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The grey areas of gun-jumping under EU competition law – A comment on the recent Altice judgment

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In April 2018, the European Commission ("EC") imposed two fines on the multinational cable and telecoms company Altice ("acquirer") in relation to its acquisition of PT Portugal ("target"), a telecommunications and multimedia operator.[1] The EC held that the acquirer both failed to notify the concentration prior to implementation under Article 4 of the EU Merger Regulation ("EUMR")[2] and that it failed to comply with the prohibition pursuant to Article 7 EUMR not to implement a concentration prior to the EC clearing it, and imposed fines of € 62.25 million for each infringement, *i.e.*, a total fine of € 124.5 million.

The General Court ("GC") largely dismissed the acquirer's action for annulment of the EC decision but reduced the fine imposed in relation to the violation of Article 4 EUMR by 10% under the GC's exercise of unlimited jurisdiction with regard to fines.[3] The GC viewed the conduct as less serious (gravity of the infringement) than the EC because the acquirer had informed the EC about the planned transaction prior to signing the SPA and filed a case team allocation request immediately after signing (paras. 365, 366), quite a standard procedure for deals that are somewhat complex.

The aim of this article is to present the main takeaways of the judgment and to evaluate whether the *Altice* judgment provides a useful clarification in the grey area of gun-jumping rules.

Implementation of a concentration

The EC had faulted Altice for three types of actions: premature implementation through pre-closing covenants (veto rights) in the SPA, instances in which Altice actually exercised decisive influence over the target prior to clearance, and instances of exchanging sensitive information that "contributed to demonstrating the exercise of decisive influence", but were not found to amount to premature implementation in themselves.

Pre-closing covenants in the SPA. The judgment's most significant practical impact relates to the EC's and the GC's guidance on whether certain pre-closing covenants in a SPA give rise to gun jumping violations. Such covenants (typically provisions requiring the target/seller to obtain the acquirer's consent for certain of the target's actions between signing and closing) may do so

because they may give the acquirer – prematurely (*i.e.*, prior to notification and/or clearance) – the "possibility to exercise decisive influence" over the target, and hence (joint or sole) control pursuant to Article 3 EUMR, thereby constituting at least a partial implementation of the concentration.[4]

In this respect, the GC upheld the EC's assessment that certain clauses in the SPA at issue, in fact, gave the acquirer indirect (joint) control over the target since several matters requiring the acquirer's approval were wide-ranging and operational in nature, notably the ones relating to:

- veto rights on hiring, terminating or amending contracts with 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 target's ordinary course of business

The EC had rejected the acquirer's assertion that these clauses were justified under the Commission Notice on Ancillary Restraints.[5] According to the EC, such pre-closing covenants are only justified if "*strictly limited to that which is necessary to ensure that the value of the target is maintained*". The acquirer had opposed this standard, arguing[6] that pre-closing covenants ought to be able to impose obligations on the seller to consult the buyer on certain actions that are *capable of affecting the integrity of the business*, regardless of whether they end up preserving, increasing or decreasing its value.

The GC clarified that the EC's strict value-preservation standard is too narrow, given that the Ancillary Restraints Notice does not rule out the possibility of using other criteria (para. 103). While the GC did not endorse a specific different or additional standard, it first assessed whether the clauses were justified under the value preservation standard. Due to the combination of low monetary thresholds triggering the acquirer's approval rights and a broad range of commercial matters covered, the GC found that the clauses went beyond what is necessary to preserve the value of the acquirer's investment (para. 117). The GC then assessed whether the clauses were necessary to avoid compromising the target's commercial integrity but held that the acquirer had not submitted persuasive evidence of such a risk (para. 131). The GC's assessment also indicated but did not stipulate this as a discrete threshold, that pre-closing restrictions are likely not justified if they affect the target's ordinary course of business operations.[7]

Influencing the target's conduct between signing and closing. The GC largely confirmed the EC's assessment that seven specific instances after signing, in which the target asked the acquirer for feedback on or even approval of (ordinary) commercial decisions, demonstrated that the acquirer had actually exercised its control over the target prior to the clearance decision and, in some instances, prior to transaction's notification to the EC.

However, it overturned the EC's finding in one instance: The target had asked the acquirer to consent to the launch of a television channel dedicated to entertaining dogs. The acquirer requested further information from the target and feared the impact on the target's image. The target ultimately launched the channel without a response from the applicant.

Due to the low annual value of the contract – it was below the monetary threshold set in the SPA – the EC held that the acquirer exercised decisive influence over the target company that could not be justified under the Ancillary Restraints Notice. In contrast, the GC held that it cannot be ruled

out that a channel aimed at dogs as a target audience could have had a negative effect on the target's image[8] and that the acquirer's intervention was, therefore, necessary to preserve the target's image or the value that might result from such an image (para. 205).

Information exchange between signing and closing. The GC also confirmed the EC's assessment that several instances in which the target disclosed competitively relevant information to the acquirer had "*contributed to demonstrating that the applicant had exercised decisive influence over certain aspects of the target's business*" (para. 235).

While the GC did not explicitly state that information exchange as such cannot be a breach of Article 7 EUMR, it took great care to clarify that the EC had not characterized the information exchange as a breach of Article 7 EUMR in itself. Hence, the EC did not have to show that the information exchange in itself resulted in the transfer of control to the acquirer under the standards of the *Ernst & Young* judgment (para. 236).

Is the gun-jumping framework fit for purpose?

Following the ECJ's *Marine Harvest* judgment[9], the GC again confirmed that it is compatible with EU law to issue separate fines for conduct that simultaneously breaches Article 4 EUMR and Article 7 EUMR because both articles pursue autonomous objectives and regulate distinct cases. Article 4 EUMR constitutes a positive obligation to act, *i.e.,* to notify the concentration prior to its implementation. On the other hand, Article 7 EUMR lays down a negative prohibition not to act, namely not to implement the concentration before its authorization by the EC (para. 57).

But in our view, the most critical aspect of the judgment is that the EC stretched the scope of Article 4, 7 EUMR beyond its purpose: The EC held in its decision that "*implementation of a concentration prior to notification and/or clearance can take different forms. Among them, early implementation of a concentration (…) could result from: (i) the acquisition (…) of the ability to exercise decisive influence; or (ii) the actual exercise (…) of decisive influence; or both.*" (para. 42 decision)

Treating the "exercise of decisive influence" as an "implementation of a concentration" appears difficult to square with the judgment in the ECJ's *Ernst & Young* case:

The *Ernst & Young* judgment provides that a concentration is implemented only by a "*transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking*" (para. 62). Transactions that are "*not necessary to achieve a change of control of an undertaking concerned by a transaction"* do not fall within the scope of Article 7 EUMR, even though they may be ancillary or preparatory to the concentration (para. 49). The AG Opinion for the *Ernst & Young* judgment likewise argued in point 68 (referenced by para. 58 of the judgment) that "*measures (…) not in and of themselves inextricably linked to the transfer of control*" should not be caught by Article 7 EUMR.

Provided that the acquirer already had the possibility of exercising decisive influence over the target from the date of signing the SPA (para. 132), it appears difficult to argue that the abovementioned conduct post-signing was "*necessary to achieve a change of control*". You cannot

acquire control over the target twice in the course of a single transaction.

Indeed, the GC held that it did not assess the post-signing conduct under the *Ernst & Young* criteria, because the EC only treated the signing of the SPA as the acquisition of decisive influence, whereas it assessed the post-signing conduct under the "exercise of decisive influence" standard (paras. 179, 236).

However, neither the EC nor the GC provide any legal basis for the assertion that the actual "exercise of decisive influence", after having already acquired the possibility to exercise such influence, can be an infringement of Articles 4(1), 7(1) EUMR. The *Ernst & Young* judgment held that Article 7 EUMR must be read in line with the general purpose of the EUMR, which seeks to ensure that "*the reorganisation of undertakings does not result in lasting damage to competition*". Hence, the obligations in Article 4(1), 7(1) EUMR serve to "ensure effective control" (Recital 34 EUMR) of concentrations by the EC.

While coordination or information exchange between competitors may result in damage to competition, there is no valid reason why Article 7 EUMR should apply instead of Article 101 TFEU, only because the offending conduct happens to take place after the acquisition of control and prior to the EC issuing a merger clearance decision.

Without stating it as such, the EC and GC both appear to treat Article 4 and Article 7 EUMR as a form of single continuous infringement, beginning with the (partial) implementation of the concentration and lasting until the EC's clearance decision, lumping together any conduct taking place during this period, but still fining the acquirer for separate infringements.

This is particularly apparent in the GC's exercise of its unlimited jurisdiction with regard to fines: The GC reduced the fine imposed in relation to the violation of Article 4 EUMR by 10% because the acquirer had informed the EC of the transaction before the SPA was signed and sent to the EC a case allocation request immediately after signing the SPA (para. 366). Nevertheless, the GC pointed out that some instances of coordinated conduct and the first information exchange meeting took place prior to the merger notification date – but why would these events be relevant for assessing the fine for Article 4 EUMR? After all, the GC concluded that the "instantaneous" infringement of Article 4 EUMR was only committed on the signing date for the SPA (see para. 322).

Moreover, from a practical perspective, the conclusions on individual overreaching pre-closing covenants both in the EC and the GC decisions are helpful, albeit that the legal standard (value preservation, commercial integrity, ordinary course of business) is still not entirely clear. What does seem clear is that a two-step analysis is required: first, does the veto right at issue give the acquirer the possibility to exercise decisive influence (or at least contribute to and is directly linked to it), and second, if that is the case, can the covenant be justified to protect the target's value or commercial integrity. In all likelihood, if the veto right relates to something that seems to be within the ordinary course of the target's business no justification is available.

More specifically, with respect to personnel, it seems that a veto right regarding the appointment and dismissal of senior management (i) suffices for an acquisition of (negative sole or joint) control via veto rights per the EC's Consolidated Jurisdictional Notice,[10] but as a pre-closing covenant between signing and closing, it is justified in order to preserve the target's value, and hence does not amount to gun jumping. By contrast, the standard for the acquisition of control and

gun jumping is the same with respect to veto rights relating to investments – if they are triggered at a low threshold, they amount to a relevant veto right for the acquisition of control[11] and hence, apparently, to gun jumping. No "value preservation" justification applies in that case, precisely because the triggering thresholds are too low for the investment to have a material impact on the target's value.

Nevertheless, case-by-case assessments will still be needed going forward, as the explicit reference to the relatively "low" monetary thresholds triggering the consent rights in the case at issue underlines.

Finally, in summary, the – somewhat unsurprising – practical takeaways are:

- Information exchange post-signing is still possible, but only within the same safeguards as pre-signing, because the parties remain independent until closing, so while closing preparation is still possible, anything beyond that can infringe Article 101 TFEU if not done in a clean team and/or contribute to the premature implementation of the concentration.
- Certain consent or veto rights for the acquirer for the period between signing and closing are permissible even if as such, they may suffice to give control, but only if they are justified to protect the value or integrity of the target, and do not interfere with the target's ordinary course of business (de facto control).
- In particular, consent rights on certain investments need to be analyzed carefully, and should not be triggered at relatively low monetary thresholds, compared to pre-transaction board approval rights, the target's typical level of investment, reflecting the nature of its business and industry.

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[1] Commission Decision of April 24, 2018, Case M.7993 Altice / PT Portugal.

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

[3] General Court Judgment of September 22, 2021, Case T-425/18 Altice Europe NV v. Commission.

[4] In its *Ernst & Young* judgment, the European Court of Justice ("ECJ") noted that "*in order to define the scope of Article 7* [EUMR]*, account must be taken of the definition of the concept of concentration set out in Article 3* [EUMR]"[4] The EUMR "*seeks to ensure that the reorganisation of undertakings* ***does not result in lasting damage to competition"*** (ECJ, judgment of 31 May 2018, Case C-633/16 *Ernst & Young P/S v Koncurrencerådet* ("Ernst & Young"), para. 44; emphasis added). Accordingly, the ECJ reasoned that the decisive factor to assess a preparatory or interim step is whether its implementation is "*likely to undermine the efficiency of the control of concentrations*". This, in turn, depends on whether such a step "*in whole or in part, in fact or in law,* ***contribute*[s] *to the change in control of the target company***" and is "*necessary*" to achieve

that change of control. By contrast, actions that are "*carried out in the context of a concentration*", but "*are not necessary to achieve a change of control of an undertaking concerned by that concentration*" do not fall under Article 7 EUMR (*ibid*., paras. 49, 50; emphasis added).

[5] Commission Notice on restrictions directly related and necessary to concentrations

(2005/C 56/03), point 13.

[6] The acquirer had also argued the pre-closing governance rights did not allow it to influence the target's business on a lasting basis (because closing actually occurred a little over four months after signing, but the GC held that it is not the lasting change of control that infringes Articles 4 and 7 EUMR, but already the partial implementation, *i.e*., a measure contributing to and necessary for a lasting change of control, as the ECJ had held in *Ernst & Young* (see paras. 91-100 of the *Altice* judgment).

[7] In this respect, the acquirer argued the covenants did not provide it with the power to block the adoption of "strategic decisions" within the meaning of point 54 of the EC's Consolidated Jurisdictional Notice (2008/C 95/01). The EC, however, had rejected that argument, saying the covenants were not strictly limited to protect the target's value but permitted the acquirer to exercise decisive influence over the target, for example by affecting its ordinary course of business (para. 112 of the contested decision).

[8] This was despite the fact that the target was already offering channels on hunting, fishing and bull-fighting (para. 204)

[9] ECJ, Judgment of March 4, 2020, Case C-10/18, Mowi ASA; formerly Marine Harvest AVA v. Commission.

[10] Commission Consolidated Jurisdictional Notice (2008/C 95/01), paras. 67, 69.

[11] Commission Consolidated Jurisdictional Notice (2008/C 95/01), para. 71.

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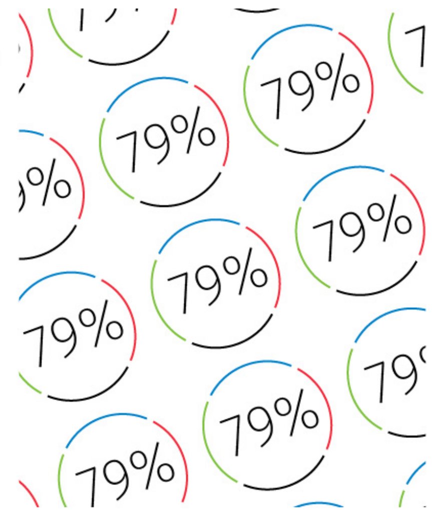

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