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The European Commission's Landmark Gun-Jumping Fine on Altice of €124.5 Million Puts Spotlight on Covenants in Transaction Agreements

SUMMARY

The European Commission ("EC") on Tuesday fined Altice, a Netherlands-based cable and communication company, €124.5 million for implementing its acquisition of PT Portugal before receiving merger control approval.[1] This is a significant development for gun-jumping case law in Europe because it is the first time the EC has taken issue with the wording of pre-closing covenants in a transaction agreement. The decision also illustrates the significant risks of information exchanges in an M&A context without adequate confidentiality arrangements. The fine is the highest ever for infringement of EU merger control rules – six times higher than the EC's €20 million fine for each of Electrabel's and Marine Harvest's gun-jumping infringements.

Tuesday's decision comes in the wake of increased EC scrutiny of "procedural" non-compliance and firmly puts the spotlight on merging parties' pre-closing conduct. The EC's firm stand is a reminder for merging parties and their advisors to ensure compliance with applicable merger control rules, in particular with respect to pre-closing covenants, integration planning, and information exchanges prior to merger control approval and closing. While the U.S. agencies have traditionally been more active than the EC in detecting and punishing pre-closing conduct, including the buyer's interference in the target's ordinary course of business, the *Altice* decision shows the EC's determination in this context and may lead to increased enforcement by national competition authorities in the EU and beyond.[2]

BACKGROUND

Tuesday's fine comes in the wake of increased EC scrutiny of non-compliance with procedural aspects of the EU merger control rules. In her press statement announcing the fine, Commissioner Vestager stated that the fine reflects the "seriousness" of the infringement and should deter other companies from breaking EU merger control rules. The press release explains that:

- "Certain provisions of the relevant purchase agreement resulted in Altice acquiring the legal right to exercise decisive influence over PT Portugal, for example by granting Altice veto rights over decisions concerning PT Portugal's ordinary business.
- In certain cases, Altice actually exercised decisive influence over aspects of PT Portugal's business, for example by giving PT Portugal instructions on how to carry out a marketing campaign and by seeking and receiving detailed commercially sensitive information about PT Portugal outside the framework of any confidentiality agreement."

Similar cases have been brought in other jurisdictions, and particularly in the U.S., where the antitrust authorities have been more active in detecting and punishing pre-closing conduct and recently issued detailed guidelines on antitrust pitfalls during pre-merger negotiations and due diligence.[3] Europe is, however, catching up. The EC launched three procedural investigations last year alone.[4] Unannounced "dawn raids" of business premises have become more common in merger investigations.[5] In addition, the EC's fines under the merger control rules have increased dramatically from the two-digit thousands in the late nineties to the record €124.5 million fine this week.

Tuesday's announcement fits squarely within this pattern of escalating EC scrutiny of procedural infringements of the EU merger control rules.[6] The radical evolution of the EC's enforcement policy, from blatant failure to notifying mergers to the less obvious type of infringement in the *Altice* case is illustrated by the overview table set out in the Appendix.

A. FAILURE TO NOTIFY

The EC historically focused its enforcement actions on cases where the parties implemented transactions without any prior notification and approval in violation of the "standstill obligation" under Article 7 of the European Merger Regulation ("EUMR"). In essence, this provision prevents the parties, save in a few (narrowly construed) exceptions, from implementing their merger before receiving the EC's approval to do so. The EC's gun-jumping decisions to date have thus mainly concerned failures to notify and/or delayed notifications, and companies' defences have centered around if and when an obligation to notify arose.

The EC has so far imposed two substantial fines for gun-jumping:

- In June 2009, the EC fined Electrabel €20 million for implementing its acquisition of Compagnie Nationale du Rhône without the EC's prior approval.[7] After notification of the transaction on March 26, 2008, the EC found that Electrabel had acquired *de facto* control over the target by increasing its existing minority shareholding in the company to nearly 50% on December 23, 2003. The EC's investigation showed that Electrabel enjoyed a stable majority at the target's shareholder meetings due to the wide dispersion of the remaining shares and past attendance rates.
- In July 2014, the EC imposed a fine of €20 million on Marine Harvest for early implementation of its acquisition of Morpol.[8] Marine Harvest had, on December 14, 2012, entered into an agreement to acquire 48.5% of the shares in Morpol. The EC found that this acquisition, upon closing on December 18, 2012, gave Marine Harvest *de facto* control over Morpol eight months before Marine Harvest notified the transaction to the EC. Marine Harvest's appeal before the European Court of Justice ("ECJ") is pending.

The EC's only remaining pending gun-jumping investigation concerns the acquisition of Toshiba Medical Systems ("TMS") by Canon.[9] The case involves a two-step transaction whereby, at the first

step, an interim buyer acquired 95% of the share capital in TMS, while Canon paid the entire purchase price for both the remaining 5% of shares and an option over the interim buyer's shareholding. This first step was carried out without EC approval. In the second step after the EC's approval, Canon exercised its option over the interim buyer's shares in TMS and effectively acquired all shares in TMS. The EC alleges that Canon should have obtained the EC's approval prior to implementing the first step of the transaction despite an exemption from notification for certain interim acquisitions by banks and other financial institutions.

B. INTERFERENCE WITH ORDINARY COURSE OF BUSINESS PENDING APPROVAL AND EXCHANGE OF COMPETITIVELY SENSITIVE INFORMATION

The *Altice* decision appears to go a step further, touching upon the less established rules applicable to pre-closing contractual covenants governing merging parties' interaction between signing and closing. EC officials have previously acknowledged that there is no "black or white list" of what companies can or cannot do in this context, and emphasized that the EC's analysis is conducted on a case-by-case basis.[10]

This legal uncertainty is a recurring issue as every merger negotiation involves balancing the buyer's interest in protecting the value of the acquired business against the legal obligation not to interfere with the target's ordinary course of business before closing. These issues are of particular importance when the merging parties are competitors, and thus risk being perceived as coordinating their competitive conduct prior to closing their transaction, for example, through the sharing of competitively sensitive information.

Deal makers should take note of the EC's finding in the *Altice* case that the parties crossed the line merely because the wording of their pre-closing covenants was so broad as to give Altice decisive influence over the target's business before merger control approval and closing.

Of additional interest to the M&A community is the EC's criticism that the parties exchanged competitively sensitive information without adequate confidentiality arrangements. This echoes the recent guidance by the U.S. Federal Trade Commission ("FTC") on compliance with competition rules in exchanging information in an M&A context.[11] The FTC advises businesses to share the least amount of information needed for effective due diligence by narrowly tailoring information requests to specific due diligence and pre-merger integration planning issues. The timing of the information requests in the overall due diligence process is also a relevant factor. The FTC also advises redaction or masking of customer identities, aggregation of competitive information, engagement of third-party consultants, and other safeguards that limit the dissemination and use of sensitive information by merging parties. The recent developments on both sides of the Atlantic demonstrate the indispensability of well-tailored "clean team" and/or "black box" arrangements, particularly in transactions between competitors.

The practical difficulties with pre-closing conduct are illustrated by an ongoing case, *Ernst & Young/ KPMG Denmark*, before the ECJ.[12] It concerns a merger between Ernst & Young ("EY") and KPMG Denmark notified to and cleared by the Danish competition authority ("DCCA") in 2014. The DCCA,

supported by the EC, claims that EY violated the Danish standstill obligation by giving notice to terminate a cooperation agreement between KPMG Denmark and KPMG International prior to the DCCA's approval. According to the DCCA, the notice, which was agreed between the parties, had potential market effects because it was irreversible, and the future of KPMG Denmark as an audit firm in Denmark would have been uncertain without the DCCA's approval.

Although the ECJ is yet to issue its judgment, Advocate General Nils Wahl recently disagreed with the DCCA and EC's position, saying that the standstill obligation should not "affect measures which, although taken in connection with the process leading to a concentration, precede and are severable from the measures actually leading to the acquisition."[13] Accordingly, Advocate General Wahl concluded that the KPMG Denmark sending the termination notice did not contribute to a shift of control between the merging parties, which remained competitors until the closing of the transaction. On that basis, in Advocate General Wahl's opinion, it did not constitute a breach of the standstill obligation. It remains to be seen whether the ECJ will follow Advocate General Wahl's analysis.

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ENDNOTES

1 EC Press Release of April 24, 2018, IP/18/3522.

2 *See, e.g.*, French Competition Authority Decision No 16-D-24 of November 8, 2016.

3 Federal Trade Commission, "*Avoiding antitrust pitfalls during pre-merger negotiations and due diligence*," March 20, 2018. Similar guidelines also exist for Brazil (*see* Administrative Council of Economic Defense, "*Guidelines for the analysis of previous consummation of merger transactions*," September 27, 2016).

4 These investigations concern *Canon/Toshiba Medical Systems*, *Merck/Sigma-Aldrich*, and *GE/LM Wind*. The latter two investigations concern the alleged provision of incorrect or misleading information.

5 Recent examples include *Ineos/Kerling*, *Yara/Kemira Growhow*, and *Caterpillar/MWM*.

6 The EC's enforcement against procedural infringements encompasses both gun-jumping and the provision of incorrect or misleading information in submissions to the EC. As is the case for gun-jumping, the EC is increasingly active also with respect to the latter, notably by last year fining Facebook €110 million and opening two investigations into the information provided by the parties of the *GE/LM Wind* and *Merck/Sigma-Aldrich* transactions.

7 Commission Press Release of June 10, 2009, IP/09/895.

8 Commission Press Release of July 23, 2014, IP/14/862.

9 Commission Press Release of July 6, 2017, IP/17/1924.

10 Global Competition Review, "*DG Comp official acknowledges gun-jumping uncertainty*," September 7, 2017, *available at* https://globalcompetitionreview.com/article/1147180/dg-comp-official-acknowledges-gun-jumping-uncertainty.

11 Federal Trade Commission, "*Avoiding antitrust pitfalls during pre-merger negotiations and due diligence*," March 20, 2018.

12 Case C-633/16, *Ernst & Young P/S* v. *Konkurrenceradet*.

13 Opinion of Advocate General Wahl delivered on January 18, 2018, para. 78, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CC0633.

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APPENDIX

The radical evolution of the EC's enforcement policy against gun-jumping is illustrated by the overview table set out below.

Case	Year	Infringement	Result
Implementation Before Clearance			
Kirch/Bertelsmann/Premiere	1997	Bertelsmann and Kirch engaged in various joint marketing operations. The EC conducted dawn raids in relation to the parties' conduct.	No fine (conduct halted at the EC's request)
Ineos/Kerling	2007	The EC conducted dawn raids in relation to suspicions that the acquirer had intervened in the management of the target, and the companies had shared competitively sensitive information.	No fine (investigation closed)
Altice/PT Portugal	2018	Altice acquired the legal right to exercise decisive influence over PT Portugal, and in certain cases, actually exercised decisive influence, prior to obtaining merger clearance from the EC.	Fine of €124.5 million
Failure to Notify			
Samsung/AST	1998	Samsung acquired *de facto* sole control over AST in January 1996, but only notified the transaction in April 1997.	Total fine of €33,000
A.P. Møller	1999	A.P. Møller implemented three separate transactions before notifying them to the EC several months later.	Total fine of €219,000
Yara/Kemira Growhow	2007	The EC remarked in its clearance decision that the transaction may be challenged in a separate procedure for breaching the standstill obligation. The EC conducted dawn raids in relation to the parties' conduct.	No fine (investigation closed)
Haniel/Cementbouw/JV (CVK)	2008	Cementbouw and Haniel acquired joint control over CVK in 1999, but notified the transaction only in January 2002. The EC retroactively approved the transaction on the condition that the parties terminate their joint control over CVK. The EC's decision effectively constituted a merger prohibition decision and no formal investigation into the procedural breaches was opened.	No fine (no formal proceedings opened and upheld on appeal)
Electrabel/Compagnie Nationale du Rhône (Electrabel)	2009	Electrabel acquired *de facto* sole control over CNR on December 23, 2003, but only notified the transaction on March 26, 2008.	Fine of €20 million (upheld on appeal)
Caterpillar/MWM	2011	The EC stopped the merger review clock and conducted dawn raids in relation to suspicions of gun-jumping and provision of misleading data.	No fine (investigation closed)

Case	Year	Infringement	Result
Marine Harvest/Morpol (Marine Harvest)	2014	Marine Harvest acquired *de facto* sole control over Morpol on December 18, 2012, but only notified the transaction on August 9, 2013.	Fine of €20 million (upheld by General Court on appeal and ECJ appeal pending)
Canon/Toshiba Medical Systems	Pending	Canon allegedly failed to notify the first step of its two-step transaction ("warehousing").	Pending