion between the parents, akin to a cartel secretariat. This risk has driven the evolution of regulations governing such arrangements. It underscores the importance of scrutinising the horizontal relationship between the parent entities, as concerns of collusion and anticompetitive behaviour are more pronounced in this context compared to the relationship between the parents and the joint venture itself.

Clear is the criterion for saying that a concentration is a joint venture, but it is important to understand how to affirm that there is a joint control. It is imperative to ascertain whether the joint venture qualifies as a full-function entity: whether the JV performs on a lasting basis all the functions of an autonomous economic entity, as per

[66] Providing that a concentration shall be deemed to arise where there is, on a long lasting basis, a change of control that results from: "*the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings*". Cfr. Article 3, paragraph 1(b) of the Council Regulation No. 139/2004/EC.

[67] Article 3, paragraph 4 of the Council Regulation No. 139/2004/EC.

Article 3, paragraph 4 of the Regulation. In simpler terms, is it to be understood if it is operating on the market as an independent economic entity. The objective is that without prior knowledge, one would not distinguish a particular company as a JV because it operates autonomously with its own products, management, and capital, much like any other independent entity in the market. This characterisation defines what is known as a full-function Joint Venture[68]. Conversely, if the JV merely sells products from the parent companies, relies heavily on parental links, lacks sufficient capital, or has management composed entirely of parent entities, it will not operate as an independent economic entity and therefore would not be considered full-functioning and will fall outside the scope of the Merger Regulation.

The subsequent step after confirming full-function status involves determining whether the JV is concentrative or cooperative. A JV is considered concentrative if it does not result in the coordination of competitive behaviour among the parent entities. If such a full-function and concentrative JV exists, it not only follows the procedural aspects of the Merger Regulation but also undergoes substantive testing. This evaluation aims to determine whether it significantly hinders effective competition. On the other hand, a JV is deemed cooperative if it leads to, or has the potential to lead to, coordinated competitive behaviour among the parent entities. In such cases, there is a risk that the JV could function akin to a cartel's secretariat. Despite being a full-function cooperative JV, it continues to benefit from the procedural advantages of the Merger Regulation but undergoes a comprehensive analysis under Article 101 TFEU within the strict deadline outlined in Article 10 of the Merger Regulation.[69] This dual assessment ensures that procedural benefits are maintained while thoroughly evaluating potential anticompetitive behaviours.

1.3.3 **Ancillary Restraints**

The doctrine of "ancillary restraints" (or restrictions) is employed to justify limitations (such as merger agreements) which is directly related to the implementation

[68] Being a full-function JV is highly desirable due to the procedural advantages it offers under Merger Regulation; on the opposite, the Regulation would not even apply (but Articles 101 and 102 TFEU would). These advantages include swift and conclusive decisions and specific time limits absent in Articles 101 and 102 proceedings.

[69] Which is titled "Time limits for initiating proceedings and for decisions".

of a main operation,[70] and which may fall within the scope of article 101 TFEU.[71] As per Article 8, paragraph 2 of the Merger Regulation, a decision which declares that a concentration is compatible with the common market is deemed to "cover" restrictions ancillary to the concentration. The Commission has additionally adopted a notice[72] on the subject, in order to provide guiding principles to evaluate the conditions and the extent under which the most common types of agreement are considered ancillary restraints: non-competition clauses, license agreements, and purchase and supply obligations. When applying the concept of ancillary restriction, the Commission does not specifically address the balance between the positive and negative effects on competition of the restraint. In the context of examining a concentration, the EC only expressly assesses such restrictions to the extent the case presents a "novel and unresolved question giving rise to genuine uncertainty". Accordingly, in light of the modernisation of the Article 81 (101) enforcement rules provided for by Regulation 1/03[73], the parties themselves need to engage in a "self-assessment" to ascertain if restrictions qualify as ancillary and therefore whether in practice the decision that declares the concentration compatible with the common market will also cover such restrictions. That implies that disputes concerning whether restrictions are directly related and essential for implementing the concentration, and thus automatically cleared by the Commission's decision authorising the concentration will also come under the competence of the courts of the Member States.[74] However, the jurisprudence of the Court of Justice emphasises that the concept of ancillary restraints under Article 101 TFEU should be interpreted narrowly, as it represents an exception to the general rule and warrants scrutiny based on the agreement itself.

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[70] For instance, it can be considered a sale and purchase agreement where A is acquiring B, but with the condition that B refrains from launching a competing business against A. The clause "A will buy B's company" is restrictive since it involves the consolidation of two companies into one entity, constituting a restrictive agreement. Similarly, "B should not compete against A tomorrow" is also restrictive because it limits B's autonomy. Such a non-compete obligation is permissible if two conditions are met: the ancillary restraint must be directly related to the main agreement (typically involving the same parties); and it must also be necessary, there should be no less restrictive alternative to achieve the same goal, and it must be proportionate. If these criteria are satisfied, it can be argued that the agreement qualifies as an ancillary restraint and should be treated in line with the main agreement.

[71] In its Best Practices, the Commission states that it may make certain key documents available to the parties immediately after the beginning of Phase II, even before the adoption of the SO. Cfr. TOSATO, BELLODI, *EU Competition Law, Volume I, Procedure*, 317.

[72] Commission Notice on restrictions directly related and necessary to concentrations, OJ 2005 C56, p. 24.

[73] Council Regulation No 1/2003/EC of 16 December 2002.

[74] Cfr. TOSATO, BELLODI, *EU Competition Law, Volume I, Procedure*, 317.

1.4 **Preventive control**

After having defined the structure of the concentration, the undertakings concerned must ascertain whether it falls within the scope of Regulation 139/2004. Consequently, it can be stated if requires to be notified the Commission or to the NCAs. In order to have a preventive control, the Regulation provides that the undertakings have to notify[75] the concentrations before implementing it, and thus any time after the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest.[76]

1.4.1 **The notification procedure**

The notification mechanism allows for an *ex-ante* control of the concentration and provides the parties with legal certainty as to the compatibility of a transaction with the common market before it is implemented. Parties usually make informal contacts to the Commission, after having ascertained that it is competent to deal with the case. They often prepare briefing notes[77] outlining transaction details, a brief description of the parties, the markets involved and the likely impact of the transaction on those markets, and any other information relevant for the appraisal of the transaction. After sending these briefing notes, especially for transactions raising significant competition concerns, notifying parties typically meet with Commission staff for preliminary discussions. Pre-notification meetings are useful for several reasons, but mainly because they help the undertakings concerned to submit complete notifications, and also because they allow the Commission to familiarise with the case before the notification is made, and hence they tend to facilitate the review of the concentration in accordance with the strict deadlines provided for by the Regulation once notification has been made. There are two phases in which the Commission can preventively control the concentration. The timeline stipulated in Article 10 of the Regulation, governing the initiation of the procedure and

[75] Using the Form CO.
[76] This is a big difference, to increase the flexibility in the notification system, if compared with the prior Regulation previsions. As a matter of fact, it was outlined that the notification had to be made within one week of the conclusion of a binding agreement, the announcement of the public bid or the acquisition of a controlling interest, and time started to run from the first of those events. Cfr. TOSATO, BELLODI, *EU Competition Law, Volume I, Procedure*, 304.
[77] These notes, akin to draft Form COs, facilitate initial discussions with Commission staff, especially for complex transactions.

decisions outlined in Article 6, paragraph 1 of the Regulation[78] starts upon notification. Consequently, the Commission has a maximum of 25 or 35 working days from the time of notification to evaluate the transaction. During this period, the Commission determines whether the concentration does not fall within the scope of the Regulation, or if it falls within the scope, but does not raise significant concerns regarding compatibility with the common market (Phase I decision). Alternatively, whether the concentration raises substantial doubts about compatibility (triggering the initiation of Phase II), the Commission proceeds with further review proceedings.[79]

The notification has important legal consequences for the parties and for third parties. The concentration may not be implemented either before it is notified of before the Commission has declared it compatible with the common market as provided under Article 7 of the Merger Regulation. The same happens where there is a failure to comply with the obligation to notify because, as per Article 14 of the Regulation, the Commission shall impose fines of up to 10% of the aggregate turnover of the undertaking concerned if the parties have, either intentionally or negligently, failed to notify a concentration prior to its implementation. The Commission shall also impose similar fines in case the parties implement the concentration while it is being examined or if it has been declared incompatible with the common market (*infra* page 71).

1.4.2 **The Commission assessment**

As mentioned above, the undertakings concerned into the concentration must notify the Commission (or the NCAs) the concentration itself through a Form CO. These types of operations need an authorisation by the relevant Antitrust authorities before implementing the transaction. This time period is named of *stand-still*, and the companies

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[78] The Article states: "*The Commission shall examine the notification as soon as it is received.*

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market. A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

(c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration."

[79] Cfr. Tosato, Bellodi, *EU Competition Law, Volume I, Procedure*, pp. 304 ff.

shall, as the term reminds, stand still and not implement the transaction, being that an obligation.[80]

During the stand-still period, the Commission must examine the notification as soon as it is received.[81] Through a two-phases process has to assess whether the concentration is compliant with the relevant legal framework or not and may also impose penalties (*supra*) whether the conditions are not met.

The first phase starts with the examination of the concentration. After that first obligation, the Commission must adopt[82] three types of different decisions, within a 25 working days term[83] under Article 6 of the Regulation, namely:

a) Article 6, paragraph 1, letter (a) decision, stating that the concentration does not fall within the scope of the Merger Regulation;[84]

b) Article 6, paragraph 1, letter (b) decision, providing that the concentration falls within the Regulation, but does not raise serious doubts as to its compatibility with the common market.

c) Article 6, paragraph 1, letter (c) provision, providing that the notified concentration falls within the scope of the Regulation 139, and moreover raises serious doubts as its compatibility with the common market.

When the Commission adopts a decision under letter (b), it must declare it compatible with the common market[85] and publish in in the Official Journal. Whereas, when adopting the third type of decision, the EC must also initiate the second phase proceedings. But the second paragraph of Article 6 clearly states that, whether there are changes for which the concentration does not raise any more serious doubts as its compatibility with the common market, the Commission may authorise the concentration, subject to conditions and obligations.[86]

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[80] Of course, the provision provides some derogations (*infra*) in certain conditions are met. The Commission decides upon.

[81] Cfr. Article 6, paragraph 1 of the Council Regulation No. 139/2004/EC.

[82] The Commission can also refer all, or part, of the review of the concentration to the authorities of a Member State.

[83] This term might be raised to 35 working days where the undertakings offer commitments.

[84] Rare type of decision, given that this type of situation emerges during the pre-notification talks.

[85] This type of decision was taken by the EC after the notification of the Canon/TMSC concentration (M. 8179) (*infra*).

[86] To ensure that the undertakings comply with the commitments they may have adopted.

In the second phase, the Commission must adopt a final decision within 90 working days,[87] but the parties may request an extension its duration, so as the Commission, but not excessing 20 working days. The Commission is responsible for ensuring that the undertakings have the chance to express their views on any objections raised against the concentration. During the investigation in phase one, the Commission sends the parties a Statement of Objections (SO) within 90 days. Typically, the SO reaches the parties six to eight weeks after the second phase begins, outlining and justifying the serious doubts the Commission has about the concentration's compatibility with the common market. Moreover, the SO asks the parties to submit their own responses. According to Article 18 EUMR, the Commission can only base its decision on objections outlined in the SO to which the parties have responded[88]. However, it is provided that the decision does not have to exactly mirror the SO, because the Commission may revise or supplement its factual or legal arguments. In addition, the SO must contain an account of the objections in sufficiently clear terms to provide all the information which the undertakings need to defend themselves properly. Following receipt of the SO, the parties must reply in writing, usually within a period of two weeks.[89]

During this second phase, the parties can access case-related documents, including those from the Commission and other involved parties, except for purely internal documents and those with business secrets. The Hearing Officer[90] (HO) supervises file access and ensures the right exercise of the right to be heard in in competition proceedings. If there are problems with this right, the HO reports them directly to the Commissioner for competition matters within DG Comp. After receiving responses to the SO, the Commission shall invite the relevant parties[91] to a hearing chaired by the HO. After that, the Commission shall draft the final decision, considering the input from the Advisory Committee, whose opinion is also communicated to the parties. The final decision is then published alongside the decision itself.

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[87] Increased to 105 working days if the notifying parties offer commitments within 55 working days after the initiation of proceedings.

[88] It can be said, *audiatur et altera pars*.

[89] Cfr. TOSATO, BELLODI, *EU Competition Law, Volume I, Procedure*, pp. 310 ff.

[90] As outlined in Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, 0J 2001 L 162, p. 21.

[91] In which are included the notifying parties, the representatives from DG Competition, the Commission's Legal Service, and members of the Advisory Committee on concentrations.

While the authorisations of the second phase do not automatically authorise concentrations, these may however be approved with commitments or modifications. Parties can propose remedies in both phase one and two. So, while the Commission cannot grant any exemption, the parties can propose commitments in order to "align" with the common market. While commitments' legal nature is the same, the ones of phase one face a less thorough review, focusing on avoiding dominance and eliminating doubts about market compatibility. But parties may be reluctant to offer commitments in that phase, to the extent that there are good chances to address the Commission's serious doubts during the second phase by a more in-depth analysis of the impact of the notified concentration. Therefore, the EC encourages the parties to submit proposals on the aspects of substance that are often more tailored and customised to specific concerns identified by the Commission. When offering commitments, parties need to provide for a procedure to ensure that the commitments can be implemented and must provide them in due time. It has to be underlined that the Commission has a restrictive approach in accepting commitments after the expiry of the deadlines for offering them, and in such cases, it is inclined to prohibit the concentration or require the parties to make a fresh notification of the proposed concentration as modified by the proposed commitments. After having received the commitment proposals, the Commission seeks the views of third parties on the question whether the commitments offered are likely to resolve the identified competition problems.[92] After that, the Commissioners adopt a final decision on the commitments, either authorising or prohibiting the concentration.

1.4.2.1 **Focus: The Substantial Lessening of Competition test and the Dominance test**

In order to decide where a concentration should be blocked, conditioned, or approved, there are three basic types of substantive test: i) a dominance test; ii) an SLC test; or iii) a public interest test. This last test differs from the previous ones by incorporating various non-competitive factors, including considerations related to employment impacts or regional development.[93] Whereas, the other two tests are competition tests and are really important to assess the compatibility of concentration with the market.

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[92] Cfr. TOSATO, BELLODI, *EU Competition Law, Volume I, Procedure*, 315.
[93] OECD, "*Substantive Criteria Used for the Assessment of Mergers*, 87.

The Substantial Lessening of Competition (SLC) test is a standard for the authorities assessing the legality of mergers and acquisitions. It evaluates whether a merger is likely to significantly lessen competition in a market, aiming to prevent price increases, output reductions, limited consumer options, or innovation stifling due to reduced competition. This test, alongside the dominance test, helps competition authorities to outline whether a concentration is anticompetitive or not. It scrutinises coordinated and non-coordinated effects across horizontal, vertical, and conglomerate mergers. Horizontal mergers may substantially lessen competition by eliminating a significant competitive constraint on one or more undertakings or by changing the nature of competition so that companies that have not been coordinating their behavior will be more likely to do so. Vertical and conglomerate mergers tend to pose less of a risk to competition Differently from the dominance test, the SLC test adopts a more effects-based approach, predicting post-merger impacts on prices, innovation, and competition. It requires a reasonable probability of harm rather than certainty or mere possibilities. In order to have an assessment, the authorities must consider factors like market structure, market accessibility, market shares, consumer behaviour, and also potential efficiencies. The authorities must demonstrate a potential substantial harm to competition, although mergers offering significant consumer benefits may be exempted despite anticompetitive findings. In conclusion, the SLC test stands as a linchpin in merger evaluation. Its emphasis on foreseeing future outcomes, assessing competitive harm, and balancing economic efficiencies is what defines its role in modern antitrust regimes.[94]

The dominance test is another key evaluation employed by competition authorities to assess the impact of mergers on competition. When evaluating the compatibility of a concentration with the common market, the Commission historically employed this "dominance test". In 2004, when adopting the new Merger Regulation, it was approved a new dominance test, in order to align EU practices with global legal systems, enhancing efficiency in handling international mergers. The Commission asserted that the new test relies more on economic evaluations, compared to the prior one. However, criticism exists regarding potential legal uncertainties due to lack of case law interpretation and conflicting legislation in some European countries still adhering to the original dominance test. The new dominance test scrutinises whether a concentration would lead

[94] RADIC, *Test SLC* (*merger*), Global Dictionary of Competition Law, Concurrences, Art. N° 88920

to the creation or reinforcement of a dominant position that significantly hinders effective competition in the common market, or a substantial part thereof. This test is also provided for under the Merger Regulation, in particular in Article 2, paragraph 2. The test has been said to mirror the SLC test, granting authorities more flexibility in assessing compatibility with US antitrust laws. The key question is whether sufficient competition persists post-merger to offer consumers ample choices. Despite there have been changes compared to the prior test, the factors considered by the Commission in evaluating the concentration compatibility remain largely unchanged. The focus remains on preserving and fostering effective competition within the common market, considering market structures, competition from both EU and non-EU entities, market positions, barriers to entry, supply and demand dynamics, and technological advancements.

The academic discussions surrounding the suitability of the dominance and SLC tests in preserving competition has been strong. Both tests are not a standard across jurisdictions; as a matter of fact, many countries employ hybrid approaches that blend elements of both tests, sometimes incorporating public interest considerations. It is essential to recognise these complexities when evaluating and comparing the effectiveness of these tests. Within the European Union, for example, there is a tendency to lean towards a standardised dominance test, largely influenced by language akin to the European Commission's Merger Regulation. However, this test is often considered a hybrid due to its inclusion of elements related to impeding effective competition in the common market. Despite ongoing debates regarding the superiority of either test and their specific advantages or drawbacks, there remains a lack of consensus. One significant point of discussion has revolved around the likelihood of anticompetitive mergers being blocked under an SLC test compared to a dominance test. While theoretical arguments suggest differences, in practice, both tests have shown the capacity to block anti-competitive mergers, albeit with differing emphases. Efficiency defences, although theoretically applicable to both tests, are more commonly associated with SLC jurisdictions, indicating nuanced practical applications.[95] In the academic discussions, it was highlighted that the transparency of the dominance test is advantageous, providing greater legal certainty for businesses and courts. However, it is noted that the dominance test may be less adept at addressing unilateral effects, whereas the SLC test offers a more

[95] Cfr. note 93, pp. 90 ff.

straightforward assessment of efficiencies. For instance, Switzerland's approach, combining both tests within its legal framework, underscores the flexibility and adaptability required in merger assessments.[96]

1.5 **The review of the Commission decisions**

All the decisions adopted by the Commission in competition matters might be challenged before the Court of Justice of the European Union. The remedies are the same as for the other acts of the other European Institutions[97] given that Article 263 TFEU provides the possibility to act before the ECJ challenging the legality of EU legal acts. It is provided that the parties affected by a Commission decision have a two-month window to challenge them. This period starts from the publication of the decision, its notification to the concerned party, or the day the party becomes aware of it. The Treaty allows any natural or legal person to contest a Commission Decision addressed to them directly or one that significantly affects them, even if addressed to another party. Parties involved in a concentration can typically challenge the Commission's decision regardless of whether they are the direct addressees or not. In most cases, these parties have a vested interest in seeking annulment of the decision, even if they abandon the merger or acquisition in question. Third parties can challenge these decisions if they can prove a direct and individual impact from the decision, "*a natural or legal person may bring proceedings against a decision addressed to another person only if that decision is of direct and individual concern to him*".[98] Occasionally, competitors of the merging parties or even minority shareholders have successfully challenged Commission merger approvals. The Court of First Instance (CFI) has clarified in its decisions that the Commission has a discretionary power when analysing the economic effects of a concentration. But the wide discretion of the Commission is not an obstacle to the review of the decision. Indeed, the Court underlined that "*As regards the review of legality, the Court of Justice has held that whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts*

[96] *Ibidem*, pp. 170 ff.
[97] CORTESE, FERRARO, MANZINI, *Il Diritto Antitrust dell'Unione Europea*, 330.
[98] Cfr. Paragraph 48 of the Judgment of the Court of 31 March 1998. - French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities. - Community control of concentrations between undertakings - Collective dominant position. - Joined cases C-68/94 and C-30/95.

of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it".[99] In such cases, the Community courts primarily ensure procedural correctness, factual accuracy, and absence of transparent assessment errors in the Commission's decision. It is crucial to note that the CFI cannot replace the Commission in evaluating market effects; it only intervenes in case of manifest errors or significant legal/procedural issues. Article 10 of Regulation 139/04 mandates that if the CFI annuls a Commission Decision, the Commission must re-evaluate the concentration in light of current market conditions. The parties must promptly submit new or updated notifications to reflect any changes in market conditions or information. The decision to challenge a prohibition Decision before the CFI presents challenges due to lengthy proceedings (often lasting two to three years) and the need for subsequent proceedings before the Commission post-annulment. This often dissuades parties from pursuing judicial review, leading to transaction abandonment, which conflicts with business strategies. To address this, the CFI introduced the fast-track procedure, allowing expedited judgments by deviating from standard procedural rules. This approach significantly reduces the time needed for judgments and is applied at the discretion of the CFI after considering case urgency and circumstances, providing a more efficient legal recourse for concerned parties.[100]

1.6 **Differences with national concentrations' provisions**

The provisions and legislations on the concentrations of course might be different in each legal system. In Italy, for instance, there are several measures covering the matter. First, the Italian Civil Code provides under Article 2501,[101] named "*Forme di fusion*e", what a merger is. Moreover, the concept of a "cross-border merger" is defined by Article

[99] Cfr. Paragraph 54 of the Judgement of the Court (Second Chamber) of 8 December 2011, in Case C-386/10 P, Chalkor AE Epexergasias Metallon v. European Commission.
[100] TOSATO, BELLODI, *EU Competition Law, Volume I, Procedure*, pp. 321 ff.
[101] It provides that the merger of multiple companies can be carried out either by establishing a new company or by incorporating one or more companies into an existing one. Moreover, it states that whether a company is in liquidation and has begun asset distribution, it is not allowed to participate in the merger.

1, paragraph 1 of Legislative Decree no. 108/2008[102], which transposed Directive 2005/56/EC,[103] now abrogated by the Directive No. 1132/2017, and Legislative Decree no. 19/2023. It states that a cross-border concentration is a transaction between one or more Italian companies and one or more companies from another Member State, resulting in an Italian or another Member State company, but it excludes transfers of part of the companies. Italian legislations require companies involved in mergers to comply with the rules outlined in the civil code, supplemented by specific provisions.

More precisely, according to competition law, as a transposition of the European legislations on competition, including the EUMR, it was enforced in 1990 law no. 287. Its provisions are very representative of the Regulation. In particular, Article 5, paragraph 1 of Law 287 transposed Article 3 of the Merger Regulation and thus provides which are the possible merger concentration structures. Under Italian law, a concentration takes place when two or more undertakings merge (and the structure is referred to as "merger"), when one or more entities which are in a position of control of at least one company or one or more companies acquire directly or indirectly, either through the purchase of shares or assets, or through a contract or any other means, control over the whole or parts of one or more companies (named "acquisition"), and when two or more companies establish a joint venture that consistently performs all the functions of an autonomous economic entity (this structure is identified as "full functioning joint venture").[104] Like in the EUMR, also or the Italian law there is a concentration only whether there is a lasting change in control.

Even though the legislation is quite the same, there are many differences between the concentrations of companies that take place within a single country (for instance, Italy), and the concentrations of companies that come from different member states of the EU. One of the possible differences is the fact that national concentrations often follow national approval procedures, while transnational concentrations may require approval from multiple regulatory authorities, involving complex procedures and of course longer

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[102] Legislative Decree of May 30, 2008, n. 208 on cross-border mergers.

[103] The Tenth Company Law Directive 2005/56/EC of 26 October 2005, set out rules to facilitate cross-border mergers of limited-liability companies. It is now replaced by Directive 2017/1132/EU, that deals with the division of public limited-liability companies in a single EU country. The Directive of 2017 also provides the grounds for a harmonisation in the field of mergers (and divisions). See N. DE LUCA, *European Company Law*, 41.

[104] Article 5, paragraph 1 law n. 287 of October 10, 1990.

evaluation times. Moreover, cross-border concentrations can have a broader impact on global markets or internal market compared to concentrations within a single state, influencing competition and market dynamics on an international scale.

Furthermore, the regulatory framework governing concentrations with a Community dimension differs significantly from national legislation, particularly in terms of procedural rules and enforcement mechanisms. The first - and perhaps most significant - difference concerns the obligation to notify, explicitly provided by the Merger Regulation to occur before the finalisation of the transaction. Additionally, within the EU context, the stand-still period sets an obligation not to implement the operation transaction. Failing to comply with the prior notification obligation or with the stand-still obligation is a violation of the Merger Regulation. The undertakings concerned would incur in fines of up to 10% of the total turnover of the concerned undertaking, depending on the severity and duration of the infringement (*infra*) to which only two exceptions are provided. These are designed to balance the need for efficient business operations with the imperative of maintaining fair competition within the EU market.

In contrast, Italian law does not provide an equally explicit prohibition regarding the early execution of the non-cross-border operations.[105] While Article 16, paragraph 1, Law No. 287/1990 provides that concentrations exceeding the turnover thresholds indicated therein must be priorly notified to the NCA, the provision of the subsequent Article 17, paragraph 1, underlines that the investigating Authority may order the involved undertakings to suspend the implementation of the operation until the conclusion of the procedure. Therefore, it can be inferred that the undertakings, lacking a specific suspension order from the Authority, are free to proceed to the implementation of the concentration even before the clearance of the relevant Authorities. Clearly, it has been academically stated[106] that it is advisable to notify the operation after having signed the contractual documentation that has to be attached to the notification documents. Conversely, failure to notify is also sanctioned in the national legal system, up to 1% of the turnover of the interested party in the year preceding the dispute.[107] Other significant differences between the two systems (EU and national) can be found in the phases of the procedure before the Authorities and the deadlines governing them.

[105] Cfr. TAR Lazio, decision No. 2478 of March 19, 2008.
[106] GHEZZI, OLIVIERI, *Diritto Antitrust*, pp. 264 ff.
[107] Article 19, paragraph 2 Law No. 287/1990.

Moreover, in 2005, through a communication, the Italian Competition Authority, the AGCM,[108] sought to soften the procedure by providing the possibility of a "pre-notification" of the operation, in line with what has already been done by the Commission.[109] It provides an informal but intense dialogue between the involved parties and the Authority, even before the formal notification. These talks may last several months, and the *ratio* is to highlight, before the notification procedure, any competition related issues, and more effectively guide the drafting of the notification form and the subsequent procedural instruction phase. Finally, there are also two other important differences between the EU and national legislations. First, the Commission may condition the authorisation of the concentration to measures other than those that are proposed ("spontaneously") by the undertakings. Furthermore, where a concentration is implemented violating the prohibition established by the European Commission, or it fails to comply with one of the conditions, or commitments to which its authorisation was subject, the Commission has the power to de-concentrate (*supra*). At the national level, the AGCM has the power to impose sanctions on non-compliant companies; and to apply all necessary measures to restore the prior conditions of effective competition by eliminating distortive effects[110],[111].

[108] *Autorità Garante della Concorrenza e del Mercato*.
[109] Cfr. Regulation No. 802/2004.
[110] Cfr. Article 18, paragraph 3 of Law No. 287/1990.
[111] GHEZZI, OLIVIERI, *Diritto Antitrust*, pp. 264 ff.

II. GUN-JUMPING

2.1 **Notion**

Diverse infringements may occur throughout the concentration process, with one such violation being gun-jumping. The expression "gun-jumping" originates from the sports vocabulary and denotes a situation where a contestant starts the race before receiving the starting signal. In such an event, the athlete would face disqualification due to a false start. In the context of competition law, a false start is invoked when an undertaking is carried out without compliance with the mandatory requirements for prior notification and suspension outlined in the regulations governing concentration control[1]. The issue in question is not quite recent and may arise in different scenarios. For instance, not only from an intention to circumvent antitrust inspection, but also from interpretative uncertainties, or mere negligence. It can also result from the conflicting needs of companies and antitrust authorities when navigating the various stages of an acquisition, which also fall within the communication obligations provided for under the Merger Regulation[2]. Practically speaking, gun-jumping refers to parties finalising a deal before obtaining clearance. However, other actions, such as demonstrations of control over the target or the sharing of sensitive information between the parties, can also be considered as gun-jumping.[3]

According to a study of the Organisation for Economic Co-operation and Development (OECD), spanning from 1991 to 2018, the Secretariat's research has identified a cumulative count of one hundred and sixteen instances of gun-jumping across all OECD countries, including Associate and Participant countries associated with the Competition Committee. Of course, the research may not be exhaustive due to potential limitations in accessing older cases and decisions online. However, it is evident that the European Commission alone has received more than seven thousand merger notifications since 1990, therefore hundred and sixteen violations of articles 4 and 7 are just a small "piece

[1] GHEZZI, PINI, *False Start! Notes on Gun Jumping and European Merger Control Rules*, 1158-1199.
[2] *Ibidem*.
[3] For instance, the Commission has in the past used its investigative powers under the EUMR to conduct inspections at the facilities of merging parties. This was done to ascertain whether there had been any exchange of sensitive information in breach of the standstill obligation. Cfr. Commission Decision of 30 January 2008 in Case COMP/M.4734, INEOS/Kerling, 30 January 2008.

of the cake". As a consequence, it is easy to infer that, compared to all cases subject to concentration regulations, those related to gun-jumping represent a small number.[4]

But it is well-recognised now, more than before, because of the frequent violations detected from the European Commission and, in particular, after *Altice Europe v Commission* case.[5] Actually, both EC and the French Antitrust Authority have imposed fines on Altice for two distinct violations of stand-still obligations, levying a penalty that exceeds many fines imposed for cartels and other hardcore violations on individual enterprises.

The Regulation 139/2004/EC (Merger Regulation) postulates, on one hand, the obligation to notify to the European Commission all the concentrations having a Community dimension prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest (art. 4(1)). It is also required to convey through a submission that the concentration could have a substantial impact on competition in a given market (art. 4(4)). On the other hand, it provides an obligation for the EC to protect the legitimate interests of the undertakings to preserve their business secrets (art. 4(3)).

Hence, it is affirmed the principle of a concentration *ex-ante* control from which originates the *stand-still obligation* (*infra*). In a nutshell it is important to clarify what this obligation is and what do the companies have – or have not – to do. Article 7 of the Merger Regulation underlines under paragraph 1 that the notifying undertakings of a concentration falling within the scope of the Community, or which is to be examined by the Commission shall not be implemented either prior to its notification or before receiving a declaration of compatibility with the common market.

The Regulation, therefore, mentions the act of implementing a concentration that constitutes a pivotal aspect in the analysis of the phenomenon of gun-jumping. Understanding and establishing the point at which a concentration is deemed effectively executed according to Article 7(1) of the Merger Regulation is crucial. Given that there are two different scenarios, the one in which companies neglect the obligation of prior notification and cases where they breach the stand-still obligation by proceeding with the transaction's implementation, identifying violations in the latter scenario may be more

[4] Cfr. paragraph 25, *Suspensory Effects of Merger Notifications and Gun Jumping*, Background Note by the Secretariat, OECD, DAF/COMP (2018).

[5] Commission Decision of 24 April 2018 No C(2018) 2418, Case M.7993.

intricate, partly due to the absence of specific conditions outlined in Article 7 of the Regulation that could render it plausible to assert that a concentration has indeed been effectively implemented.

After having highlighted the concept of stand-still and having provided a general definition of gun-jumping, it is fundamental to distinguish two circumstances. Many experts categorise the stand-still obligation as a situation that encompasses two different obligations: a positive one (to provide a notification) and a negative one (to refrain from implementing the merger). From one perspective, there is the scenario where the parties to a transaction correctly submit formal notification of the transaction to the relevant competition agency, but subsequently engage in *coordinated activities* during the mandatory pre-closing suspensive period. This behavior is known as "substantive gun-jumping" and typically prompts a complex approach by competition authorities, involving various theories of harm.

Furthermore, the practitioners also look into what is called "procedural gun-jumping", constituting a distinct infringement due to the complete omission of any filing with the respective authority[6]. Any undertaking that infringes the Merger Regulation to such provisions, might face penalties of up to 10 percent of its aggregate turnover.

This distinction between types of gun-jumping leads us to the explanation of different aspects that arise questions. Firstly, it is imperative to analyse the fact that the imposition of penalties for gun-jumping gives rise to challenges concerning the *ne bis in idem* principle, which prohibits double punishment. Secondly, there exists a disparity in the limitation period for each type of offense because on one hand, the violation of the notification obligation (Article 4, paragraph 1) refers to a singular breach and the infringement is not a continuous one; on the other hand, a breach of the stand-still obligation persists as long as the illicit merger is in effect or until the Commission declares it compatible with the Internal Market. Moreover, the stand-still obligation may be violated even if the notification obligation has been fulfilled, but not vice versa. A failure to comply with the notification obligation automatically results in a breach of the standstill obligation. This conclusion is drawn from the fact that a concentration may be notified and implemented without Commission clearance, but penalising a breach of the notification obligation is only possible if the merger has been fully implemented.

[6] LEMMONIER, "*Enforcers take aim at gun-jumping"* (2018) *White & Case Insight.*

Consequently, if it is determined that a merger has been fully or partially implemented without prior notification, a breach of the stand-still obligation is inevitable.[7]

The normative significance of distinguishing between these two types of breaches lies in the procedural nature of a failure to notify, while a violation of the stand-still obligation encompasses both procedural and substantive aspects (as it can impact market structure). Consequently, legal action against a breach of Article 4(1) becomes time-barred three years after its occurrence, whereas the corresponding limit is five years for a violation of Article 7 (1). It is important to note that the limitation period for breaching this last piece of legislation starts only after the transaction has been unwound or cleared. This leads to the issue of *ne bis in idem*: an undertaking that has implemented a merger without notifying it may face fines for two offenses under Article 14(2) EUMR (up to 10% of the undertaking's turnover), even though one could argue that the gun-jumping offense is a single violation.[8]

In the following pages there will be a *focus* on the legal framework of the two types of gun-jumping.

2.1.1 **Substantive gun-jumping**

Substantive gun-jumping concerns the type of scenario where the parties of a merger are also competitors and use to coordinate, illicitly, their competitive actions prior to the formal closure of the transaction. The inappropriate collaborative behavior includes, for example, the exchange of competitively sensitive information. As a fundamental principle, competition laws forbid independent undertakings from coordinating their competitive behaviour[9] and this is what is affirmed in Article 101(1) TFEU: that would be in principle a violation of competition law, but not only there is a meeting of minds, but also this meeting of minds occurs during a merger procedure.

Conversely, for the companies it is not always clear the violation and the reason is that, under article 7 of the EUMR, the scope of the stand-still obligation remains, in some way,

[7] LAURI, *Gun-jumping in the EUMR: how it ought to be regulated*.

[8] For example, in Marine Harvest (Commission Decision of 23/07/2014, Case No COMP/M.7184 – Marine Harvest/ Morpol), the General Court (GC) concluded that the *ne bis in idem* does not apply to a situation where several penalties are imposed in a single decision, despite originating from the same infringement; anyway, the European Court of Justice upheld this outcome on appeal.

[9] DIONNET, GIROUX, *Gun Jumping*.

nebulous and the direct consequence is the potential occurrence of the substantive gun-jumping, even though there is not the will of the parties.
Indeed, the likelihood of incurring in penalties in cases of substantive gun-jumping, has notably risen after *Altice* decision by the Commission.[10] This ruling has generated considerable uncertainty among legal practitioners, as customary M&A practices, including the inclusion of pre-closing covenants in SPAs mandating the seller to obtain the buyer's consent on specific transactions, and discussions and information exchange related to post-merger implementation planning, were deemed in violation of Article 7.[11]

That is the *discrimen* that leads us to say that, differently from the procedural gun-jumping, the violation of the stand-still obligation through the substantive type introduces a more complex dimension. Actually, it is evident that more cases flagged and contested by the EC for having breached the obligation are not merely straightforward instances of gaining full control over the target and transferring the majority of acquired shares; it is trickier, due to the complex legal issues. The situation leads to a necessary uncertainty for the undertakings involved in the merger, which might – as was already said – occur in the substantive gun-jumping (*infra*). Before that, it might be analysed *Altice/Pt Portugal* case and decision to better understand the substantive gun-jumping. It is a fairly recent decision of the Commission where it has extraordinarily described the guidelines on all conduct susceptible to giving rise to gun-jumping phenomena. Therefore, a thorough analysis of the specific case will be conducted, leading to a detailed exploration of the conclusions reached by the Commission. The objective is to develop general principles applicable to all situations where undertakings preemptively anticipate the effects of concentration, jumping the gun.

2.1.1.1 **Case M.7499, Altice/PT Portugal**

Altice N.V., headquartered in The Netherlands, served as the notifying entity in the *Altice/PT Portugal case (M.7499)*. In 2015, Altice S.A., the former holding company of Altice Group[12], transferred almost all assets and liabilities to its fully owned subsidiary,

[10] Commission Decision of 24 April 2018 No C(2018) 2418, Case M.7993.
[11] ALLENDESALAZAR, *Gun Jumping*, Global Dictionary of Competition Law, Concurrences, Art. N° 86381.
[12] The Altice Group is a multinational corporation involved in cable, fiber, telecommunications, content, and media, operating in four key regions – Western Europe (including France, Belgium, Luxembourg, Portugal, and Switzerland), the United States, Israel, and Overseas Territories (currently covering the French Caribbean, the Indian Ocean regions, and the Dominican Republic). The group delivers high-speed

Altice Luxembourg S.A. that, subsequently, on merged with Altice N.V., the new holding company of the Altice Group. Functioning as a multinational cable and telecommunications company, Altice's operations in Portugal involved subsidiaries, namely Cabovisão and ONI.

PT Portugal SGPS S.A., subject of the transaction, is a multimedia and telecommunications service provider operating across all branches of telecommunications in Portugal. It offers its customers fixed and mobile telephony, internet access, and pay-tv services. The company also provides a range of services tailored for businesses, including, in addition to telephony and internet, data center services and cloud storage.

The pivotal moment occurred on December 9, 2014, when Altice S.A. and Altice Portugal S.A. executed a Share Purchase Agreement with Brazilian telecom operator Oi S.A. (referred to as "Oi" or the "Seller"). This facilitated the acquisition of sole control over PT Portugal through an SPA.

The Transaction, falling under the Union dimension of the Merger Regulation, was formally notified to the Commission on February 25, 2015, following the pre-notification talks that began on December 18, 2014. On April 20, 2015, the Commission issued a clearance decision, deeming the Transaction compatible with the internal market, contingent upon Altice's full compliance to the stipulated obligations and conditions[13].

However, on April 13, 2015, the Commission reached out to Altice following media reports surfaced about visits by Altice executives to PT Portugal before the clearance decision. Therefore, Altice was requested to provide details about the visits, aiming to determine whether there was an exchange of information during the meetings. The Commission also requested documents related to the visits, and Altice initially provided only its own documentation. After further prompts, Altice did also furnish the documentation from PT Portugal. As a consequence of the EC's analysis of all the documents, on March 11, 2016, Altice was subject to an investigation for potential breaches of the stand-still obligation (Article 7) and notification requirement (Article 4) of the Merger Regulation.

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services such as premium pay television, fast broadband Internet, fixed-line telephony, and, in some regions, mobile phone services to both residential and corporate customers.

[13] Cfr. Paragraph 4, Summary of Commission Decision of 24 April 2018, Case M.7993 — *Altice/PT Portugal* (Art. 14(2) procedure).

Article 7(1) of Regulation No. 139/2004 imposes the stand-still obligation, stating to refrain from implementing a concentration until the Commission's decision of clearance is made. The Commission identified Altice's violation of this obligation on various factual elements.

The share purchase agreement between Altice and Oi contained clauses of conduct for the period between the agreement's signing and the operation's closure. Under the Agreement, Altice had the right to intervene in PT Portugal's activities beyond what was appropriate to preserve the value of the Portuguese company, overstepping the boundaries[14], holding veto rights[15].[16]

Moreover, the Agreement also included a clause in which Oi committed to refraining from taking various actions against PT Portugal without prior authorisation from Altice. Altice effectively influenced operational decisions within PT Portugal, such as marketing campaigns, commercial contracts, and future investments, even when these decisions did not affect the value of PT Portugal. Even in cases where the transaction agreement did not mandate PT Portugal to seek Altice's approval [17], numerous commercial decisions were only made with Altice's consent and instructions on how to proceed. The Commission verified that, during the relevant period, Oi formally requested Altice's approval for nine actions covered by the agreement clause.

While the Commission recognises that clauses determining certain target company behaviours during the suspension period to preserve its value are common and legitimate business practices, in this case, the contacts between Altice and PT Portugal were not legitimate. The two companies exchanged information on sensitive business areas, and Altice played a substantial role in PT Portugal's decision-making, significantly influencing its strategy.[18]The Commission concluded that the purchase agreement

[14] Cfr. Paragraph 41, Summary of Commission Decision of 24 April 2018, Case M.7993 — *Altice/PT Portugal* (Art. 14(2) procedure).

[15] This could already constitute part of a gun-jumping infringement because, differently from the case in exam, the acquirer may only veto any conduct that relates to significant changes in the target business, provided that such actions are directly linked and essential for carrying out the transaction, as it is also stated in the EC's Ancillary Restraints Notice. Cfr. WILSON, *Altice: Commission Guidance on Gun-Jumping*, in Kluwer Competition Law Blog.

[16] Commission Notice on restrictions directly related and necessary to concentrations 2005/C 56/03. In Part II ("General Principles") (13) it is said that whether are available equally effective alternatives to attain the legitimate aim pursued, the undertakings must choose the one which is objectively the least restrictive of competition.

[17] WILSON, *Altice*.

[18] The EUMR specifies that control can be established through rights, contracts, or other means capable of ensuring the ability to exert decisive influence. This influence can manifest through positive actions, such

between Oi and Altice essentially granted Altice the power to decisively influence PT Portugal's strategic choices, and such clauses cannot be justified in preserving the target company's value.

The Commission noted that Altice:

i. Influenced many routine decisions of PT Portugal, such as contract conclusions, by providing specific negotiation instructions. Additionally, Altice directly participated in PT Portugal's marketing campaigns.
ii. Attempted to influence numerous decisions related to PT Portugal's business.
iii. Systematically exercised control over PT Portugal's activities, essentially acting as if it were a controlling shareholder.
iv. Gathered detailed sensitive information that only an affiliated company or a controlling shareholder would typically have access to. This information exchange occurred without adequate confidentiality and non-disclosure agreements.

The case was closed on April 24, 2018, when the Commission adopted *Decision C(2018) 2418* imposing two sanctions[19] on Altice for an amount of EUR 62.250.000,00 each. The Commission deemed the violation of Article 4(1) and Article 7(1) of the Merger Regulation as inherently serious. Altice's infringement is discernible in three key aspects: firstly, the implementation of a concentration with Union dimension from December 9, 2014, contrary to the Merger Regulation; secondly, violations persisting regardless of the Commission's review outcome; and thirdly, legislative equivalence with Articles 101 and 102 TFEU, imposing similar maximum fines.

This case is a cornerstone in gun-jumping issues (*infra*). What seems to emerge is the necessity for a case-by-case analysis, aimed to understand not only if agreements include clauses that confer rights and/or powers that could imply control, but also to verify if, and how, these rights and/or powers have been exercised. Another example is the exchange of information, which is completely legitimate during the due diligence

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as decision-making, or negative behaviors, like exercising veto rights to prevent certain decisions. The EUMR specifies that control can be established through rights, contracts, or other means capable of ensuring the ability to exert decisive influence. This influence can manifest through positive actions, such as decision-making, or negative behaviors, like exercising veto rights to prevent certain decisions.

[19] Namely, for putting the transaction into effect in breach of Article 4(1) and Article 7(1) Council Regulation No. 139/2004/EC.

period; however, it is still necessary to assess the frequency of such exchanges and the content of these interactions. A potential demarcation line can indeed be found in the type of information being shared: whether it relates solely to decisions aimed at preserving the value of the target or touches on high-sensitivity issues such as pricing policies, advertising campaigns, or other critical areas of the business.

2.1.2 **Procedural Gun-Jumping**

As it was preannounced in the prior section, the procedural gun-jumping type raises less issues than the substantive one. The phenomenon occurs when parties involved in a merger or acquisition fail to notify the transaction to competition authorities and where they implement prematurely implement certain aspects of the transaction before obtaining formal approval from the relevant competition authorities.

This issue is crucial not only to ensure compliance with antitrust regulations but also to prevent companies from gaining an undue advantage in the market before the competent authority has had the opportunity to examine and approve the proposed operation. Furthermore, it has been already explained that procedural gun-jumping raises issues related to the *ne bis in idem* principle, as there can be an overlap between procedural and substantive sanctions imposed on the involved companies.

The most evident and easily identifiable case of gun-jumping involves the violation of the obligation of prior notification of the operation to the European Commission or to the antitrust internal authority. And the reasons behind such conduct can vary a lot, the company might be in good or in bad faith. Firstly, it may stem from a material error caused by the negligence of the involved companies: they might have made a mistake in calculating the dimensional thresholds above which the notification obligation is triggered. Another possibility is that the companies, acting in bad faith, have chosen to omit the notification to avoid the Commission investigation or simply to expedite the procedure of the operation.

An example of this type of procedural gun-jumping may be found in *case Marine Harvest v. European Commission* for the merger of Marine Harvest and Morpol.[20]

[20] Commission Decision of 23/07/2014, Case No COMP/M.7184 – Marine Harvest/ Morpol.

2.1.2.1 **Case M.7184 Marine Harvest/ Morpol**

Marine Harvest and Morpol are two Norwegian companies that are primarily engaged in salmon farming. Marine Harvest ASA ("Marine Harvest") is a Norwegian seafood company listed on the Oslo and New York Stock Exchanges, specialised in both primary and secondary processing of farmed salmon and white halibut, carrying activities not only in many countries in Europe, but also overseas.

Morpol, on the other hand, produces a wide range of salmon products (smoked, frozen, marinated) and manages the secondary processing phase in less countries than Marine Harvest. It was as well as the other company – before the acquisition – listed in the Oslo Stock Exchange.

On December 14, 2012, Marine Harvest entered into a purchase agreement with Friendmall Ltd. and Bazmonta Holding Ltd. which agreed to sell Morpol shares to Marine Harvest. Actually, the two companies were under the exclusive control of Jezy Malek which is the founder and CEO of Morpol. Through this purchase agreement on December 18, 2012, Marine Harvest acquired approximately 48.5% of Morpol's share capital. Under Norwegian law, an acquirer holding more than one-third of shares in a listed company must make a public tender offer for the remaining shares.

On January 15, 2013, Marine Harvest initiated the tender offer for 51.5% of Morpol's shares and, in November 2013, successfully acquired them. Consequently, Morpol was delisted from the Oslo Stock Exchange.On December 21, 2012, Marine Harvest initiated the pre-notification phase with the Commission regarding the Morpol acquisition and formalised the notification of a proposed concentration on August 9, 2013. After having discussed about some of the doubts of the EC, on September 30, 2014, the Commission granted conditional approval for the operation, imposing specific measures on Morpol in the Scottish salmon market. During the investigation, the Commission raised concerns about the adequacy of the notification procedure, pointing out that Marine Harvest's 48.5% ownership of Morpol was already sufficient for effective control.

On July 23, 2014, the Commission confirmed that, at the time of notification, Marine Harvest had *de facto* acquired control of Morpol, resulting in a belated notification. The Commission imposed a fine of EUR € 10 million on Marine Harvest for violating the pre-notification obligation under Article 4(1) EUMR and an additional EUR € 10 million for breaching the standstill obligation under Article 7(1) of the Regulation.

Marine Harvest's defence before the General Court primarily relied on the exemption from the pre-notification obligation provided in Article 7(2) EUMR for public takeover bids on a stock exchange[21]. However, the exemption only applies if the parties promptly notify the Commission and the acquirer refrains from exercising voting rights or does so only to maintain the shares' full value. The Court upheld the Commission's decision, emphasising that the exemption does not apply when the notification is delayed. In this case, Marine Harvest effectively gained control of Morpol in December 2012, making the notification belated.

The General Court[22] confirmed the Commission's findings regarding Marine Harvest's negligent conduct, interpreting Article 7(2) of the Merger Regulation inconsistently with its literal content, previous, Commission decisions, or Court of Justice precedents.

The fined company appealed to the Court of Justice, challenging both of the grounds considered in the General Court's judgment[23].

In particular, in 2020 there was the Court of Justice decision in *Mowi* (Mowi ASA, formerly Marine Harvest ASA) case[24] in which it was emphasised that the exception outlined in Article 7(2)[25] should be interpreted narrowly and cannot be employed to cover any preceding transaction that has already resulted in a change of control. Only transactions deemed essential to bring about a change of control will be considered as components of a unified concentration eligible for exemption under Article 7(2)[26].

The Court of Justice dismissed Marine Harvest's claim of a single concentration, stating that the subsequent public bid had no direct functional link to the earlier private acquisition of shares in December 2012. The initial acquisition, conferring control over Morpol, triggered the notification requirement. The Court considered the subsequent

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[21] This provision allows share transactions before Commission clearance within the context of a public offer.

[22] Judgement of the General Court (Fifth Chamber) of October 26, 2017, in *Case T-704/14 Marine Harvest ASA v European Commission*.

[23] Namely, the GC upheld the Commission decision because agreed with it. The EC issued two EUR 10 million fines against Marine Harvest for violating the obligation of prior notification provided under Article 4(1) of the EUMR, and the stand-still obligation (Article 7(1)) by implementing the concentration before the Commission's approval.

[24] Judgment of the Court (Fourth Chamber) of March 4, 2020, in *Case C-10/18 P. Mowi ASA v European Commission*.

[25] The exception provided in article 7(2) is quite narrow and is about public bids or securities, exempting complex acquisitions from pre-notification, offering legal certainty for transactions with multiple sellers and intricate control dynamics.

[26] Cleary Gottlieb, *Court of Justice Upholds Commission's Two Fines Against Marine Harvest for Gun-jumping*.

mandatory public bid and Marine Harvest's non-exercise of voting rights under Article 7(2) as irrelevant factors.[27]

Mowi contested the imposition of two separate fines by the Commission for the same violation invoking various principles of EU law, including *ne bis in idem* (no one should be punished twice for the same conduct), the set-off principle (the first penalty must be considered in determining the second), and "concurrent offences" (a company should not be penalised for two offences with the same objective).
The Court of Justice clarified that Articles 4(1) and 7(1) of the EUMR establish two distinct obligations with different objectives. Violating Article 7(1) can occur independently of Article 4(1), allowing the Commission to differentiate sanctions. The Court rejected the idea that one offense subsumes the other. Concerning the set-off principle, the Court ruled that Mowi had not demonstrated that the Commission had not adequately considered the first fine in determining the second.

This Commission decision marks a significant development in the (still) emerging discipline of gun-jumping and serves as a warning to market operators, highlighting the serious consequences of completing concentrations before clearance from the relevant antitrust authority. Additionally, the Commission reaffirms an important principle: the acquisition of minority shares can confer *de facto* control, especially where a company's ownership is widely dispersed, and the participation of other shareholders in meetings is low. In such cases, even minority ownership can confer control over the company. Lastly, the Court confirms another principle: for the application of the Merger Regulation, actual exercise of control is not necessary; the mere possibility of exercising control is sufficient.
There also is another type of procedural gun-jumping in which the companies adopt a pre-closing conduct; as an exemplification it can be analysed an important case, namely *Ernst & Young v Konkurrencerådet.* This was the first time in which the ECJ addressed the scope of the standstill obligation since, until then, only the General Court did so.[28]

[27] *Ibidem*.
[28] The Case No COMP/M.7184 went before the ECJ, but only after the decision over *Ernst & Young*.

2.1.2.2. **Case M.7184 Ernst&Young/KPMG DK**

KPMG Denmark ("KPMG DK"), a member of the KPMG International network using KPMG International trademarks under a cooperation agreement in Denmark[29] entered into a merger agreement with Ernst & Young (hereafter also only "EY") on 18 November 2013. On the same day, KPMG DK notified the withdrawal from the agreements to International corporation, taking effects no later than September 30, 2014. After the news of the termination of these cooperation agreements by KPMG DK had started to circulate, many of its clients transitioned to the services of KPMG International, which had already entered into a new cooperation agreement with another tax auditing company.

Therefore, the parties submitted the transaction for clearance to the Danish Competition and Consumer Authority (DCCA)[30] in December 2013, with the clearance granted in May 2014. However, the DCCA, in its December 2014 decision, determined that the parties had violated the gun-jumping prohibition[31] by terminating the cooperation agreement before obtaining clearance, characterising this termination as irreversible, as likely to have market effects and also merger-specific.

The Danish Authority justified its decision based on a comprehensive assessment of the factual circumstances, which can be summarised into three main arguments.

Firstly, the DCCA believed that the termination of the cooperation agreement by KPMG DK was closely linked to the imminent merger with Ernst & Young, asserting that without such an operation, KPMG DK would not have terminated these cooperation agreements. Secondly, the Authority noted that the measure of withdrawing from the cooperation agreements is irreversible, as the notice of withdrawal cannot be revoked in any way. Finally, it considered the potential market effects of the withdrawal notice. If the

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[29] The agreements included provisions providing the distribution of clients, the requirement to offer services to customers from different states, and an annual fee for membership in the network. Additionally, this agreement instituted a voluntary collaboration among the involved companies, functioning under shared rules and presenting themselves as a global network, despite each being an autonomous and independent business.

[30] The transaction did not meet the criteria for the EU dimension according to Council Regulation No. 139/2004/EC, therefore its execution required approval from the Danish Competition Authority and not from the EC.

[31] This concerns paragraph 12c(5) of the Danish Competition Act (Consolidation Act No. 869, July 8, 2015). This provision mirrors the provisions of Article 7(1) Council Regulation No. 139/2004/EC, stipulating a mandatory suspension period of the transaction during the investigative phase and until the decision of the Danish Competition and Consumer Authority.

concentration operation did not receive clearance, the future of KPMG DK would be uncertain. The DCCA therefore argued that a predictive assessment would be sufficient, without the need to demonstrate actual effects.

EY opted to contest the DCCA's gun-jumping ruling in June 2015 by bringing the case before the Danish Maritime and Commercial Court. Since the Danish gun-jumping regulations mirror those outlined in the EUMR, the Danish court suspended proceedings and sought clarification from the CJEU.

With the first question, the Danish Court asked the Court of Justice to clarify the actual scope of the stand-still obligation. With the second one, it inquired whether (and to what extent) the potential market effects resulting from the termination of the cooperation agreements could be relevant. Specifically, asking the Court whether an enforcement action of the operation presupposes that such action constitutes an integral part of the change of control (or merger) of the activities continuing to be carried out by the participating companies[32].

The Court of Justice clarified that a concentration can only be achieved through an operation that, wholly or partly, in fact or in law, contributes to the change of control of the target company. Since Regulation No. 139/2004 does not provide any indication of the conditions under which a concentration can be considered achieved, the Court sought to outline the scope of the prohibition on completing the concentration during the waiting period imposed by Article 7, based on a systematic interpretation of EU law.

Relying on the objectives pursued by the Regulation, the Court held that, to ensure effective control of concentrations, any type of partial implementation of the operation must be considered subject to the application of Article 7. In this perspective, operations closely linked to each other must be considered as a single operation[33], but it is required that they are both necessary for the modification of control of the companies involved in the operation. If, on one hand, these operations are merely preparatory or ancillary phases to the concentration, without a direct and final functional connection to its achievement,

[32] Judgment of the Court of Justice, Fifth Chamber, Case C-633/16, Ernst & Young P/S v Konkurrencerådet, dated May 31, 2018.

[33] Cfr. Recital 20, Regulation No. 139/2004 of January 20, 2004, in the Official Journal of the European Union No. L 024 of January 29, 2004.

then on the other hand, their implementation cannot, in principle, prejudice the actual control of concentrations by the Commission.[34]

As for the second question, namely, whether the circumstance that preparatory operations can have market effects is relevant for concentration control, the Court has established that this is not sufficient to justify an extensive interpretation of Article 7 EUMR. The stand-still obligation applies regardless of whether the concentration is compatible with the common market or not, as this measure aims to ensure the effective control of concentrations. However, it cannot be *a priori* excluded that an operation not producing market effects may still contribute, at least in part, to the modification of control of the target company, realising a concentration.

The principle developed by the Court is, therefore, that, during the suspension period, all operations aimed at bringing about a lasting change of control are prohibited[35].

Finally, the Court clarified that operations not qualifying as concentrations but still capable of affecting the market structure of the Union are not exempt from scrutiny by the Commission solely because Regulation No. 139/2004 does not apply to them. Regulation No. 1/2003[36]., in fact, aims to regulate all business conducts that, without constituting a concentration, may give rise to forms of coordination contrary to Article 101 of the TFEU.[37]However, extending the application of Article 7 of Regulation No. 139/2004 to operations that do not constitute concentrations would amount to arbitrarily expanding the scope of said regulation and narrowing down the field of application of Regulation No. 1/2003.

Returning to the case of KPMG DK and Ernst & Young, the Court considered that the withdrawal from a cooperation agreement, although functional to the realisation of the concentration and despite the effects it may have had on the market, did not, however, contribute by itself to the lasting modification of the control of the target company. It is also worth considering that this withdrawal operation concerned only one of the two

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[34] Judgment of the Court of Justice, Fifth Chamber, Case C-633/16, Ernst & Young P/S v Konkurrencerådet, dated May 31, 2018.

[35] Cfr. Paragraph 52, Judgment of the Court of Justice, Fifth Chamber, Case C-633/16, Ernst & Young P/S v Konkurrencerådet, dated May 31, 2018.

[36] Regulation (EC) No. 1/2003 of the Council, of December 16, 2002, concerning the implementation of the competition rules laid down in Articles 81 and 82 of the Treaty, in the Official Journal No. L 001 of January 4, 2003.

[37] However, extending the application of Article 7 of Council Regulation No. 139/2004/EC to operations that do not constitute concentrations would amount to arbitrarily expanding the scope of said regulation and narrowing down the field of application of Regulation No. 1/2003.

companies involved in the concentration, namely KPMG DK, and that Ernst & Young did not acquire any possibility to exert decisive influence over the counterparty due to this withdrawal, as KPMG DK was entirely independent from KPMG International.[38]
The Court concluded that the termination of the cooperation agreement did not breach the stand-still obligation as it did not contribute to a change of control at KPMG DK[39] and had not anticipated the effects of the concentration during the suspension period.

At the conclusion of the description of the KPMG DK and Ernst & Young case, the significance of this judgment in the discipline of the gun-jumping phenomenon becomes evident. In this context, the Court has formulated fundamental principles that can be summarised as follows:

i. The interpretation criterion of Article 7 of Regulation No. 139/2004 involves evaluating whether an operation has contributed, in whole or in part, in fact or in law, to the realisation of a concentration and thus to a lasting modification of control.
ii. Not all ancillary or preparatory operations to a concentration are relevant for the application of Article 7 of the Regulation. It is necessary to assess whether, in substance, they have effectively contributed to the change in control of the target company.
iii. The potential effects produced on the market by an operation that does not constitute a concentration can be evaluated in light of the provisions contained in Regulation No. 1/2003.

2.2 **The waiting period and the *stand-still* obligation**

In the previous paragraph it was analysed the phenomenon of gun-jumping and it was introduced the *stand-still* obligation. In order to provide for a notion to this concept it might be cleared that it is for the undertakings a negative obligation, to not implement the concentration until the competent competition authority has cleared the transaction.[40]
The *ratio* behind the adoption of a system of preventive control of concentrations, in over ninety jurisdictions, is to prevent distortions and limitations of competition. Eliminating

[38] Cfr. Paragraph 61, Judgment of the Court of Justice, Fifth Chamber, Case C-633/16, Ernst & Young P/S v Konkurrencerådet, dated May 31, 2018.
[39] YSEWYN, *Jumping the gun: some clarification from the Court of Justice*.
[40] ALLENDESALAZAR, *Gun Jumping*.

them at a later stage would prove extremely complicated, and in some cases, it could even be impossible to restore the situation to its pre-operation state. The effects considered do not only concern the sphere of competition law but also emphasise the economic interests of companies, which could be significantly harmed by a potential de-concentration operation. Although concentrations may be evaluated *ex post*, when they are likely to be assessed as anti-competitive agreements prohibited by Article 101 Treaty on the Functioning of the European Union (TFEU) or might lead to market dominance whose abuse is prohibited by Article 102 TFEU, it is recognised that *ex ante* control – preventing such potential negative effects before they might arise – may be more effective [41] than fixing them after a merger has been put into effect[42].

In the European Merger Regulation, Article 7 is titled "*Suspension of concentrations*",[43] and it explains that "*A concentration with a Community dimension […], or which is to be examined by the Commission […] shall not be implemented either before its notification or until it has been declared compatible with the common market*".[44] The provision, amongst its many purposes, one of these is aimed at avoiding the possibility to undermine the effective functioning of the merger control system.
This concept is not a secondary one in competition law, on the contrary it seems to be really important and, as a proof of this value, Margrethe Vestager stated that: "*This obligation, that we call standstill obligation, is at the heart of our merger control system […]".*[45]

2.2.1 **Lack of conditions**

The provision gives major problems. Article 7 EUMR introduces an obligation to suspend any type of implementation but does not provide any further information on the conditions according to which a concentration is considered to be implemented. Furthermore, no information is provided on whether the accessory or preparatory acts – which are usually made up in that period – are to be considered as deeds that employ the concentration or not. This situation leads the companies to breach the stand-still

[41] DUFKOVÁ, *'Gun Jumping' in the merger implementation in the EU in light of the Altice Case*, 95-106.
[42] CAPOBIANCO, OECD, *Suspensory Effects of Merger Notifications and Gun Jumping, Background Note by the Secretariat*, DAF/COMP (2018)11.
[43] Cfr. art. 7 of Council Regulation No. 139/2004/EC.
[44] Cfr. art. 7 paragraph 1 of Council Regulation No. 139/2004/EC.
[45] VESTAGER, Press Release of 20 August 2021 IP/21/4322, Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina / GRAIL transaction.

obligation even though they don't mean to. In fact, in the press release for *Altice* case, the Commissioner Margrethe Vestager stated that: "*Companies that jump the gun and implement mergers before notification or clearance undermine the effectiveness of our merger control system*".[46] Accordingly, on one hand, the notification obligation is intended to ensure that concentrations for which is competent the Commission are brought to its attention; on the other hand, the stand-still obligation aims to prevent the concentration from being implemented before receiving a positive opinion from the Commission.

But how far do really companies understand this notion? The provided activities are too broad to be understood in their parameters. Whatson is to delineate what is the boundary between what can be considered as a licit activity, preparatory for the conclusion of the merger, and what can be considered as a cooperation, a collusion, an exchange of information between the merging parties in view of detrital competition. Navigating the identification of which behaviors are to be classified as *anti-competitive gun-jumping activity* is rather a delicate matter. And the intricacy comes from the consideration that certain forms of coordination or information exchange during the *due diligence* phase of an operation are essential and lawful[47]; the reason why is, in reality, quite easy: its aim is to discover as much information as possible about the *target* company, especially its potential liabilities, in order consider them during the offer development, also to develop a concrete business plan for the future.

It is evident the conflict between, on one side, the economic and commercial purposes that concretely need the contact between the parties, and, on the other side, the imperative to still maintain a level of competition in the relevant market. And this conflict becomes more visible (and, consequently, relevant) where after the conclusion of an agreement but before obtaining an authorisation from the Commission, there's an exchange of information that could easily lead the involved companies to operate as a single economic entity, thereby anticipating the effects of the operation prior to clearance from the Commission, when they should operate as distinct undertakings – as they are before the merger.

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[46] VESTAGER, Press Release of 24 April 2018 IP/18/3522, *Mergers: Commission fines Altice €125 million for breaching EU rules and controlling PT Portugal before obtaining merger approval*.
[47] ALLENDESALAZAR, *Gun Jumping*.

And here it can be raised an important question: what could companies do in order not to fall in the gun-jumping violation when exchanging information? There are some theories, but, in my opinion, the main precautionary safeguards that can be taken are, firstly, to plan information exchanges carefully, considering antitrust implications at an early stage and assessing potential antitrust concerns and taking steps to mitigate risks before entering into agreements. At the same time to institute data rooms, exclusive physical spaces where the relevant information is stored. To develop and enforce clear protocols for communication during merger or collaboration discussions with the establishment of *clean teams* that have exclusive access to the information and data rooms. Its members should refrain from engaging in day-to-day business operations, maintain a restricted number, and adhere to confidentiality protocols.[48] These clean teams should also refrain the management from having access to such information.

2.2.2 **Which type of cooperation?**

The observed trend indicates that following the attainment of a concentration agreement, the involved parties typically perceive the operation as having reached its culmination. Subsequently, they are inclined to proceed with its execution prior to obtaining clearance, regarding that process as a mere "formality". The waiting period can be arguably represented as the most delicate phase for the companies involved, given that they have acquired a considerable amount of sensitive information, thereby fostering an incentive for them to act in a coordinated manner. However, the complexity of the issue intensifies at this juncture, primarily due to the aforementioned point that such behavior may potentially entail a violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU) in principle. The ensuing problem stays around the question of whether to apply this specific piece of legislation or, alternatively, to address the matter in terms of a violation through premature implementation, gun-jumping, and its contravention of the stand-still obligation.

The precise delineation of the application frontiers of this concept remains unclear at this point in time. However, it is undeniably certain that, in a general sense, information that is publicly accessible in a highly aggregated form is unlikely to give rise to coordinated behavior and this assertion also holds true for historical data that are old to

[48] Cfr. note 42.

the extent that they no longer have the capacity to unveil the market strategies of a company. Nevertheless, it is important to underscore, as previously mentioned, that there exist no fixed criteria for determining when data ceases to pose risks to competition. The evaluation typically depends on various factors, including the nature of the data, the level of aggregation, the frequency of exchange, and characteristics of the relevant market (such as its stability, transparency, structure, and entry barriers). For instance, in previous cases, the European Commission has regarded the exchange of individual data which was more than one year in age as historical[49] and therefore not could reveal the company's strategies. During this phase, all activities that may involve coordination between companies should be undertaken with the objective of preserving the value of the target.

Even though it is not possible to predict every form of coordination that companies may undertake before the completion of the operation, it can be done a list of some of the most common practices:

i. Exchange of sensitive information that may impact competition of the relevant market;
ii. Actual integration of relevant aspects for the activities carried out by the companies, such as infrastructure, information systems, personnel, corporate identity, or marketing initiatives;
iii. Placement of personnel from one company into new positions opened in the counterpart company involved in the operation;
iv. Any activities by the acquirer aimed at influencing and/or controlling strategic aspects of the target, such as pricing determination or selective selling to certain customers.

The next paragraphs will analyse the first two types of coordination, relevant to the gun-jumping phenomena.

2.2.2.1 **Exchange of sensitive information**

The exchange of sensitive information between competing undertakings before the clearance decision can be interpreted by a competition authority not only as a potential cartel behavior but also as a form gun-jumping. This exposure may lead to sanctions, including fines and the risk of being held liable for damages in legal proceedings initiated

[49] BEDROS, *Exchange of Information in M&A Transactions – Competition Issues*.

by affected parties. While parties are rightfully encouraged to take necessary steps to advance their transaction business integration initiatives, this legitimacy hinges on refraining from any implementation activities before obtaining the required approvals for merger control. To mitigate risks, merging parties should restrict the disclosure or exchange of non-public, competitively sensitive information to a designated group of individuals known as the "clean team".[50] These individuals must possess a level of knowledge essential for the successful execution of the transaction. Moreover, it is crucial to ensure that any shared information, whether qualitative or quantitative, is limited strictly to what is absolutely essential to reach the terms of the agreement, valuation, or organisational purposes.[51]

Competition law authorities may rise concerns whether this exchange of sensitive information occurs before clearance and, subsequently, if the transaction fails to be finalised. Such an event could have significant consequences, as shared information might facilitate price fixing, stabilization, or coordination of future prices, rates, or terms of trade, as well as the sharing of customers and market. In light of these concerns, the involved parties should perhaps limit the sharing of sensitive information to what is absolutely necessary for deal negotiations and integration planning. Any information exchange should match the progress made towards finalising the transaction, both in terms of quality and quantity.

2.2.2.2 **Integration of relevant aspects for the activities**

All the rules explained *infra* also apply to the integration planning of relevant aspects between the parties before the acquisition is closed. Accordingly, the parties are expressly prohibited to fully implement any integration plans or to coordinate their present or future business activities before the closing, in particular since the acquisition needs to be notified to a competition authority.[52]

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[50] The composition of the clean team should be separately identified by both merging parties and include external, independent consultants such as accountants or lawyers, to grant that any exchange of information occurring prior to the closure of the deal adheres to secure practices and aligns with the regulations governing competition.

[51] LOURENÇO, *Information exchanges between competitors from a competition law perspective – the problem of premature exchanges of sensitive information in the context of merger control (Gun Jumping)*, 78-101.

[52] *Ibidem*.

2.2.3 **Derogation**

Article 7, paragraph 3 EUMR: "*The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction*".[53]

It is clear that there are exceptional cases in which concentrations, that would normally be subject to the stand-still obligation, enjoy an exemption instead. In such cases, the undertakings are allowed to conclude the operation before the waiting period expires. Article 7, paragraph 3 of the Regulation specifically addresses this possibility; many other jurisdictions also provide this option. Within the European Union, the Commission, upon a properly motivated request from the parties, can grant an exemption from the stand-still obligation considering, in order to decide upon, not only the concrete situation of the requesting companies, but also any potential harm the concentration might cause to competition.

The EC has the important task to carry out a real balancing act of conflicting interests, namely the need of the involved companies to expedite the effects of the operation and the necessity to safeguard and ensure effective competition in the relevant market. In fact, the Commission might decide to grant the exemption even only subject to additional conditions[54] and requirements aimed, of course, at ensuring that the concentration is harmless for competition in the market affected by the operation. As for the assessment of the actual possibility to grant the early implementation of the concentration, there is the need for the requiring undertakings to bring circumstances that justify the "urgency" of carrying out the operation, or at least a part of it.

The kind of assessment that the Commission must undertake involves a thorough examination of the entire operation, especially regarding its compatibility with the common market, albeit in a more concise manner compared to the Commission's usual

[53] Crf. Article 7 paragraph 3, Council Regulation No. 123/2004/EC.
[54] Cfr. Commission Decision in Case M.8633 – Lufthansa/Certain Air Berlin Assets of 21/12/2017.

post-notification process. It is essential for the Commission not to harbor strong doubts about the concentration because, if it grants the derogation and the companies proceed with the operation, reinstating the *status quo ante* in case of denied clearance would pose significant challenges. Therefore, it is reasonable to assume that the Commission may grant a derogation under Article 7(3) of Regulation No. 139/2004 only when it initially evaluates the entire operation positively.

The exemption occurs, obviously, in exceptional cases and there are not many registered until now. But one example might be, for instance, in cases where the transaction does not, *prima facie*, raise competitive concerns, and immediate execution becomes imperative to prevent bankruptcy or other severe adverse consequences that are typically unrelated to a standstill obligation.[55]

2.2.3.1 **Case M.8633: Lufthansa/Certain Air Berlin Assets**

One of such cases is *Lufthansa/Certain Air Berlin Assets*[56] of 2017 where the Commission has decided "*not to oppose the operation as modified by the commitments and to declare it compatible with the internal market*".[57] Case M.8633 regards a request for an exemption from the stand-still obligation with the consequent positive decision of the EC; being of considerable interest it deserves to be explored further.

Lufthansa,[58] headquartered in Cologne, Germany, serves as the holding company of Lufthansa Group,[59] second Europe's largest airline, encompassing various subsidiaries. Operating flights to 301 destinations in 100 countries with a fleet of about 600 aircraft, it is also the largest airline in Germany, Austria, and Switzerland by both passengers and revenue. Luftfahrtgesellschaft Walter GmbH (LGW), headquartered in Dortmund,

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[55] SNELDERS, PIERGIOVANNI, *European Union*, in *ICLG to Merger Control*, 103-110.

[56] Case M.8633 – LUFTHANSA / CERTAIN AIR BERLIN ASSETS Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No. 139/2004/EC and Article 57 of the Agreement on the European Economic Area.

[57] Official Journal of the European Union, EUR-Lex, document number 32017M8633.

[58] One of the founding members of the Star Alliance, the world's largest airline alliance, formed in 1997 and which includes Adria Airways, Aegean Airlines, Air Canada, Air China, Air India, Air New Zealand, All Nippon Airways, Asiana, Austrian Airlines, Avianca, Brussels Airlines, Copa Airlines, EgyptAir, Ethiopian Airlines, EVA Air, LOT Polish Airlines, Scandinavian Airlines, Shenzhen Airlines, Singapore Airlines, South African Airways, Swiss International Air Lines, TAP Portugal, Thai Airways, Turkish Airlines and United Airlines.

[59] Besides its own services, and owning subsidiary passenger airlines Austrian Airlines, Swiss International Air Lines, Brussels Airlines, and Eurowings (referred to in English by Lufthansa as its *Passenger Airline Group*), Deutsche Lufthansa AG owns several aviation-related companies, such as Lufthansa Technik and LSG Sky Chefs, as part of the Lufthansa Group. In total, the group has over 700 aircraft, making it one of the largest airline fleets in the world.

Germany, is a wholly owned subsidiary of Air Berlin, the second largest airline in Germany. Although Air Berlin filed for insolvency in 2017, LGW remains solvent. On October 28, 2017, with the cessation of Air Berlin'' operations, LGW discontinued leasing its aircraft to Air Berlin.

On October 13, 2017, Lufthansa entered an agreement to acquire all shares in LGW and NIKI,[60] along with other assets and rights from Air Berlin. Anticipating that, before the completion of the acquisition, Air Berlin would transfer its own fleet of aircraft, cabin crew, and certain airport slots to LGW. The acquisition's scope was later modified on December 13, 2017, focusing solely on Lufthansa's acquisition of all shares in LGW, additional aircraft, crew, and airport slots to be transferred to LGW before closing. As a result of the transaction, Lufthansa would have acquired exclusive control of LGW and, consequently, all assets belonging to it. LGW, therefore, would have served as the vehicle to allow the continuation of the flight program previously operated by Air Berlin under a crewed lease contract with the Lufthansa group in 2016.

Together, the legal entity LGW, along with the assets, resources, and rights conveyed to it before the conclusion of the transaction, forms a business with a discernible market presence, to which a clear market turnover can be assigned. Therefore, LGW, including the supplementary aircraft, crew, and slots to be transferred, represents an undertaking or a component of an undertaking as defined by the Merger Regulation.[61]

The Transaction therefore represents a concentration falling within the meaning of Article 3(1)(b) EUMR.

On October 10, 2017, Lufthansa submitted a request to the Commission seeking an exemption from the suspension obligation under Article 7(3) of the Merger Regulation. The exemption request regarded the implementation of the following measures:

i. The substitution of Lufthansa for Air Berlin in aircraft leasing contracts (up to a maximum of twenty aircraft);
ii. The conclusion of a new lease agreement for 17 of the aforementioned 20 aircraft, with Lufthansa as the lessee and LGW as the lessor;
iii. The submission of the flight plan by Lufthansa to LGW to enable the latter to operate.

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[60] Another Air Berlin's subsidiary.

[61] Official Journal of the European Union, EUR-Lex, document number 32017M8633.

The Commission, when deciding whether to grant such a waiver, has to evaluate the potential effects on third parties[62] and/or competition arising from the early execution of the operation. Here, the Commission decided that implementing the measures requested by Lufthansa would essentially outcome to a carrying out of the concentration itself. So, Lufthansa, in justifying the exemption request, asserted that if it couldn't promptly step into Air Berlin's aircraft leasing contracts, the lessees would have leased the same aircraft from other operators, essentially hindering NIKI and LGW from continuing their operations. Therefore, the granting of such a waiver would have been crucial to prevent the complete suspension of LGW and NIKI activities, and, according to the applicant, it would not have had any negative impact on third parties, nor would it have entailed a structural modification of the relevant market.

The Commission considered it likely that the denial of the exemption could have led to the immediate cessation of all flight routes operated by NIKI and LGW. Such an outcome would have had negative repercussions for both consumers and the employees of these companies. Furthermore, the complete shutdown of operations would have pushed NIKI and LGW into insolvency, causing inevitable harm to creditors. In evaluating the potential impacts on market competition linked to the exemption approval, the Commission observed that the involved parties had significant market influence, especially in major airports in Germany, Austria, and Switzerland. This considerable strength at key global hubs could create substantial barriers to competition.

During this phase, the EC has to balance diverse interests. On one side, there is the undeniable negative effect a denial of the exemption would have on the implicated companies and external stakeholders like consumers or personnel. On the other side, granting the exemption would pose a substantial threat to the competitive landscape of the relevant market, exacerbated by the fact that the operation would be executed prior to a thorough Commission examination.

As a result, the Commission chose to grant Lufthansa's requested exemption, contingent upon meeting specific conditions to ensure that the early implementation of the measures would not adversely impact competition, particularly by not complicating the future sale of NIKI and LGW to another purchaser.

[62] As it is provided for by Recital 34 of Council Regulation No. 139/2004/EC.

Therefore, the Commission imposed three conditions on Lufthansa:

i. Ensure that the aircraft leasing contracts entered into by Lufthansa could be easily transferable to NIKI, LGW, or any other potential buyers, without granting Lufthansa the right to impose monetary sanctions.
ii. In the event that Lufthansa had to purchase the aircraft used by NIKI and LGW, it had to guarantee these entities and other buyers the opportunity to lease or purchase such aircraft on market terms.
iii. In case Lufthansa had entered into leasing contracts with NIKI or LGW as a lessee, and these companies were subsequently acquired by another entity, the acquirer should be able to terminate such leasing contracts without incurring any penalties.[63]

Concerning the evaluation of the actual feasibility of granting early implementation of the concentration, this case highlights the necessity to verify the existence of circumstances that could justify the urgency in carrying out the operation or, at the very least, a part of it. The Commission primarily considers potential adverse effects arising from the delay in obtaining clearance, which could negatively impact consumers, creditors, and employees of the involved companies.

2.2.4 **Activities carried out during the waiting period**

Going through the analysis of Article 7 it is necessary to have a look at paragraph 4, which provides that: "*The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(1), (2) or (3) or on a presumption pursuant to Article 10(6)*".[64]

It defines the consequences that apply to all those acts that have been carried out in the waiting period by the undertakings, in violation of Article 7(1).

In order to fully understand the provision, it is essential to have a short look at the recalled articles.

Article 6, titled "*Examination of the notification and initiation of proceedings*", provides the general recommendation for which the EC has to examine the notification of a merger as soon as it is received. Moreover, in paragraph 1, letter b), it is underlined that where the Commission finds that the notified concentration does not raise serious

[63] Cfr. Paragraphs 39, 40 e 41, Commission Decision on case M.8633, *Lufthansa/Certain Air Berlin assets*.
[64] Cfr. Article 7 paragraph 4 of Council Regulation No. 139/2004EC.

doubts as to its compatibility with the common market, even though it falls within the scope of the EUMR, it shall decide not to oppose it and declare its compatibility with the common market.[65] Hence, the provision gives the Commission great discretional powers that, therefore, are examined in the following provisions.

Article 8 is titled "*Powers of decision of the Commission*" and its first three paragraphs are of importance in this field:

- Paragraph (1) provides that when the Commission determines that a reported merger meets the conditions specified in the Merger Regulation[66] and in the TFEU[67], it will release a decision confirming the compatibility of the concentration with the common market that is considered to encompass limitations that are directly linked and essential to carrying out the concentration.
- Paragraph (2) underlines that if, upon modification by the relevant undertakings, the Commission determines that a reported merger satisfies the same conditions specified in the previous paragraph, it will issue a decision confirming the compatibility of the concentration with the common market and, if needed, will impose conditions and obligations in its decision.
- Paragraph (3) provides the cases in which the Commission determines that a merger satisfies the criteria outlined the EUMR[68], but does not meet the ones

[65] Cfr. Article 6 (1) (b) of Council Regulation No. 139/2004/EC

[66] Cfr. Article 2 paragraph 2 Council Regulation No. 139/2004/EC: "*A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market*".

[67] In the cases referred to in Article 2(4), the criteria laid down in Article 81(3) (previously TEC) of the Treaty (now 101(3)) that provides that the provisions outlined in paragraph 1 (behaviors incompatible with the internal market) may, nevertheless, be considered inapplicable in the case of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, or any concerted practice or category of concerted practices. These exceptions apply when such actions contribute to improving the production or distribution of goods or promoting technical or economic progress, while ensuring consumers receive a fair share of the resulting benefits. However, these actions must not impose unnecessary restrictions on the concerned undertakings to achieve these objectives or provide them with the opportunity to eliminate competition significantly for a substantial part of the relevant products.

[68] Cfr. Article 2 paragraph 2 Council Regulation No. 139/2004/EC. It highlights that in cases where the Commission determines that a concentration has already been implemented and declared incompatible with the common market or has been implemented in violation of a condition attached to a decision under paragraph 2, the Commission is empowered to take specific measures. If the concentration is found incompatible, the Commission may require the involved undertakings to dissolve the concentration, especially through the dissolution of the merger or divestment of acquired shares or assets, with the goal of restoring the situation existing prior to the implementation of the concentration. If dissolution is not feasible, the Commission has the authority to implement any other appropriate measure to achieve as much restoration as possible. Furthermore, the Commission is authorised to issue any other suitable measure to

specified in the Treaty, it will take a decision stating that the concentration is not compatible with the common market.

Lastly, Article 10 is titled "*Time limits for initiating proceedings and for decisions*" and its sixth paragraph provides that where the EC has not taken a decision in accordance with Article 6(1)(b), (c), 8(1), (2) or (3) within the time limits set in paragraphs 1[69] and 3[70] respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.[71]

After having given these important inputs, necessary to understand Article 7(4), it is interesting to consider what would happen to the transactions where the Commission decides not to authorise the operation, considering that rule states that the validity of each transaction undertaken in violation of the stand-still obligation depends on the Commission's decision regarding the compatibility of the operation with the common market.

So, there are two different scenarios:

i. The Commission decides to grant clearance, giving the green light to the undertakings;
ii. The Commission decides not to implement the transaction and block all the activities.

For what concerns the first hypothesis (i.), the transactions would not be affected by any kind of invalidity, it rather only would serve as a basis for the imposition of fines[72] (*infra*). In the second scenario (ii.) the Commission does not grant clearance and all the acts and the activities carried out by companies during the stand-still period are null and void. This is evident where Article 8 (4) EUMR outlines that if a merger is identified to have already been implemented and declared incompatible with the common market, or implemented in contravention of a condition attached to a decision made under paragraph 2, the Commission has the authority to require the concerned undertakings to dissolve the

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ensure that the concerned undertakings dissolve the concentration or undertake other restorative actions as specified in its decision.

[69] Set at 25 working days at most. Period that shall be increased to 35 working days where the Commission receives a request from a Member State, in some given cases.

[70] The decision shall be taken within not more than 90 working days of the date on which the proceedings are initiated. That period shall be increased to 105 working days where the undertakings concerned offer commitments. This period can be increased again for 15 more days.

[71] Cfr. Article 10 paragraph 6 of Council Regulation No. 139/2004/EC.

[72] Cfr. Article 14 of Council Regulation No. 139/2004/EC.

merger. This can be achieved through the dissolution of the merger or the divestiture of all acquired shares or assets, aiming to restore the situation prevailing prior to the implementation of the merger. In cases where restoration is not feasible through dissolution, the Commission may adopt any other suitable measures to achieve the *closest possible* restoration.

It is not a coincidence that the Council has decided to use the phrase "*closest possible*", given the fact that the Commission has the duty to account for all relevant factors that can be accounted, between which there are: "*the nature and gravity of damage to the undertakings concerned or to third parties*".[73] This is an important provision: the undertaking that has implemented the merger before the expiration of the stand-still period, might have entered into business relationships with third parties that could be in *bona fides*. As a consequence, in order to achieve the goal of mitigating all the negative effects for the third parties involved, somehow, in the violation, the EC might have to grant approval to the concentration.

Such cases (i.) and (ii.) converge in the substantive gun-jumping type. Accordingly, it is more favourable to assess these situations.

It is more difficult to reach such a conclusion,[74] because in this scenario there is not even a deliberation phase in which the EC has given an opinion. Anyway, it is still possible to have that outcome, and, in those cases, the Commission has the power – of course – to fine the undertakings.

2.3 **Failure to provide a preventive notification**

Where the merging companies fail to notify the concentration, they violate the provision of article 4, paragraph 1 of Regulation 139 of 2004, stating that: "*concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation* […]".[75] The notification though shall be made of course before the implementation of such concentration, but also after the

[73] Cfr. Recital 34, Council Regulation No. 139/2004/EC: "*In deciding whether or not to grant a derogation, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the under- takings concerned or to third parties, and the threat to competition posed by the concentration. In the interest of legal certainty, the validity of transactions must nevertheless be protected as much as necessary*".

[74] More difficult than the situation in which it is ascertained the violation of failure to notify (procedural gun-jumping).

[75] Cfr. article 4 paragraph 1 Council Regulation No. 139/2004/EC.

conclusion of the agreement, the announcement of the public bid or after the acquisition of a controlling interest.
The Regulation states that the undertakings concerned must be sure about the concentration they ought to make, before activating the process before the European Commission through the notification. The provision expresses an obligation that applies to each concentration having a Union dimension: this duty to notify holds significance in the EU's *ex ante* control system as it guarantees that the EC is made aware of such concentrations, securing the Commission's ability to detect and investigate them.[76]
This is the most straightforward form of gun-jumping. Differently from Article 7 and the stand-still obligation, Article 4 provides a clear obligation, thus it is easily to detect such a violation.

Anyway, investigating various cases of procedural gun-jumping, it was clear that only occasionally the Competition Authorities (NCAs & EC) have discovered instances where parties intentionally failed to notify a merger. On the contrary, in the majority of cases it was not identified the deliberate wrongdoing, instead, what has been observed was more a misunderstanding regarding whether the merger notification requirements were applicable to the transaction or not. For example, companies might struggle to comprehend the assessment of control or how to calculate the combined aggregate worldwide turnover or the aggregate Community-wide turnover and market share.
Before 2009, the Commission primarily addressed cases of lacking prior notification with leniency, and only imposed minor fines in two instances, one of which involved procedural gun-jumping.[77] In several other cases, the Commission opted not to levy fines at all. For example, the Commission did not issue gun-jumping fines in *Air France/Sabena*[78], even though the transaction was implemented before notification, nor in *IPO/EnBW/Praha/PT*,[79] where the notification only occurred nine years later.[80]

[76] Cfr. note 42.
[77] In 1998 the EC imposed fines (€33.000,00) for failing to notify and for putting into effect three concentrations in breach of Article 4 and Article 7(1) of Council Regulation (EEC) No 4064/89, Case No IV/M.969 – A.P. Møller.
[78] Commission decision of 05.10.1992 declaring a concentration to be compatible with the common market (Case No IV/M.157 - AIR FRANCE / SABENA) according to Council Regulation (EEC) No 4064/8.
[79] Case No COMP/M. 5365 IPO / ENBW / PRAHA / PT.
[80] HULL, GORDLEY, *Gun Jumping in Europe: An Overview of EU and National Case Law*, e-Competitions | N°85642.

Where a concentration generates distorting effects on competition (irreversible, in some cases), before obtaining the Commission's authorisation, it is not directly a prerequisite for the determination of wrongdoing and the subsequent imposition of sanctions. The Commission can impose significant sanctions for the violation of Articles 4(1) and 7(1), regardless of the assessment of any anticompetitive effects that the implementation of the concentration may have caused in the market. This means that even if the operation has had no negative impact, the Commission has the authority to impose substantial sanctions. Indeed, such a mechanism is designed to enable the Commission to conduct a comprehensive review of all concentrations with a euro-unitary dimension. The imposition of sanctions aims to act as a deterrent for companies from committing the offense of gun-jumping, providing clear evidence that implementing a concentration before the Commission's evaluation will not go unpunished.

2.3.1 **Case COMP/M.4994 Electrabel/Compagnie Nationale du Rhône**

One of the most famous cases of failure to provide a preventive notification is *Electrabel* case, thereby falling within the scope of the Merger Regulation due to its Community dimension.

Electrabel is a Belgian company operating in the energy sector, involved in the production and sale of electricity and natural gas. It is the largest energy producer in the Benelux and it was a part of the Suez group[81] at the relevant time, actively engaged in public utility services in partnership with businesses and individuals across electricity, gas, and water sectors. Additionally, Electrabel operated in the French market through its subsidiary, Electrabel France (EDF).

La Compagnie Nationale du Rhône (CNR) is a French public company engaged in electricity production and river engineering services, functioned under a concession granted by the French state.

On June 24, 2003, Electrabel acquired stakes in CNR, constituting 17.86% of its share capital and 16.88% of its voting rights. A few days later, on June 27, 2003, Electrabel and Electrabel France entered into a SPA for shares outlining the complete transfer of EDF's stake in CNR to Electrabel.

[81] An industrial and service group, active in the management of public utility services as a partner of local authorities, undertakings and individuals in the electricity, gas energy services, water and public health sectors.

However, a problem arose because the MURCEF law[82] provided a prohibition that barred private operators from holding more than the 50% of CNR's share capital or voting rights because, being under a concession, such majorities were reserved to local or regional authorities.

On December 23, 2003, Electrabel purchased EDF-held shares, elevating its stakes in CNR to 49.95% of the capital and 47.92% of the voting rights. Meanwhile, the Caisse des Dépôts et Consignations (CDC) held 22% of the share capital, and the rest of the ownership structure was fragmentated. Elctrabel then obtained the ability to nominate two out of three executives to CNR's management, consolidating its role as the sole industrial shareholder, thanks to an arrangement with CDC.

Four years later, on August 9, 2007, Electrabel decided to reach out the Commission to seek an opinion on its acquisition of *de facto* sole control over CNR. Subsequently, in order to facilitate the EC's following analysis of CNR's current and historical status, there were discussions between Electrabel's legal advisers and the Commission. These contacts concluded in 2008, when the company notified the concentration on March 26 in accordance with Article 4 of the Merger Regulation. On 29 April 2008, acting under Article 6(1)(b) EUMR, the Commission decided not to oppose the concentration, and declared it compatible with the common market and the EEA Agreement[83]. The EC left open the question as to the exact date in which the control over CNR was acquired[84], as it had no bearing on the competition analysis, concluding only Electrabel held *de facto* sole control over CNR. A statement of objections (SO) was then sent in the following months to Electrabel (17/12/2008) where the Commission issued the prior acquisition of control over CNR, before Regulation (EC) No 139/2004 entered into force. Electrabel answered to the SO requesting a hearing.

On June 10, 2009, the Commission issued a decision after an investigation, determining that the operation had been realised before notification, thereby violating Article 7(1) of Regulation No. 4064/1989.[85] Consequently, Electrabel was fined for 20 million Euros. The Commission argued that Electrabel had gained control over CNR when it acquired

[82] Law of 11 December 2001 no. 2011/1168.

[83] Commission Decision of 10 June 2009. Case COMP/M.4994 Electrabel/Compagnie Nationale du Rhône.

[84] The Commission had clear information showing that Electrabel had effectively acquired exclusive control of CNR in 2003 (23/12), thus before the EUMR had entered into force.

[85] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. No longer in force, Date of end of validity: 30/04/2004.

majority shares and the right to appoint two out of three members to CNR's Board of Directors in December 2003. The widely dispersed ownership structure ensured Electrabel a stable majority at shareholders' meetings, despite lacking an absolute majority of voting rights.

Even though Electrabel did not secure a majority of voting rights in CNR, and thus did not possess a *de jure* control over CNR, an examination of participation and voting patterns among shareholders during meetings revealed that Electrabel would, in reality, possess an absolute majority. This would grant it the ability to exercise *de facto* an exclusive control over CNR. The Commission determined that this *de facto* control was further substantiated by additional factors, such as Electrabel's majority position on the board of directors.[86]

Electrabel challenged the decision initially before the General Court, which upheld the EUR 20 million fine, affirming the correct find of the Commission in its determination for the breach. The court ruled that, as of December 2003, Electrabel effectively held a majority at shareholder meetings and over the board of directors, establishing *de facto* control over CNR. Electrabel's claim, that this was a mere procedural violation, was dismissed by the General Court which deemed the failure to report a significant transaction a serious infringement of EU competition law.

The General Court also rejected Electrabel's arguments where these were asserting that the Commission's actions were time-barred. It determined that the failure to notify the transaction and subsequent violation of the stand-still obligation did not fall under a procedural infringement subject to a limitation period. Instead, the General Court concluded that such infringements persisted as long as the control acquired in breach of Article 7(1) persisted, and the transaction had not been authorised by the Commission.[87]

On 3rd July 2014, the European Court of Justice rejected Electrabel's appeal in its entirety, but primarily on procedural grounds. The ECJ highlighted that Electrabel's arguments were inadmissible as they had not been raised before the GC. While the ECJ did not explicitly confirm the Commission and General Court's position on the non-instantaneous nature of the infringement and the applicability of the statute of limitations, it noted that the Commission had interrupted the 5-year limitation period with a request for

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[86] Herbert Smith Freehils, *Warning to companies of the Importance of compliance with EU merger control filing requirements: EU General Court upholds €20 Million fine imposed on Electrabel,* Competition Law.
[87] Case T-332/09, Electrabel v Commission, 12 December 2012, paragraph 212.

information in June 2008. The ECJ explained that even when the participation of other shareholders in assemblies reached its maximum level (76.6%), Electrabel still maintained a stable majority. This was very well explained by the Commission, projecting the voting rights at general meetings that would be held by a shareholder with a stake of 47.92% of voting rights on December 23, 2003. This projection considered the participation rates of shareholders observed at general meetings in the four fiscal years preceding the acquisition of the EDF stake. According to this estimate, the voting rights held by such a shareholder would consistently exceed 60%.[88]

The Court agreed with the EC's prospect to such an extent that it decided that in the prospective assessment phase focusing on the configuration of voting rights in assemblies, the criterion to be applied involves examining how these arrangements have been structured over a period spanning at least the three fiscal years leading up to the current one. The argument put forth by Electrabel, asserting that Article 21 of the MURCEF law[89] would guarantee that Electrabel would not acquire control over CNR, was indeed rejected by the court. This decision is based on the understanding, as already discussed in the first chapter, that holding the majority of shares or voting rights in a company is not the sole means through which control can be exercised. Under certain conditions, a much more modest stake may be sufficient for this purpose.

As a consequence, despite not holding the majority of voting rights at the general assembly, minority shares can still ensure a *de facto* control as well, especially when the other ownership is significantly dispersed as in *Electrabel* case.

Finally, the Court of Justice has confirmed what was stated *prima facie* by both the Commission and the Tribunal: Electrabel *de facto* assumed control of the target well before completing the notification of the transaction. The judges further emphasised that effecting a concentration before obtaining approval from the Commission is not merely a formal violation of a regulation but can concretely lead to structural changes in the market, with significant implications on competition, confirming the fine applied previously.

[88] Judgement of the General Court (Third Chamber) of December 12, 2012, in Case T-332/09, paragraph 52.

[89] Article 21 of MURCEF law mandated that the majority of the share capital and voting rights could not be held by a private operator.

2.4 **Fines**

Violating the standstill obligation has two main consequences for the undertakings concerned: the Commission may forbid the transaction and mandate its reversal; and apply fines. The Council Regulation No. 139 of 2004 provides when and how the Commission can apply penalties to the merging parties.

In particular it has to be analysed Article 14, paragraph 2, according to which: "*The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertaking 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, they:*

(a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorized to do so by Article 7(2) or by a decision taken pursuant to Article 7(3);

(b) implement a concentration in breach of Article 7;

(c) implement a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not comply with any measure ordered by decision pursuant to Article 8(4) or (5);

(d) *fail to comply with a condition or an obligation imposed by decision pursuant to Articles 6(1)(b), Article 7(3) or Article 8(2), second subparagraph*".[90]

The Commission has the authority to impose fines for violations of the stand-still obligation, with sanctions reaching up to 10 percent of the combined turnover of the involved parties from the prior financial year, even if the transaction is eventually cleared. Additionally, should the EC identify potential gun-jumping violations while reviewing the notified transaction, it could adversely affect the overall review process.[91] In fact, within the following paragraph (3), the Council underlined that the Commission, by fixing the amount of the fine, shall have regard to: "*the nature, gravity and duration of the infringement*".[92] This provision gives the Commission the right to modulate the sanction to the situation.

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[90] Article 14 paragraph 2 of Council Regulation No. 139/2004/EC

[91] CARLONI, *Electrabel v Commission & COMP M.7184 Marine Harvest/Morpol*: *Gun-jumping and Violation of the Merger Standstill Obligation in Europe*, *Journal of European Competition Law & Practice*, pp. 693–696.

[92] Article 14 paragraph 3 of Council Regulation No. 139/2004/EC.

Even though at first the EC was more willing not to fine or to apply the *de minimis* sanctions, with the *Electrabel* case,[93] however, there was a change in approach, and for the first time, the Commission imposed a substantial fine of 20 million Euros.[94]
This clearly marks the moment when the European Union shifted gears regarding gun-jumping adopting a significantly stricter stance compared to the previous era.
This trend is indeed confirmed by subsequent decisions of the Commission, such as the 2014 ruling against *Marine Harvest,*[95] which incurred a fine of 20 million Euros. The decision on *Altice/PT Portugal*[96] also aligns with this trend, imposing a penalty of 125 million Euros, as does the recent decision on *Canon*, where the Commission imposed a fine of 28 million Euros.[97]
This new attitude of severity towards gun-jumping incidents is a sign of renewed attention from the Commission towards concentration regulations and beyond. It also reflects how the evolution of law often occurs through legal decisions, in this case, through the Commission's rulings.

2.5 **Issues on the legislation on gun-jumping**

Going through the last paragraphs it is evident that there are issues surrounding gun-jumping legislation, particularly the relationship between two key articles, 4(1) and 7(1) of the Regulation No. 139 of 2004.
There are of course some differences between the two provisions. On one side, Article 4(1) provides a positive obligation to act (notify the concentration) whereas, on the other side, Article 7(1) issues a negative obligation not to act, avoiding the implementation of the notified concentration. Moreover, the limitation periods for both the infringements are different: while the notification obligation is subject to a three-year limitation period, the standstill obligation is statute-barred after five years.[98]

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[93] Cfr. *supra* pp. 67 ff.
[94] It is interesting the declaration of Neelie Kroes, a competition Commissioner at that time that, by announcing this penalty, explicitly stated: "Implementing a transaction which has not received the clearance foreseen in EU law constitutes a serious breach of the Merger Regulation. Today's decision sends a clear signal that the Commission will not tolerate breaches of this fundamental rule of the EU merger control system. Cfr. Commission press release of 10 June 2009, *Mergers: Commission fines Electrabel 20 million euros for acquiring control of Compagnie Nationale du Rhône without prior Commission approval*.
[95] Cfr. *supra* pp. 46 ff.
[96] Cfr. *supra* pp. 41 ff.
[97] Cfr. page 95.
[98] KREGL, *Gun-Jumping and EU Merger Control Selected Issues and Types of Problematic Conduct*.

The legal framework of these articles may seem unusual, as both violations can lead to the imposition of similar penalties. However, breaching the preventive notification obligation automatically triggers a violation of the stand-still obligation. The *Marine Harvest* case acknowledged this peculiarity, hinting at potential challenges to the legality of these provisions.

In *Mowi* judgement,[99] the Court of Justice clarified that Article 4(1) and Article 7(1) of the Merger Regulation establish two distinct obligations with separate objectives. Article 4(1) requires the notification of a concentration before its implementation, while Article 7(1) prohibits implementing a transaction before obtaining the EC approval, constituting a stand-still obligation.

In short, a company may violate Article 7(1) without infringing Article 4(1) by notifying the transaction at the appropriate time, but proceeding with its implementation before the Commission issues a decision; on the contrary, the Court of Justice[100] underlined that the breach of the duty to notify automatically results in an infringement of Article 7(1).

The dynamic interaction between adherence with Article 4(1) and the risk of premature concentration implementation presents nuanced considerations. Despite complying with Article 4(1) EUMR, the persistent risk of early implementation remains a tangible concern.

Challenges to the imposition of penalties for both violations have been raised, invoking the principles of proportionality and the prohibition of double punishment with the *ne bis in idem* principle. In *Altice Europe,*[101] the General Court emphasised the "autonomous objectives" of both Articles 4(1) and 7(1) within the "*one-stop-shop*" principle, justifying the imposition of two separate fines[102], highlighting the peculiarity of the relationship between Articles 4(1) and 7(1) of the EUMR. Altice's successor appealed the General Court's judgement on 2 December 2021.[103] The appeal argues that the General Court erred in law in rejecting Altice's objections of illegality along with its claims that the

[99] Judgment of the Court (Fourth Chamber) of 4 March 2020, in *Case C-10/18 P. Mowi ASA v European Commission*.
[100] Judgement of the General Court (Sixth Chamber) of 22 September 2021, *Altice Europe NV v Commission*, Case T-425/18, ECLI:EU:T:2021:607, paragraph 54.
[101] Judgement of the General Court (Sixth Chamber) of 22 September 2021, *Altice Europe NV v Commission*, Case T-425/18, ECLI:EU:T:2021:607.
[102] Judgement of the General Court (Sixth Chamber) of 22 September 2021, *Altice Europe NV v Commission*, Case T-425/18, ECLI:EU:T:2021:607, paragraph 56.
[103] Judgement of the Court of Justice of 9 November 2023, *Altice Group Lux v Commission*, Case C-746/21 P.

Decision infringed the principles of proportionality and the prohibition of double punishment, and in its interpretation of the notion of "implementation" under Articles 4(1) and 7(1) EUMR under the Court of Justice's judgement in *Ernst & Young*[104]. The appeal argues that *Ernst & Young* provided that transactions that are not necessary to achieve a change of control do not fall under Article7(1) EUMR because they do not present a functional link with a concentration's implementation.[105]

Another recalled issue linked to the relationship between Articles 4(1) and 7(1) of the EUMR is the *ne bis in idem* principle, under which an undertaking cannot be sanctioned more than once for the same actions.

In *Marine Harvest*, it was invoked this principle to seek the annulment of the Commission decision; what was new was that the GC, in rejecting the claims, grounded its reasoning in the case law of the European Court of Human Rights. According to this jurisprudence, the *ne bis in idem* principle should only be considered applicable when different offenses based on a single act are prosecuted consecutively, one after the other. Thus, the application of the principle is considered irrelevant in merger cases involving both procedural and substantive gun-jumping.[106]

These findings were subsequently affirmed by the Court of Justice, which identified no legal errors in the General Court's judgment.[107] The same *ne bis in idem* argument was also introduced in the *Altice* case; however, the applicant withdrew it after the General Court made a reference to the *Marine Harvest* decision.[108]

Another key issue in the gun-jumping literature and jurisprudence are the veto rights, which have been at the very center of the landmark gun-jumping case, *Altice*. The problem is that veto rights which confer joint control typically include decisions on issues such as the budget, the business plan, major investments, or the appointment of senior management. The acquisition of joint control, however, does not require that the acquirer has the power to exercise decisive influence on the day-to-day running of an undertaking. The crucial element is that the veto rights are sufficient to enable the parent companies to

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[104] Court of Justice's judgement of 31 May 2018 in Case C-633/16, Ernst & Young.

[105] MODRALL, *EU General Court Upholds Commission Gun-Jumping Decision: Altice Europe NV v Commission*, pp. 549 – 552.

[106] Judgement of the General Court (Fifth Chamber) of 26 October 2017, *Marine Harvest ASA v European Commission*, paragraphs 307-344.

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

[108] KREGL, *Gun-Jumping and EU Merger Control Selected Issues and Types of Problematic Conduct*.

exercise such influence in relation to the strategic business behavior of the joint venture. Moreover, it is not necessary to establish that an acquirer of joint control of the joint venture will actually make use of its decisive influence. The possibility of exercising such influence and, hence, the mere existence of the veto rights, is sufficient.[109]

Quite peculiar are the veto rights concerning decisions on the appointment and dismissal of the senior management and the approval of the budget. The power to co-determine the structure of the senior management, such as the members of the board, usually confers upon the holder the power to exercise decisive influence on the commercial policy of an undertaking. The same is true with respect to decisions on the budget since the budget determines the precise framework of the activities of the joint venture and, in particular, the investments it may make.[110]

And, of course, according to the Commission, the main issue in the case was the SPA and its contractual covenants[111] that allowed Altice to exercise veto powers over PT's daily business operations. In light of this, and other actions, Altice was considered as already controlling PT Portugal, exercising a decisive influence over the latter.

[109] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), paragraph 67.

[110] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), paragraph 69.

[111] One of the contested provisions in the SPA forbade the target, among other things, from engaging in transactions, making commitments, incurring liabilities, or entering into or terminating agreements, once these exceeded a threshold of 5 million EUR. Additionally, the agreement restricted the target from hiring or firing new directors and officers, as well as altering its pricing policies.

III. M. 8179 CASE: CANON/TOSHIBA MEDICAL SYSTEMS CORPORATION

After having highlighted what gun-jumping violations are, and what the fine mechanism is, it will be explored a specific case where a breach occurred, in particular of the procedural type, resulting in a EUR 28 million fine imposed by the European Commission. Moreover, for this case, also both the US and China levied fines for gun-jumping, while Japan issued a warning regarding the potential violation.

3.1 **Background**

Canon Inc. (hereinafter, only "Canon") is a multinational company renowned for its expertise in crafting cutting-edge imaging and optical products. It boasts a diverse portfolio ranging from cameras and camcorders to photocopiers and computer printers[1]. Canon also specialises in the manufacture of medical equipment, including computed tomography systems, diagnostic ultrasound systems and medical devices magnetic resonance imaging systems. Canon is a publicly listed company, headquartered in Tokyo, Japan, and listed on the stock exchanges of Tokyo, Nagoya, Fukuoka, Sapporo, and New York[2]. According to the consolidated financial results of Canon, it reported a turnover of YEN 3,951,937 million (EUR 30,307.2 million) for the year from January 1st, 2018, to December 31st, 2018. The medical equipment business unit accounts for 11% of its total sales[3]. In a strategic move to expand its offerings, Canon acquired Toshiba Medical Systems Corporation (hereinafter, also only "TMSC"). TMSC was a company that operated within the sphere of medical equipment, engaging in a spectrum of activities ranging from research and development to manufacturing, sales, and technical service provision. Its offerings encompassed a wide array of medical devices[4]. Previously a subsidiary of Toshiba Corporation ("Toshiba"), a publicly listed company, headquartered in Tokyo, Japan, and listed on the stock exchanges of Tokyo and Nagoya, TMSC is now

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[1] With an unwavering commitment to innovation, Canon has solidified its position as a leader in the industry, continually pushing the boundaries of technological advancement.

[2] Canon / Toshiba Medical Systems Corporation (Case M.8179) Commission Decision of 27.6.2019.

[3] Cf. Canon's results for the fourth quarter and the fiscal year ended 31 December 2018. Amounts converted to EUR based on the average 2018 EUR/JPY conversion rate of the European Central Bank ("ECB") (1 EUR= 130.396 JPY).

[4] Such as diagnostic x-ray systems, medical x-ray computed tomography systems, magnetic resonance imaging systems, CT diagnostic ultrasound systems, radiation therapy systems, diagnostic nuclear medicine systems, medical sample testing equipment, and information systems tailored for medical equipment.

a subsidiary of Canon. On January 4th, 2018, TMSC was renamed Canon Medical Systems Corporation ("CMSC").

The renaming of TMSC to CMSC on January 4th, 2018, symbolises a seamless transition. It reflects Canon's commitment to exploit the collective strengths of both entities to drive sustainable growth and deliver value to stakeholders. In essence, Canon's acquisition of TMSC and its subsequent transformation into CMSC symbolises a paradigm shift in the convergence of technology and healthcare, underscoring Canon's relentless pursuit of excellence and innovation across diverse domains.

3.2 **Parking arrangement**

Before delving into the intricacies of this case, it is essential to establish a clear understanding of the concept of "*parking arrangement*" (or warehousing) within the context of merger control.

In merger control, a "*parking arrangement*" describes a scenario where a company is temporarily held by a third party, typically a financial institution or a bank. This interim holding is undertaken with the expectation that the company will be sold to a final buyer only after having obtained an approval from the relevant antitrust authority. The financial risk associated with the initial purchase is often borne by the eventual buyer, who assists in facilitating the transaction. This structure offers a commercial advantage to sellers by mitigating merger control risks and expediting the sales process. By making an offer contingent on merger control clearance, sellers can close deals more swiftly, enhancing the appeal of their offerings during negotiations. And this was a key object in Canon/TMSC case[5].

However, despite the practical utility of parking arrangements, there exists a regulatory discrepancy. The Merger Regulation appears to disregard this type of scenario, as it states that a concentration does not occur when «*credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them*»[6]. The consequence of this provision would – at first glance – be that the parking arrangement should not be sanctioned by the European Commission.

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[5] Canon / Toshiba Medical Systems Corporation (Case M.8179) Commission Decision of 27.6.2019.
[6] Article 3 paragraph 5 lett. a Council Regulation No. 139 of 2004.

Notwithstanding, this apparent oversight is further compounded by conflicting interpretations within the Commission Consolidated Jurisdictional Notice[7]. Under paragraph 35, the provision seems to be antagonist with respect to Article 3(5)(a) of the EUMR. In particular, it is there outlined that when a company is "*parked*" with an interim buyer, based on an agreement for the future sale of the business to a final acquirer, there have to be applied certain conditions. The interim buyer typically obtains shares "*on behalf*" of the final acquirer, who often shoulders a significant portion of the economic risks and may also receive specific rights. In these cases, the initial transaction serves solely to facilitate the subsequent one, with the initial buyer directly connected to the final acquirer. The target business remains unchanged, and the series of transactions is initiated solely by the final acquirer. Finally, «*The Commission will consider the transaction by which the interim buyer acquires control in such circumstances as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer*»[8].

A pivotal case shedding light on this regulatory ambiguity is *Editions Odile Jacob SAS v Commission*[9]. In this case, Vivendi, a French mass-media holding company headquartered in Paris, sought to expedite the sale of its publishing assets in Europe, that had through its subsidiary company Vivendi Universal Publishing (VUP). Lagardère, a French conglomerate, entered into an agreement with a bank (NBP) to acquire, and subsequently resell, these assets, pending the approval of the European Commission. Lagardère agreed to indemnify NBP for any losses resulting from the initial purchase. The Commission approved the merger but imposed specific conditions for Lagardère to adhere to, in order to acquire the publishing assets. In fact, the EC emphasised that without these conditions, the merger would have led to the creation or strengthening of a dominant position. As a consequence, Lagardère committed to divesting a significant portion of VUP's assets. It contacted several companies interested in acquiring these assets, including Editions Odile Jacob, which expressed interest in the operation. However, at the end of the process to select the new buyer, Lagardère accepted the offer from another company, Wendel Investissement. So, despite concerns raised by the

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[7] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004, 1–48, Document 52008XC0416(08).

[8] Paragraph 35, Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

[9] Judgment of the Court (Grand Chamber), Case C-551/10 P, Éditions Odile Jacob SAS v European Commission.

Commission, the transaction was eventually approved, underscoring the complex interplay between regulatory provisions and judicial interpretations in the context of parking arrangements. Consequently, Odile Jacob sought for the annulment of the authorisation and in September 2010, the Court upheld the concentration clearance decision but annulled the buyer's authorisation decision.[10] These rulings were upheld by the Court of Justice in 2012, where Odile Jacob lodged a new annulment appeal against this decision, which was rejected by the Court in a judgment dated September 5th, 2014. Odile Jacob, at that point, sought the annulment of that last judgment before the European Court of Justice, that ruled: «*Even if the transactions carried out in December 2002 enabled Lagardère to acquire, as early as that period, the control, or control jointly with NBP, of the target assets, that circumstance had no consequences other than that the notification of the concentration at issue might be found to have been made late or, possibly, as stated by the General Court* […]*, that that concentration might be found to have been implemented prematurely, and without clearance under Regulation No 4064/89*».[11]

The European Court of Justice chose not to delve deeper into the gun-jumping aspects of the transaction. The *ratio* was that the Commission had authorised the concentration under certain conditions, so there was not the necessity for the General Court to scrutinise whether Lagardère gained sole control or joint control with NBP over the target assets through the nominee holding arrangement. This determination was deemed unnecessary for ruling on the legality of the contested decision. The decision by the ECJ has been argued to confirm the legality of parking arrangements in EU merger control. However, subsequent developments, such as the Commission's decision in Canon/Toshiba Medical Systems Corporations,[12] have raised questions regarding their legitimacy.

3.3 **The transaction**

Canon's acquisition of TMSC was executed through a two-step transaction structure, the "*parking arrangement*".

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[10] Stating that it was based on a report prepared by an agent who did not meet the independence requirement set by the Commission.
[11] *Ibidem*.
[12] Cf. note 2.

3.3.1 **The Canon/TMSC transaction**

On March 17th, 2016, Canon publicly announced that the share transfer agreement (the "Transaction") with Toshiba was completed, signifying Canon's acquisition of TMSC and its transformation into a Canon subsidiary. The agreement was contingent upon obtaining necessary regulatory clearances, like it was underlined by Canon in its website: «*This transaction is conditional upon the clearance of necessary competition regulatory authorities*».[13]

On the same day, Toshiba and TMSC disclosed their agreement, with Toshiba agreeing to sell TMSC to Canon, thereby resulting in TMSC being no longer a subsidiary of the Toshiba group[14]. Toshiba's decision to sell TMSC was influenced by significant financial difficulties experienced in 2016, notably the risk of reporting negative shareholders' equity by the end of the financial year ending March 31, 2016, as it was pointed out in Toshiba's response to the Article 11(3) Decision of October 7th, 2016[15]. In the Toshiba Revitalization Action Plan and FY2015 Forecast, Toshiba underlined: «*As Toshiba Group is limited in its ability to allocate of necessary resources for business operation, in-depth measures, such as reforms made with other companies outside Toshiba Group, are under consideration as the next step*»[16]. Moreover, at page 9 of the Action Plan, it was included to invite outside majority shareholder(s) into TMSC in exchange for cash[17]. As per Toshiba's, finalising the definitive agreement for the majority shareholding sale of TMSC prior to the conclusion of its fiscal year 2015 would enable the company to effectively enhance its financial records.

Toshiba initiated an expedited bidding process for TMSC's sale, with bids solicited by January 13th, 2016, followed by subsequent rounds, and final proposals due by March 4th, 2016.

Firstly, Toshiba introduced an "80/20 proposal" transaction structure to bidders on February 19th, 2016, aiming for a horizontal comparison of proposals.

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[13] Cf. Canon's website in "News Release", "*Canon Inc. to make Toshiba Medical Systems Corporation a subsidiary*".

[14] Cf. note 2.

[15] No public company, comparable to Toshiba, in Japan's records of that time had reported such an occurrence, so Toshiba faced uncertainty regarding the repercussions on its business performance, financial stability, and market standing. The company perceived a looming threat of adverse outcomes across various facets of its operations.

[16] Cf. Toshiba website "Toshiba Revitalization Action Plan and FY2015 Forecast", 5.

[17] Cf. note 2.

This plan involved the buyer acquiring 20% minus one share of TMSC by March 2016 and pre-paying for the remaining 80% plus one shares. Toshiba would retain ownership of the remaining shares until competition authorities approved the transfer. If approvals were not granted by June 2016, the buyer would keep the acquired shares, and Toshiba would refund the pre-payment minus a break-up fee.

In its response, Canon proposed a new structure ensuring full payment to Toshiba before March 2016, while delaying formal control acquisition until regulatory clearances were secured. This arrangement, though complex and legally risky, offered Toshiba an expedited and irreversible payment method, securing its financing needs. The bid was so appealing due to two main reasons: its innovative two-step transaction scheme for which Canon proposed an expedited and irreversible transfer of the entire purchase sum, which provided Toshiba with immediate liquidity; and because it did not rely on merger control clearances in any jurisdiction, reducing regulatory risks.

Following thorough examination, Toshiba deemed Canon's proposal the most competitive, as it offered swift and unconditional payment, leading to the announcement on March 17th, 2016. Toshiba signed binding transaction documents, ensuring timely financing.

3.3.2 **The creation of a holding**

On March 8th, 2016, a special-purpose vehicle (MS Holding) was created. It had as controlling directors a Senior Advisor at a Japanese Corporation, an attorney and a CPA, former Executive Board Member of a Japanese Services firm, chosen by Canon, Toshiba and MS Holding's external lawyers, the Japanese law firm TMI Associates, and each of them holding a 33.3% stake in MS Holding[18].

The MS Holding acquired certain voting shares in TMSC for approximately € 80, while, Canon, in consideration for payment of the full price agreed for the purchase of TMSC, for approximately € 5.28 billion, acquired call options on all the remaining voting shares in TMSC. In addition, Canon acquired the one non-voting share in TMSC for approximately € 40.[19]

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[18] Cf. note 2.

[19] General Court of the European Union, Press Release No 86/22, *The General Court dismisses the action brought by Canon, which was fined € 28 million by the Commission for failure to comply with merger control rules in its acquisition of Toshiba Medical Systems Corporation*, Judgment in Case T-609/19 Canon v Commission.

To effect the transfer of TMSC to the third-party warehouse, Toshiba and Canon indirectly established a special purpose vehicle (SPV), which acquired 95% of TMSC's shares for a nominal sum. Canon promptly paid the entire EUR 5.28 billion purchase price to Toshiba upfront, securing a 5% stake in TMSC along with an option to acquire the remaining shares held by the SPV. These options, exercisable upon the receipt of merger control clearances or the conclusion of proceedings across various jurisdictions, including the EU, constituted the "Interim Transaction". Following the fulfilment of the merger control conditions, Canon exercised its option, resulting in the acquisition of 100% of TMSC's shares through the SPV (here the "Ultimate Transaction").

The agreement for the warehousing structure and the subsequent implementation of the Interim Transaction took place on March 17, 2016. Just before, Canon formally notified the Commission about the Ultimate Transaction, outlining both phases of the warehousing structure. Although Canon obtained Phase I merger clearance from the Commission regarding TMSC's acquisition in September 2016, a separate procedural investigation was initiated to examine potential violations regarding premature execution through the use of the warehousing structure.[20]

3.3.3 **The conversion of the shares**

In order to understand the complexity of the structure, it is crucial to analyse the conversion of the shares, keeping in mind the technicisms of the description.

Following Canon's proposal, TMSC undertook several actions to facilitate the implementation of the transaction structure and converted its 134.980.060 ordinary shares and created certain (new and additional) classes of shares to be able to implement the transaction structure.[21]

On March 15th, 2016, TMSC amended its articles of incorporation for including the new and additional classes of shares, referred to as the "Amended Articles of Incorporation". Under these amended articles, TMSC created three categories of shares:

(a) Class A Shares ("voting shares");
(b) Class B Share ("non-voting shares");
(c) Class C Shares ("voting shares with a call option exercisable by TMSC").

[20] EVANS, BOYD. *Canon/Toshiba medical systems: questions raised on the legitimacy of warehousing and further enforcement of gun jumping*, 24-29.
[21] Cf. note 2.

Additionally, TMSC converted all of its existing ordinary shares into Class C Shares and introduced Share Options for the compulsory buyback of all Class C Shares.
Lastly, on March 16th, 2016, TMSC executed the conversion of the Class C Shares and issued in return:

(a) 20 Class A Shares;
(b) 1 Class B Share;
(c) 100 "Share Options" attached to Class C Shares.

At TMSC shareholder meetings, holders of Class A Shares were entitled to one voting right per share owned. Resolutions regarding the appointment of directors and internal auditors required a majority vote from attending shareholders, while their remuneration needed approval through a shareholder meeting resolution.
In contrast, Class B Shares did not grant voting rights at shareholder meetings. However, written consent or a prior resolution from Class B shareholders was necessary for specific matters outlined under Article 322(1) of the Japanese Companies Act, such as decisions on share issuance, approval under Article 179-3(1), acquiring treasury shares, or organisational restructuring.
The Share Options, also known as "First Series Share Options", were detailed in the appendix to TMSC's Amended Articles of Incorporation. These options were based on TMSC's ordinary Class C Shares, with each option representing 1.349.800 shares. Holders of Class C Shares had voting rights, but these rights couldn't be exercised as long as the options remained unexercised.
Share Options could be exercised until December 31st, 2018, provided that all merger control proceedings in the US, EU, China, and Brazil were completed, either through approval or expiration of relevant waiting periods. Exercising the options was not contingent upon any other conditions.

3.4 **The process**

On March 17th, 2016, Canon made a decisive move to acquire TMSC from Toshiba, aiming to establish it as a subsidiary. This pivotal decision was formalised through a "Shares and Other Securities Transfer Agreement" (hereinafter, only the "Agreement") between Canon and Toshiba. According to the Agreement, Canon agreed to purchase one Class B share for ¥ 4,930 (roughly € 40) and 100 Share Options attached to Class C Shares for ¥ 665,497,806,400 (equivalent approximately to € 5.28 billion).

Also on March 17, 2016, MS Holding and Toshiba executed the "Excluded Share Transfer Agreement", wherein MS Holding agreed to acquire 20 Class A Shares for ¥ 98,600 (approximately € 800). Both agreements were executed simultaneously. As of March 17, 2016, the fulfillment of the following conditions was required:

(a) TMSC's Articles of Incorporation had to be amended as outlined in Exhibit 5.1.1.1 of the Agreement;
(b) The Share Alteration[22] process had to be completed in accordance with Article 5.1 of the Agreement;
(c) The *Excluded Share Transfer Agreement* had to be legally executed, and the transfer of the Class A Shares to MS Holding had to be finalised. This agreement was contingent upon the execution and enforceability of the Agreement.[23]

According to TMSC's Amended Articles of Incorporation, once the conditions for exercising the Share Options were fulfilled, including obtaining approvals from competition authorities, the following actions were expected:

(a) Canon would proceed to exercise its Share Options, thereby acquiring all Class C Shares, representing TMSC's ordinary shares (134,980,000);
(b) TMSC would repurchase the Class B Share from Canon at the same price it was originally paid for its acquisition, ¥ 4,930 (approximately € 40);
(c) TMSC would also buy back the 20 Class A Shares from MS Holding at ¥ 1,804,930 (around € 15,000) per share, amounting to a total of ¥ 36,098,600 (roughly € 300,000). MS Holding had initially acquired these shares for ¥ 98,600 (about € 800)[24].

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[22] The "Share Alteration" is defined in Article 5.1 (2): "*Immediately upon the Articles of Incorporation Amendment becoming effective, Seller shall alter all of the 134,980,060 ordinary shares issued by the Target and held by Seller, to Class C Shares, by consent of Seller as the only shareholder in the Target*." (Shares and Other Securities Transfer Agreement, Article 5.1, paragraph 2, p. 10).

[23] Pursuant to Article 1.2 of the *Excluded Share Transfer Agreement*, the acquisition by MS Holding of 20 Class A shares "*shall be completed on the condition that the Shares and Other Securities Transfer Agreement dated March 17, 2016, is lawfully and validly executed between Canon Inc. and Seller and continues to remain in effect, and that, at the time of completion of the Transaction, the transfer of all Class B Shares in the Target and First Series Share Options in the Target under that agreement is reasonably expected to be completed with certainty*." See Shares and Other Securities Transfer Agreement, Exhibit 1.1. Excluded Share Transfer Agreement executed in 2016.

[24] Canon explains that "*the purchase price of the Class A shares payable by TMSC to MS Holding upon the exercise of the option was determined by negotiation between Toshiba and Canon, considering the expected corporate tax incurred by MS Holding, incorporation costs of MS Holding, legal fees payable to TMI, and appropriate level of remuneration for three directors of MS Holding*". Cf. Canon's Reply to the RFI dated

If the conditions for exercising the Share Options were not met (i.e., approvals from competition authorities were not obtained), Canon had the right to sell its Share Options to a third party. Subsequently, the third party could exercise these options upon obtaining the necessary merger control clearances, if required.

To reiterate for clarity, the transactions involving the sale of the Class B Share and Share Options to Canon, as well as the sale of the Class A Shares to MS Holding, collectively constitute the "Interim Transaction". The acquisition of 100% of Class C Shares, subject to obtaining the necessary merger control clearances, is denoted as the "Ultimate Transaction".

The entire transaction, involving Canon gaining sole control over TMSC through both the Interim Transaction and the Ultimate Transaction, is referred to as the "Concentration".

On December 19th, 2016, after obtaining all relevant merger clearances, including approval from the Ministry of Commerce of the People's Republic of China, Canon exercised its Share Options and finalised the Ultimate Transaction[25].

3.4.1 **The EC authorisation**

On March 11th, 2016, Canon initiated the regulatory process by submitting a case team allocation request to the Commission concerning its acquisition of sole control over TMSC in accordance with Article 3(1)(b) of the Merger Regulation.

Subsequently, Canon diligently provided the Commission with the necessary documentation, including the Form CO section regarding transaction structure and a concise presentation outlining transaction steps. Furthermore, an English translation of the *Shares and Other Securities Transfer Agreement*, along with select exhibits, was provided to the Commission on April 18th, 2016. Canon's engagement with the Commission persisted as they submitted a first draft Form CO on April 28th, 2016, followed by responses to inquiries posed by the Commission on May 11th, 2016, specifically regarding the transaction structure. On August 12th, 2016, Canon formally

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11 May 2016, Part I (transaction structure), question 2, dated 27 May 2016, p. 5. Amounts in text as converted by Canon in Form CO in Case M.8006 – Canon/Toshiba Medical Systems Corporation, paragraph 54.

[25] Cf. note 2.

notified the Commission of its acquisition of sole control over TMSC by acquiring 100% of its shares in accordance with Article 4 of the Merger Regulation, stipulating coverage from the Interim Transaction to the Ultimate Transaction on a without prejudice basis. After conducting a thorough investigation, the Commission concluded on September 19th, 2016, that the Concentration raised no competition concerns. Consequently, the EC issued an Approval Decision, deeming the Concentration compatible with the internal market and the EEA Agreement.[26]

3.4.2 **Articles 4 and 7 Reg. 139/2004**

The previous chapter thoroughly covered the essential aspects of the two articles; but nonetheless, a quick review of them is beneficial to grasp their relevance to the case. In accordance with the Merger Regulation, the Commission evaluates mergers with Union-wide scope, as defined in Article 1 EUMR, to assess their compatibility with the internal market. Articles 4(1)[27] and 7(1)[28] of the Merger Regulation are fundamental components of the preventive control framework for Union mergers, essential for ensuring its effectiveness. They require companies to report Union-wide mergers and prohibit their implementation until they have been reported and deemed compatible with the internal market.

While mergers typically result from a single transaction, the concept of a concentration under Article 3 EUMR can encompass several legally distinct but closely connected operations, constituting a single concentration. This notion is referenced in Recital 20 of the Merger Regulation, which states: «*It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time*».

[26] Agreement on the European Economic Area, Official Journal L 001, 03/01/1994 P. 0003 - 003.

[27] Article 4(1) of the Merger Regulation provides: "*Concentrations with a Community [Union-wide] dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest*".

[28] Article 7(1) of the Merger Regulation specifies that *"A concentration with a Community [Union-wide] dimension as defined in Article 1, or which is to be examined by the Commission 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 8(2), or on the basis of a presumption according to Article 10(6)"*.

According to the Court in the *Cementbouw*[29] case, to determine if different operations are part of a single concentration, one must consider "the economic purpose pursued by the parties".[30]
The specific scenario of warehousing schemes, characterised by two-phase arrangements involving a temporarily third party intermediary, is outlined in paragraph 35 of the Consolidated Jurisdictional Notice. In such schemes, «*an undertaking is 'parked' with an interim buyer, often a bank, on the basis of an agreement on the future onward sale of the business to an ultimate acquirer. The interim buyer generally acquires shares 'on behalf' of the ultimate acquirer, which often bears the major part of the economic risks and may also be granted specific rights. In such circumstances, the first transaction is only undertaken to facilitate the second transaction and the first buyer is directly linked to the ultimate acquirer. Contrary to the situation described in the first scenario in paragraphs 30-33, no other ultimate acquirer is involved, the target business remains unchanged, and the sequence of transactions is initiated alone by the sole ultimate acquirer.* […] *The Commission will consider the transaction by which the interim buyer acquires control in such circumstances as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer*».[31]
Therefore, the two operations (Interim and Final transactions) within a warehousing scheme constitute two phases of a single concentration. Hence, within a warehousing scheme, as outlined in paragraph 35 of the Consolidated Jurisdictional Notice, it reflects both Recital 20 of the Merger Regulation and the Court's interpretation of the notion of a single concentration in the *Cementbouw* case.

Indeed, when considering the entire transaction structure in its economic reality, it becomes apparent that the interim and the final transactions are closely intertwined. The interim transaction serves as a means to achieve the final transaction, through which the final buyer secures lasting control over the target. Consequently, although the interim transaction alone does not result in the acquisition of lasting control, it is regarded as part of a single concentration where the final buyer gains control over the target.[32]

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[29] Case T-282/02, Cementbouw Handel & Industrie v. Commission.
[30] *Ibidem*, part 106.
[31] Cf. note 7.
[32] Summary of the Commission Decision of 27 June 2019 in Case M.8179 — Canon/Toshiba Medical Systems Corporation.

Therefore, in accordance with EU regulations and case law, the concept of a single concentration suggests that a temporary and non-permanent operation, and thus not constituting a concentration subject to notification in itself, may be considered as part of a single concentration subject to notification.

3.4.3 **The concept of implementation in the Merger Regulation**

According to the Court of Justice in case *Ernst & Young,*[33] the concept of implementation referred to in Article 4(1) and Article 7(1) EUMR should be interpreted as based on the purpose and systematic structure of those provisions.
Building on this premise, the *Ernst & Young* judgment clarified the notion of implementing a concentration under Article 7(1) of the merger regulation (which naturally corresponds to the notion of implementation under Article 4(1) of the regulation). The Court first pointed out that Article 7(1), by prohibiting the premature implementation of a concentration, limits this prohibition to concentrations as defined in Article 3 EUMR, thereby excluding the prohibition of any operation that cannot be considered instrumental to the implementation of a concentration[34]. Consequently, the implementation of a concentration under Article 7 of the Merger Regulation occurs as soon as the parties to a concentration carry out operations that contribute to a lasting change in control over the target undertaking. Furthermore, the Court explicitly clarified that the partial implementation of a concentration falls within the scope of the same article, as effective control of concentrations would not otherwise be ensured. Moreover, Recital 20 of the Merger Regulation was stated to serve the purpose of ensuring effective *ex ante* control of concentrations by suggesting that operations closely related should be treated as a single concentration. The Court clarified that this criterion of close connection excludes operations from Article 7(1) EUMR which are not essential for altering the control of the affected undertaking, although conducted within a concentration framework. And then, the Court specified that such operations, even if ancillary or preparatory, lack a direct functional link to the implementation of the concentration, thus their execution typically does not impact the control of concentrations.

To ascertain premature implementation, the operations carried out within a concentration should be evaluated based on their necessity for altering the control of the

[33] Case C-633/16, Ernst & Young P/S v Konkurrencerådet.
[34] Case C-633/16, Ernst & Young P/S v Konkurrencerådet, paragraph 43.

target undertaking and their direct functional relationship with the concentration's implementation. The Court explained that a concentration operation is deemed implemented through any operation that contributes, wholly or partially, in fact or law, to changing the control of the target undertaking.
Within this framework, in scenarios involving "*parking arrangements*" or "*warehousing*" outlined in point 35 of the Consolidated Jurisdictional Notice, initiating the first phase of a single concentration (i.e., the intermediate operation) often triggers premature implementation of the concentration.

Given the inherent close connection between the two phases and their inclusion in the parties' chosen structure, the intermediate operation typically plays a necessary role in effecting a change of control in the target undertaking. Thus, the intermediate operation, by virtue of its direct functional link with the concentration's implementation, contributes, at least partially, to altering the control of the target undertaking, aligning with the requirements set forth in the *Ernst & Young* case.

3.4.4 **The inquiry**

Just a few days after the request for case team allocation regarding Canon's acquisition of TMSC, an anonymous complainant (hereinafter also referred to as "the Complainant") contacted the Commission providing information, gathered from public sources, suggesting that Canon may have breached Articles 4(1) and 7(1) of the Merger Regulation in the context of acquiring control over TMSC. Consequently, the Complainant provided additional information on the transaction structure of the Concentration. Then, on May 11th, 2016, the Commission sent Canon a request for information ("RFI") regarding the first draft Form CO dated April 28th, 2016.
Specifically, three questions were posed regarding the transaction structure, to which Canon responded on May 27th, 2016. In its responses, Canon explained that, in its view, the transaction structure implemented by Canon did not constitute a warehousing arrangement.

However, in July 2016, the Commission informed Canon that it was conducting an investigation into the matter, which could lead to the imposition of fines pursuant to Article 14(2)(a) and (b) of the Merger Regulation for possible breaches of the standstill obligation under Article 7(1) of the Merger Regulation and the notification requirement of Article 4(1) of the Merger Regulation. Following the initiation of the investigations,

the Complainant reached out to the Commission on September 5th, 2016, for further communications. Consequently, on October 6th, 2016, a State of Play meeting was held between the Commission and Canon. The following day, the Commission adopted three decisions under Article 11(3)[35] of the Merger Regulation, requesting Canon, TMSC, and Toshiba to provide relevant information and internal documents for the investigations. The responses arrived, more or less, promptly from the companies. On July 6th, 2017, the Commission issued a Statement of Objections ("SO") addressed to Canon pursuant to Article 18 of the Merger Regulation.[36] In the SO, the Commission reached the preliminary conclusion that Canon had intentionally, or at least negligently, violated Articles 4(1) and 7(1) of the Merger Regulation, and therefore, the Commission was considering imposing fines on Canon in accordance with Article 14(2) of the Merger Regulation.

But every story has two sides, and Canon argued that its side should be heard in an oral hearing, which finally took place in May 2018. The Commission sent Canon questions from the first hearing via e-mail on May 8th, 2018, to which Canon responded on May 24th, 2018. On June 11th, 2018, Canon provided further documentation to the Commission, urging the termination of the violation proceedings, based on the legal precedent set by the CJEU in the *Ernst & Young*[37] judgment of May 31st, 2018.

Subsequently, on November 30th, 2018, the Commission issued a Supplementary Statement of Objections (SSO), initially concluding that Canon's actions breached Articles 4(1) and 7(1) of the Merger Regulation, also considering the refined interpretation of the legal framework provided in the *Ernst & Young* judgment. Canon submitted its response to the SSO on January 21st, 2019, and requested a second oral hearing. During the second Hearing on February 14th, 2019, Canon presented its arguments in response to the SSO. Lastly, on April 3rd, 2019, Canon submitted additional remarks to the Commission concerning its stance on the *Ernst & Young* judgment, as discussed during the second Hearing.

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[35] Article 11 (3) of the Council Regulation No. 139 of 2004 states: "*Where the Commission requires a person, an undertaking or an association of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which it is to be provided. It shall also indicate the penalties provided for in Article 14 and indicate or impose the penalties provided for in Article 15. It shall further indicate the right to have the decision reviewed by the Court of Justice*".

[36] The article is titled: *Hearing of the parties and of third persons*.

[37] Cf. note 33.

3.5 **Findings of the European Commission**

The Commission's investigation that involved Toshiba, MS Holding, and Canon, regarding the Interim Transaction, occurred on March 17, 2016, and revealed two simultaneous operations:

I. the transfer of Class B Shares and Share Options from Toshiba to Canon;

II. the sale of Class A Shares from Toshiba to MS Holding.

These transactions were considered part of a unified concentration along with the Ultimate Transaction.

Despite Canon's argument that the Interim Transaction did not result in a lasting change of control, the Commission disagreed. The EC emphasised the need of the transaction and its direct link to TMSC's control dynamics, noting the involvement of both merging parties and Canon's significant influence over TMSC's future.

The Interim Transaction was deemed necessary within the framework established by the Parties to effect a change of control in TMSC and was considered to have a direct functional link to the implementation of the concentration, thus contributing, at least partially, to the change in control of the target undertaking, as established in the *Ernst & Young* case.[38]

Canon breached Article 4(1) of the Merger Regulation by initiating the intermediate operation on March 17, 2016. Before having it notified to the Commission. Furthermore, Canon gained lasting control over TMSC before the Commission received the notification[39].

Therefore, the Commission concluded that Canon violated the notification requirement outlined in Article 4(1) of the Merger Regulation.

Similarly, Canon partially executed the Concentration before obtaining clearance from the Commission, thus violating Article 7(1) of the Merger Regulation. This occurred on March 17th, 2016, coinciding with the execution of the agreements for the Interim Transaction. Canon acquired lasting control over TMSC before obtaining clearance from the Commission.[40]

[38] Cf. *Supra* note 33.
[39] The notification took place on August 12th, 2016.
[40] Clearance was granted on September 19th, 2016.

Consequently, the Commission concluded that Canon breached the standstill obligation outlined in Article 7(1) of the Merger Regulation. As a result, the Commission found Canon in violation of both Articles 4(1) and 7(1) of the Merger Regulation, concluding that Canon started implementing the concentration before notifying and obtaining clearance from the Commission.

3.6 **The gravity and the duration of the infringements**

During the investigation, Canon contested the Commission's initial conclusion regarding the intentional or negligent nature of the infringements of Articles 4(1) and 7(1) of the Merger Regulation, which was a key factor in assessing the gravity of Canon's infringement.

The European Commission followed a line: firstly, it asserted that Canon was aware, or perhaps should have been aware, that proceeding with the Interim Transaction could potentially constitute a breach of Articles 4(1) and 7(1) of the Merger Regulation, thus implying that Canon's actions amounted to negligence at least; secondly, concerning the calculation of fines, the Commission took into account that the Canon/TMSC Transaction did not raise competitive concerns and was deemed compatible with the internal market and the EEA Agreement through a Commission decision based on Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement, as referenced in the case Marine Harvest v. European Commission.[41]

In conclusion, the Commission determined that when setting fines for Canon, it should consider:

(i) Canon's actions being at least negligent in breaching Articles 4(1) and 7(1) of the Merger Regulation, and

(ii) the approval of the Canon/TMSC Transaction by the Commission under Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

During the investigation, Canon contended that the duration of its breach of Article 7(1) of the Merger Regulation was partially attributable to actions by the Commission: firstly, Canon argued that if the violation of Article 7(1) persisted for six months and two days, it was primarily due to the extensive Requests for Information from the Commission,

[41] Paragraph 497.

which, according to Canon, lacked a thorough understanding of the market dynamics. While acknowledging the Commission's perspective, Canon emphasised that this should not disadvantage them; secondly, Canon asserted that the assessment of the infringement's duration should consider the Commission's request for a Full Form CO almost three months after Canon had provided a draft short Form CO. Canon contended that this request was unnecessary and suggested that had the Commission correctly defined the geographical market (EEA-wide instead of national), a simplified procedure would have sufficed, resulting in a shorter duration of the infringement.

The Commission determined that both infringements began on March 17th, 2016, when Toshiba, Canon, and MS Holding signed agreements for the Interim Transaction, allowing Canon to gain control over TMSC. The EC further considered that a violation of Article 4(1) of the Merger Regulation is an instantaneous infringement, occurring when a concentration is not notified before its implementation.[42] On this basis, Canon's infringement of Article 4(1) of the Merger Regulation had a duration of one day.[43]

In contrast, a continuous infringement under Article 7(1) of the Merger Regulation begins upon implementation of the concentration and continues until declared compatible with the internal market by the Commission. Canon's infringement under Article 7(1) commenced on March 17th, 2016, and ended when the Commission declared the Concentration compatible on September 19th, 2016, totaling six months and two days.[44] Canon's arguments about duration only relate to Article 7(1), which involves continuous infringement.

The Commission asserted that Canon's delay was due to its own incomplete filing, not the Commission's thorough investigation. Canon's responsibility is to submit a correct and complete filing form, and any delay in providing necessary information rests with Canon, pursuant to the EUMR and its implementing regulation.[45]

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[42] Cf. Electrabel v. Commission, paragraph 187. See also Marine Harvest v. European Commission, paragraphs 304 and 352.
[43] Cf. note 2.
[44] Cf. Electrabel v. Commission, paragraph 190.
[45] Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (Text with EEA relevance) (OJ L 133, 30.4.2004, p.1).

Additionally, Canon's initial indication that the transaction could be reviewed under a simplified procedure was contradicted by later data provided, requiring a non-simplified review.

Therefore, the Commission has concluded that Canon's infringement durations stand at 1 day for Article 4(1) and 6 months and 2 days for Article 7(1), reflecting a relatively limited timeframe.

3.7 **Mitigating and aggravating circumstances**

During the case analysis, the Commission had to determine whether were there any mitigating or aggravating circumstances. As a matter of fact, in applying the Regulation, the EC takes into account various factors that can influence the severity of violations and the determination of sanctions (*supra*).

Regarding mitigating circumstances, the Commission found none. However, the concentration's lack of serious doubts about its compatibility with the internal market had to be (and, thus, was) considered when assessing the gravity of the infringements. On one hand the Commission outlined that, contrary to the assertions made by Canon, imposing fines in this case did not contravene the principle of *nullum crimen, nulla poena sine lege.*[46] On the other, it also provided the lack of any aggravating circumstance. The Commission considered that Canon, being a multinational company, was aware of the Union merger control rules and obligations when assessing the severity of the infringement but did not identify any aggravating circumstances. Both breaches of Articles 4(1) and 7(1) of the Merger Regulation are deemed serious. Canon has, at least negligently, violated both articles. Additionally, the Commission takes into account that the Canon/TMSC transaction did not pose competitive concerns and was declared compatible with the internal market under Article 6(1)(b) of the Merger Regulation and Article 57 of the Agreement on the EEA. The breach of Article 4(1) is considered an instantaneous breach, while the breach of Article 7(1) lasted for 6 months and 2 days, hence being relatively limited in duration. Finally, there were not applied any aggravating nor mitigating circumstances and it was determined that the fines imposed for the infringements were proportionate to the nature, gravity, and duration of both breaches.

[46] It is a Latin expression which states the principle of peremptoriness, according to which there cannot be a punishment for an action that is not expressly provided for as a violation by the law, and thus there cannot be a penalty that is not established by it.

3.8 **Amount of the fines**

When imposing penalties, the European Commission ensures that fines have a significant deterrent effect. Considering the size of a company like Canon, the penalty must be substantial to achieve this deterrent effect.

Considering the specific circumstances of the present case,[47] the Commission decides to impose fines of EUR 14,000,000 for the infringement of Article 4(1) and EUR 14,000,000 for the infringement of Article 7(1) under Article 14(2)(a) and (b) of the Merger Regulation. Additionally, Canon's turnover for the fiscal year ending on December 31st, 2018, had to be considered to assess if adjustments were necessary, as fines imposed should not exceed 10% of this figure. This was YEN 3,951,937 million (EUR 30,307.2 million),[48] consequently, below 10% of that figure, and no adjustment were necessary.

3.9 **The decision of the Court**

After being subject to fines totalling € 28 million, Canon brought an action for obtaining the annulment (under Article 263 TFEU) of the decision C(2019) 4559 of June 2019, which imposed fines for failure to notify a concentration in violation of Article 4(1) of Council Regulation (EC) No 139/2004, and for implementing a concentration in violation of Article 7(1) of the said regulation. Alternatively, Canon asked the annulment or the reduction of the fines imposed.

However, the Sixth Chamber of the Court dismissed the action in its entirety. As a matter of fact, on May 18th, 2022, in Case T-609-19 (Canon v Commission)[49] the General Court confirmed the fine to Canon for early implementation of the concentration with TMSC. In the Canon v. Commission case, the main question was to ascertain whether the interim transaction triggered the obligation to notify and thus to comply with the stand-still requirement under the EUMR. Therefore, even though the interim transaction did not result in a final acquisition in this instance, the GC affirmed that it constituted the early implementation of the merger by enabling the eventual change of control. Furthermore, the General Court emphasised that splitting the implementation into partial sequential transactions could not be used to bypass the standstill obligation.

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[47] Particularly the nature, gravity, and duration of the infringements.
[48] Cf. note 2.
[49] General Court, Case no T-609/19, Canon v Commission.

Canon contended that the decision of the European Commission contradicted some caselaw of the European Court of Justice, stating that a concentration is implemented only when one company gains control over another. Thus, the first has to hold the ability to exercise decisive influence over the second. Nevertheless, in the GC's view, a concentration is deemed not to have occurred only when there is an absence of any influence whatsoever. Moreover, in this instance, having the ability to make decisions through the exercise of share options implied a certain level of influence over TMSC. Consequently, it was indisputable that the Interim Transaction constituted a partial implementation of the merger.

Finally, Canon disputed the EC's determination that both the Interim transaction and the Final transaction formed a single merger. The Commission justified its decision based on the fact that the Interim transaction was only conducted in anticipation of the Final transaction, a specific holding company was established to carry out the transaction without obtaining formal control, and Canon assumed the financial risk of the entire transaction starting from the interim phase. The General Court asserted that the Interim transaction had a direct functional tie to executing the merger, thereby playing a role in altering control of the target company. The initial phase of the merger was crucial for Toshiba to transfer TMSC early, primarily for accounting reasons. Because both phases pursue the same economic goal, and the Interim transaction was vital for executing the entire merger.

The GC determined that both the transactions collectively form a unified merger. As a consequence, the Court dismissed Canon's appeal. This ruling aligned with past instances of early implementations of concentrations and represents a significant development in merger control. It specifically addresses potential violations of the standstill obligation in a merger awaiting approval, particularly in scenarios involving two-step transactions with special purpose entities. The fact that the merger eventually gained approval, as seen in this case, does not exempt parties from facing substantial penalties if certain actions were taken before obtaining clearance, even if these actions alone did not lead to a change in control. Thus, actions directly contributing to a significant alteration in control of the target company can breach the standstill

obligation.[50] While Canon retains the option to appeal to the EU Court of Justice, this case underscores the importance for companies to exercise caution when implementing transactions awaiting competition authority approval.

3.10 **Findings of other antitrust authorities**

As it was clear by the analysis of the case, the European Commission found Canon to have violated both Article 4, paragraph 1 and 7, paragraph 1.

It was anticipated[51] that the EC was not alone in condemning the structure used in Canon/TMSC. As a matter of fact, the United States' Antitrust Authorities, namely the Federal Trade Commission (FTC) and the Department of Justice (DoJ), but also the Chinese Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) and the Japanese Fair Trade Commission (JFTC) also took issue with it.[52] In the following paragraphs it will be explained the path they followed to find Canon guilty too.

3.10.1 **Findings of the United States**

Before providing which was the considerations of the FTC and the DoJ, it is important to explore the relevant legislation: the Hart-Scott-Rodino Act (HSR Act). This Act mandates that, in the context of a concentration, all the acquiring and selling parties involved must submit a prior notification to the competent antitrust authorities and observe a waiting period before closing the deal. The situation provided is noticeably similar to the stand-still obligation provided by the Merger Regulation within the European Union. Thus, whether the involved companies do not comply with the HSR Act, the actual consequence provided by the relevant legal framework is the application of daily monetary penalties, that, for the records, are surely high.[53] It is interesting to know that the highest fine applied for having breached the provisions of the Hart-Scott-Rodino Act, for jumping the gun was USD 11 million.[54] These provisions about the prior notification and waiting period were effectively applicable to the Canon/TMSC transaction.

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[50] RUIZ, TEBAR, *In Gun jumping: the GC confirms the fine to Canon for early implementation of a concentration*.
[51] Cfr. page 76.
[52] EVANS, BOYD, *Canon/Toshiba medical systems: questions raised on the legitimacy of warehousing and further enforcement of gun jumping*, 28.
[53] Up to USD 43,280 per day, circa.
[54] United States v. VA Partners I, No. 16-cv-01672 (WHA) (N.D. Cal. 2016).

It was not said before, but during the implementation of the Interim Transaction, and therefore without observing the waiting period in respect of this part of the transaction, the involved parties submitted a notification under the HSR Act. As a consequence, the Federal Trade Commission referred an accusation to Canon and Toshiba for having arranged a particular scheme that contradicted the anti-avoidance provisions of the HSR Act to the DoJ for further investigation. Hence, Canon settled these allegations with the DoJ in early 2019, paying a total of USD 5 million (divided in: USD 2.5 million for failure to notify; and another USD 2.5 million for failing to honour the waiting period). As part of the settlement's consent order, Canon also committed to instituting HSR compliance programs.

At the end of the story, the US' authorities adopted a decision in line with the Commission's position. Both the DoJ and FTC emphasised the significance of procedural regulations in ensuring the effectiveness of the pre-merger notification process when announcing the settlement agreement. The U.S. authorities viewed the aim of the arrangement as a means to circumvent the waiting period requirements outlined in the HSR Act.[55]

3.10.2 **Findings of the Chinese antitrust authority**

In China, rules similar to those in the European Union and the United States of America prevent the implementation of a concentration without a prior notification to the relevant antitrust authorities (in China at that time was the MOFCOM[56]). Failure to notify results in the gun-jumping violation. While China's merger control regulations generally align with global standards, the penalties for violating these rules were notably lower, capped at CNY 500.000,00 (approximately EUR 65.000,00) for unlawful transactions. This is significantly less than the penalties in other major competition jurisdictions, where fines can reach up to 10% of an undertaking's annual turnover, as seen in the European Union. Given this context, SAMR has proposed a substantial increase in the maximum fine, suggesting a penalty of 10% of a party's global turnover from the previous year. In fact, SAMR has implemented comprehensive guidelines to promote antitrust compliance

[55] EVANS, BOYD, *Canon/Toshiba medical systems: questions raised on the legitimacy of warehousing and further enforcement of gun jumping*, 29.

[56] The MOFCOM preceded the current Chinese merger control authority, namely the State Administration for Market Regulation (SAMR).

among companies, focusing on preventing gun-jumping and other violations of China's merger control regulations. These guidelines specify penalties of up to 10% of a company's turnover from the previous year for cases harming competition (potentially multiplied by two to five times for severe violations) or up to CNY 5 million (approximately EUR 640.000,00) for cases not harming competition. These guidelines also detail SAMR's expectations for antitrust compliance systems, strongly recommending implementation for companies with revenues exceeding CNY 400 million (approximately EUR 51 million) in China. Importantly, the guidelines highlight that an effective anti-premature-action compliance system could mitigate penalties in enforcement actions.[57]

The Canon/TMSC decision of 2016 has sparked considerable discussion due to being the authority's first gun-jumping ruling involving a purely foreign-to-foreign transaction. Moreover, because the transaction occurred in two stages, raising questions about what actions constituted implementation. The specifics of the case (*supra*) are important to understand MOFCOM's decision-making process. The Authority deemed the phases closely intertwined, constituting the acquisition by Canon of TMSC. Parties were found to have begun implementing their transaction upon closing the first phase, breaching the standstill obligation under Article 21 of the Chinese Antimonopoly Law.[58] At that time the maximum amount of the fine, as stated above, was CNY 500.000,00, and it was imposed a fine of CNY 300,000 (approximately EUR 35.000,00) to Canon for the gun-jumping violation.[59]

3.10.3 **Findings of the Japanese antitrust authority**

In Japan, the Financial Services Agency (FSA) provides a set of standards and guidelines for the interpretation and operation of laws and regulations on corporate disclosure in a document, titled "Consideration Points with respect to Disclosure of Corporate Affairs, etc.", commonly referred to as the Disclosure Guidelines. This document provides a framework for interpreting and implementing laws and regulations related to corporate disclosure. In August 2014, it was made an update and Article B2-12 of the revised

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[57] WAHA et al., *Gun-jumping under China's Antimonopoly Law*.
[58] *Ibidem*.
[59] EVANS, BOYD *Canon/Toshiba medical systems: questions raised on the legitimacy of warehousing and further enforcement of gun jumping*, 29.

Disclosure Guidelines now outlines eight categories of corporate disclosure activities that are not considered as "solicitation" of securities under the Financial Instruments and Exchange Act (FIEA). The FIEA requires the Securities Registration Statements (SRS) filings to be made for Public Offerings (*boshu*) or Secondary Distributions (*uridashi*) of securities and prohibits the solicitation for acquisition or sale prior to its filing: same rule as gun-jumping in the other legal systems (*supra*). As above, the *ratio* is to prevent solicitation for investment based on information that has not been fully disclosed and, also in Japan, a solicitation conducted in respect of specific securities prior to the SRS filings is subject to administrative monetary or penal penalties.[60]

For what concerns the procedure, the JFTC has the authority to levy fines for gun-jumping up to JPY 2 million (equivalent to approximately EUR 15.000,00) and can also mandate remedies to address anticompetitive transactions, as well as seek annulment. However, historically, the JFTC has not been known for actively enforcing gun jumping violations. In the Canon/TMSC case, the authority took an unprecedented step by issuing a cautionary warning to the involved parties regarding the transaction's structure, highlighting the potential violation of merger control regulations. This warning may indicate the JFTC's willingness to use its enforcement powers to penalise gun-jumping violations in future cases.

[60] NEMOTO, *Recent developments in gun-jumping regulations in Japan: Clarification on corporate disclosure activities not deemed as "solicitation"*, 1-5.

CONCLUSIONS

In conclusion, it can be affirmed the importance of complying with the provisions set forth in Regulation 139/2004/EC, and the consequences resulting from potential violations thereof. The preceding chapters have delved into the topic of concentration control within the European framework, with a particular examination of the Gun-Jumping phenomenon, which has seen increasing prevalence in recent years and consequently garnered heightened attention from antitrust authorities.

It has been provided the path taken by the European Union policymakers that brought to the Merger Regulation of 2004, which has finally achieved all the goals which have been set in the past years. With a further analysis of all the most relevant aspects of the Regulation and the violations provided thereof, it was given an analytical framework of the Regulation and its implications.

The core objective was to explain the violation of Gun-Jumping, a notably significant violation, encompassing varied behaviours, including failure to provide prior notification, or prematurely effectuating the effects prior to authorisation.

There has been an explanation of the obligation of the prior notification. Among the key provisions of the Regulation, it is one of the most important ones. This mandatory requirement is provided for those concentration operations surpassing the thresholds outlined in the Regulation itself. The past Chapters also analysed the prohibition to implement the operation before having received the clearance from the Commission or NCAs, depending on the scale of the concentration. That is called stand-still obligation and in was provided why this provision is mandatory and how it does apply.

Throughout the work, by way of examples, concrete cases have been inspected to better grasp the theoretical concepts, elucidating behaviours that could constitute a breach of the standstill obligation and of the obligation of prior notification to the Commission (or to the NCAs).

In fact, an important target was the explanation of the one-stop-shop principle. Through the provisions in the EUMR it was seen that there are some thresholds that, if achieved, bring the concentration to a European Union level; if not, the concentration can be considered as non-relevant for the EU field and must be analysed by the National Competition Authorities. There are exceptions to this rule, provided in the precedent pages.

It has been observed that antitrust authorities are approaching this issue with heightened seriousness and stringency in the realm of concentration control. This signifies that despite gun-jumping being a longstanding phenomenon, its significance has globally escalated in recent years, as evidenced by the surge in sanctioned cases. The fines imposed on undertakings for failure to notify or violation of the standstill obligation have become notably substantial, with some cases resulting in multimillion-dollar fines or nearing the maximum stipulated penalties.

Moreover, through the analysis of Canon/Toshiba Medica Systems Corporation case, all the priorly explained implications have been perceived in a concrete manner. It

could be seen first-hand the proceedings. First, the smart construct of the special purpose company, created to acquire all the shares of TMSC, then the pre-notification talks, the clearance of the Commission and the anonymous tip that the latter received. It was explained Phase I along with Phase II and their implications that led to the imposition of high fines to Canon.

Canon was harshly fined not only by the EC, but also from other competition authorities around the word. It was seen that China, USA and Japan stated the violation of gun-jumping also in their legal systems and imposed high fines. Particularly, there was a general explanation of their legal framework on what it is in the EU considered as gun-jumping.

Above all, this research has highlighted the relevant aspects of the third pillar of Competition within the European Union, having a specific look at the violation of gun-jumping, its implications and consequences, with a particular focus on Canon/TMSC case, that led to the comprehension of the practical consequences of the non-compliance with the European Merger Regulation.

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