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Altice: Commission Guidance on Gun-Jumping

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Gun-jumping relates to the premature implementation of a transaction prior to obtaining clearance from the relevant competition authorities. It is currently a "hot topic" as enforcement levels across the globe have increased significantly in recent years.

In April 2018, the European Commission (EC) imposed a gun-jumping fine of €124.5 million on the multinational cable and telecoms company Altice in relation to its acquisition of a telecommunications operator, PT Portugal. The non-confidential version of the Altice fining decision has now been published (here). It provides detailed insights and guidance for companies on the EC's interpretation of the scope of EU gun-jumping, in particular with regard to SPA veto rights of the acquirer and pre-clearance behavior. The decision pre-dates (and therefore does not take into account) the judgement of the EU Court of Justice (ECJ) in the EY / KPMG case, in which the court established a narrower test for gun jumping as previously assumed by the EC in its administrative practice (essentially tying the stand-still obligation back to the concept of concentration) and clarified the relationship between the EUMR stand-still obligation and Article 101 TFEU (see my blog post on this judgment here).

The Altice Decision

The EC's Altice decision focuses on three key areas which together contributed to an infringement of the EUMR stand-still obligation:

Rights granted in the transaction agreement allowed Altice to veto decisions and intervene in the target's business beyond what was necessary to preserve value, giving it the possibility to exercise decisive influence over PT Portugal. In particular, the EC found that the commercial matters requiring Altice's approval were both wide-ranging and operational in nature relating to:

- the appointment of senior management;
- the target's pricing policies and standard offer prices; and
- the entering into a number of contracts which, due to the low qualifying monetary thresholds, captured many contracts relating to the ordinary course of PT Portugal's business.

Altice *exercised control in practice* over operational decisions that did not impact PT Portugal's value, including marketing campaigns, commercial contracts and future investments. Even in situations where the target was not obliged to obtain Altice's agreement under the transaction

agreement, a variety of commercial decisions were made only with Altice's consent. In particular, Altice was directly involved in:

- the decision making process regarding a PT Portugal marketing campaign (Altice also monitored the implementation and results of the campaign);
- setting the targets and the negotiating strategy regarding the renewal of PT Portugal's contract with Porto Canal;
- establishing PT Portugal's selection process for radio access network suppliers;
- defining the terms for the negotiation of a supply agreement between PT Portugal and Cinemundo; and
- the decision whether to include the DOG TV channel in PT Portugal's TV offering.

A *systematic and extensive disclosure of competitively sensitive information* by PT Portugal to Altice without the appropriate safeguards which was not necessary to preserve target value but rather gave Altice considerable insight into and influence over the day-to-day operation of the target business and its commercial and strategic policy at a time when the two parties were competitors in the same market. This level of exchange placed Altice in a position as if it already controlled PT Portugal, further evidencing that its actions constituted the exercise of decisive influence over the target in breach of the EUMR.

Key Takeaways

SPA veto rights of the acquirer can already form part of a gun-jumping infringement. This is the case if they are too far-reaching without a material impact on the target business and not necessary for maintaining the target's value in the interim period.

- The EC *recognizes the legitimacy of target value protection* between signing and closing. The acquirer may veto any conduct relating to *material changes* to the target business as long as this is *directly related and necessary* for the implementation of the transaction, as set out in the EC's Ancillary Restraints Notice.
- Whether a measure falls within or outside the *ordinary course of business conduct* of the target serves as a "good indication" to determine whether it will have material impact on the target (but, according to the EC, careful analysis is required). Criteria used by the EC include (i) whether *many or few measures* are covered by the relevant clause requiring purchaser consent, (ii) whether the action is *important for the day-to-day functioning* of the target business and (iii) whether monetary value thresholds (e.g. with regard to contracts) are *high or low* compared to the *overall value* of the target and the target *purchase price*. Especially the last criterion will often be met as, for instance, individual types of contracts will typically be of much lower value than the overall value of the target. It may therefore be more appropriate to look at the average / typical monetary value of the relevant measures over a certain time period (e.g. the monetary value of contracts concluded in the last few years) in order to determine whether or not a conduct falls within or outside of the target's ordinary course of business.
- The SPA must not give the acquirer the right to intervene in the target's ordinary course of business as this would allow him to exercise decisive influence over the target.
- Assuming that the possibility of exercising decisive influence can be shown by the EC, this seems to be in line with the legal test of the ECJ established in the EY / KPMG case, according to which only measures that contribute, either wholly or in part, legally or de facto to a change of

control constitute gun-jumping (as the notion of control under the EUMR covers both, the possibility and the actual exercising decisive influence over the target).

The exchange of competitively sensitive information can amount to gun-jumping if it allows the acquirer to exercise decisive influence over the target.

- The EC acknowledges that *competitively sensitive information can be exchanged in the context of a proposed merger*, but only within the structure of a *clean team* or if other *appropriate safeguards* are put in place to ensure confidentiality of the information exchange (e.g. confidentiality agreement).
- The EC also accepts that such *information exchange is legitimate in the due diligence process* in order for the acquirer to assess the value of the target business (seemingly not necessarily even safeguarded by clean teams, contrary to what has become a common practice in many M&A projects).
- In EY / KPMG the ECJ clarified that the EUMR stand-still obligation is lex specialis to Article 101 TFEU so long as the measure in question contributes to a change of control. If sensitive information is disclosed to the acquirer for instance on only one occasion outside of the clean team following the due diligence one would normally therefore assume an Article 101 violation (as the information disclosure alone would not yet contribute to a change of control as per the ECJ's legal test). However, any very frequent exchange of competitively sensitive information that puts the acquirer in a position to exercise decisive influence over the target would be caught by the stand-still obligation, as concluded by the EC.

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