# Kluwer Competition Law Blog

## ECJ Advocate General Supports the European Commission's Broad Interpretation of Gun-Jumping and The Importance of Deterrence in Fine Setting

Tilman Kuhn, Jia Liu (White & Case) and Peter Citron (Editor) (White & Case, Belgium) · Tuesday, May 16th, 2023

Advocate General Anthony Michael Collins has proposed that the European Court of Justice upheld the General Court's *Altice* judgment. In his Opinion, he considered that entering into certain types of pre-closing covenants by an acquirer may constitute gun-jumping, regardless of the absence of the transfer of shares. AG Collins emphasised the importance of deterrence when fixing the level of fine for gun jumping, denying that there is a need for further transparency.

**The EC's record gun-jumping fine**

In April 2018, the European Commission (the "**EC**") issued its largest fine to date for gun-jumping – a total of EUR 124.5 million – upon Altice, relating to its acquisition of PT Portugal. The EC imposed two separate fines:

- EUR 62.25 million for breaching the notification obligation pursuant to Article 4 of the EU Merger Regulation (the "**EUMR**");
- EUR 62.25 million for breaching the standstill obligation pursuant to Article 7 of the EUMR (implementation before clearance).

The EC found that Altice had: (i) implemented the transaction prematurely by obtaining the veto rights contained in the pre-closing covenants in the sale and purchase agreement (the "**SPA**"); (ii) actually exercised decisive influence over PT Portugal by intervening in its day-to-day business prior to clearance; and (iii) prematurely exchanged a considerable amount of competitively sensitive information with PT Portugal.

In a landmark judgment, the General Court (the "**GC**") dismissed Altice's appeal against the EC's decision. However, in the exercise of its unlimited jurisdiction, the GC reduced the fine for the infringement of the notification obligation by ten per cent. This reduction aimed to reflect that, before signing the SPA, Altice had informed the EC of the transaction, and after signing the SPA, Altice had submitted a case-team allocation request and engaged in pre-notification discussions with the EC (including sending it a copy of the SPA with a draft of its notification).

Altice appealed the GC's judgment before the European Court of Justice (the "**ECJ**").

**AG Collins' opinion**

AG Collins recommended that Altice's appeal be dismissed in its entirety.

*Setting fines for gun-jumping*

AG Collins sided with the EC's approach to setting fines for gun jumping.

***Transparency***

Altice argued that the EC's decision lacked sufficient reasoning regarding the level of the two fines – in particular, that the EC had not assessed the level of each fine separately. While Altice argued that there was a lack of transparency in the setting of fines, AG Collins suggested that further transparency would not contribute to compliance with the EU merger control regime. Notably, he highlighted the risks of a harm-based approach in calculating fines. In particular, such an approach, which may result in higher fines being imposed on more problematic mergers, would conflict with the principle that all breaches of the EUMR shall be punished in the same manner. In addition, were the companies able to calculate the fines accurately, they might include the gun-jumping risk in the cost-benefit analysis of a merger. AG Collins emphasised that a certain degree of unforeseeability in the level of fines is necessary to achieve the desired deterrence effect.

***Proportionality***

AG Collins considered that Altice could not claim that an infringement of Article 4(1) EUMR, which is instantaneous, is less serious than an infringement of Article 7(1) EUMR, which is continuous. This is because an infringement of Article 4(1) is instantaneous and does not have a duration, which makes it impossible to compare to an infringement of Article 7(1), which does have a duration.

In addition, AG Collins confirmed that the GC had respected the principle of proportionality in carrying out its review of the fines. The fact that the GC reduced the fine only for the infringement of Article 4(1), but not for that of Article 7(1), suggested that the GC had considered each infringement separately.

*There can be two separate infringements*

AG Collins disagreed with Altice's argument that Article 4(1) is redundant and therefore illegal in light of Article 7(1) of the EUMR. By reference to paras 103-104 in *Marine Harvest*, AG Collins considered that the two provisions impose different obligations and pursue autonomous objectives. Article 4(1) "*mandates timely notification*", while Article 7(1) "*prohibits early implementation*".

*Gun-jumping can occur not just with a transfer of shares*

AG Collins considered that contrary to what Altice argued, the possibility to exercise decisive influence cannot only arise from a transfer of shares but also from the provisions of the SPA.

Altice argued that the pre-closing covenants lasted for less than five months and that therefore the change of control was merely temporary. AG Collins confirmed the GC's analysis that a distinction must be drawn between measures that contribute to a change of control, which do not have to be lasting, and the change of control itself, which must last in order to constitute a concentration.

In addition, Altice relied on paragraph 49 of *Ernst & Young*, which provides that the implementation of transactions that do not present a direct functional link with the implementation of a concentration, and are therefore unnecessary to achieve a change of control, do not fall within the scope of Article 7 of the EUMR. Altice argued that the pre-closing covenants had no direct functional link with the implementation of the transaction and therefore fell outside the scope of the above-mentioned provision. AG Collins considered that this was a misinterpretation of the case law. *Ernst & Young* concerned a situation where a concentration was achieved by successive partial operations and by closely connected transactions, making it irrelevant to the present case.

*Concept of veto rights*

Altice argued that the pre-closing covenants in the SPA did not give it the right to veto the adoption of strategic decisions; they only required its consent. AG Collins clarified that veto rights should be interpreted as meaning that the parties to a transaction agree that the buyer's consent is required for certain business decisions affecting the target. The GC, therefore, did not err in the use of the term in its judgment.

*Information exchange*

AG Collins disagreed with Altice's submission that the GC should have examined the information exchanges under Article 101 TFEU, rather than the EUMR. The information exchanges were "*inherent to the operation of the consent arrangements in the pre-closing covenants and an integral aspect of Altice's exercise of decisive influence over the target*". The EC had therefore rightfully assessed them under EUMR.

**Outlook**

Should the ECJ follow the Opinion, the EC is likely to be emboldened to continue to apply a wide interpretation of what constitutes gun jumping. This is consistent with the approach being taken by other national authorities (*see* our alert on a recent gun-jumping fine by the French competition authority).

Transaction parties should pay close attention to the content of the SPA to ensure that it does not, in any pre-closing covenants, grant veto rights over certain types of decisions of the target, resulting in *de facto* control for the acquirer. Parties should also implement appropriate safeguards for information exchange, such as the establishment of clean teams.

The EC will be encouraged to impose large and unpredictable fines for gun jumping. The EC will appreciate the AG's views that the EC is not required to provide detailed reasoning for its fine-setting mechanism, provided that it has respected general principles of EU law, such as principles of equal treatment, proportionality and the requirement to state reasons.

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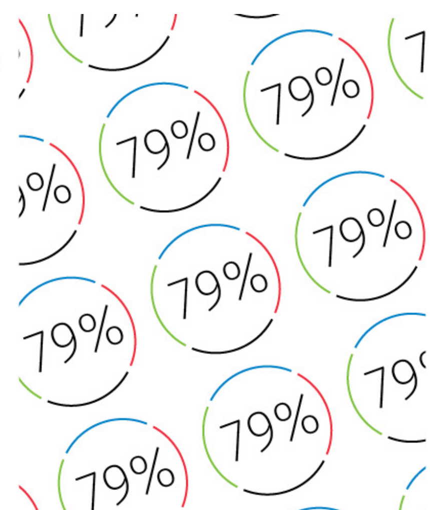

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