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## Gun-Jumping in M&A – ECJ Confirms the Possibility of Two Separate Fines for Gun-Jumping and the European Commission’s Broad Interpretation of What Constitutes Gun-Jumping (Altice)

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On 9 November 2023, the European Court of Justice (**ECJ**) confirmed that the European Commission (**EC**) was right to impose two separate fines on Altice for breaching standstill rules and failing to notify its acquisition of PT Portugal, but lowered the fine for failure to notify by €3.1 million.

The European Union (**EU**) merger control regime imposes strict limitations on the interactions between parties pending merger clearance, to ensure there is no premature implementation of the transaction. The judgment offers further guidance to merging parties on when interim covenants in M&A agreements prematurely give the acquirer undue influence over the target, so-called “*gun-jumping*”.

### Background

In 2018, the EC [fined](#) the French telecommunications company €62.25 million for implementing its acquisition of PT Portugal before notifying the transaction (i.e., infringing the notification obligation pursuant to Article 4(1) EUMR), while also levying an additional €62.25 million fine for closing the transaction before the EC had cleared it (i.e., infringing the standstill obligation pursuant to Article 7(1) EUMR). On 22 September 2021, the General Court (**GC**) dismissed an appeal lodged by Altice against this decision but reduced the fine for breaching the filing obligation by 10%. It took into account that before signing the sale and purchase agreement (**SPA**), Altice had informed the EC of the transaction, and, after signing, 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). Following Altice’s appeal of the GC’s ruling, in his Opinion of April 2023, [Advocate General Anthony Michael Collins](#) recommended that the ECJ uphold the GC’s judgment in its entirety.

### Key points of the judgment

### *Obligation to state reasons for setting the two identical fines*

The ECJ confirmed that the infringements of Article 4(1) and Article 7(1) of the EUMR are different in duration. The breach of the former constitutes an instantaneous infringement and the latter a continuous infringement. In this regard, the ECJ held that the EC had “*in no way explained why, in spite of that difference, the two infringements called for fines of the same amount*”. In other words, the EC had not explained why the significant difference did not justify a difference in the amount of the two fines.

In the exercise of its unlimited jurisdiction, the ECJ reduced the fine for the infringement of the notification obligation to EUR 52.9 million. In setting the amount of the fine, the ECJ took into account the nature, gravity and duration of the infringement and the need to ensure deterrence.

The ECJ endorsed, nevertheless, the rest of the GC’s judgment and the broad interpretation of gun-jumping.

### *Transparency in setting fines for gun-jumping*

In setting fines, the ECJ considered that the EC must set out with sufficient clarity the reasons justifying the fines by showing the factors taken into account, i.e., the nature, gravity and duration of the infringements found. However, the EC does not need to specify in detail the figures relating to the calculation of the fines.

### *The notification and standstill obligations can be separately breached*

The ECJ confirmed that it was justified to impose two separate fines for breaches of the obligation to notify a merger (Article 4(1) EUMR) and the obligation to obtain clearance prior to implementation of the merger (Article 7(1) EUMR) and that this did not breach the principles of proportionality and the prohibition on double punishment. To this end, the Court reiterated the stance taken on this issue in [Case C-10/18 P Marine Harvest](#) – noting (amongst other things) that whilst an infringement of Article 4(1) EUMR (notification obligation) automatically results in an infringement of Article 7(1) EUMR (standstill obligation), the reverse is not true. The Articles also pursue autonomous objectives: the former lays down an obligation to act and the latter lays down an obligation not to act; the former constitutes an instantaneous infringement and the latter constitutes a continuous infringement. In short, failure to comply with the requirements under each Article justifiably constitutes two separate infringements.

### *Pre-closing covenants can amount to the implementation of concentrations*

The ECJ ruled that the signing of the SPA can amount to an implementation of a concentration because it confers on the acquirer the *possibility* of exercising decisive influence (which is the definition of “*control*” under EU merger control rules) over the target as of that point in time – it is irrelevant whether the acquirer has actually *exercised* decisive influence.

In addition, the ECJ considered that the implementation of a concentration is not limited to situations that may lead the EC to order, in the event of prohibition of the transaction, that the concentration be dissolved.

The ECJ also clarified that although the pre-closing covenants are of limited duration, they are capable of contributing to a lasting change of control along the lines of the standard developed in [C-633/16 Ernst & Young](#). For there to be a concentration, it is the change of control itself that must last, rather than the measures that contribute to a change of control, which could be temporary.

### *Concept of veto rights*

The ECJ confirmed that the acquirer's veto rights over certain of the target's business activities contained in the SPA went beyond what was necessary to preserve the value of the target and conferred the possibility of exercising decisive influence on the target. In particular:

- Altice's consent was required for a large number of decisions concerning the target's business operations, commercial policy and management structure;
- The covenants gave Altice veto rights over the target's pricing policies; and
- The low monetary thresholds captured a wide range of contracts.

### *Information exchange*

The ECJ followed AG Collins' Opinion that information exchanges contributing to the implementation of a concentration is relevant for the assessment of a breach of Articles 4(1) and/or 7(1) EUMR, and must not be exclusively assessed under Article 101 TFEU.

## **Outlook**

The ECJ's judgment endorses the EC's wide discretion when it comes to enforcing gun-jumping violations and thus puts transaction parties on notice that they risk significant fines if they fail to observe the strict EU merger control rules. Whilst technically understandable that separate fines can be imposed for failing to notify and early implementation, by and large, it does seem a bit like double jeopardy, especially because the conduct that infringed these two provisions was exactly the same. But this makes compliance all the more important.

Making the issue particularly tricky to navigate in practice is that the actual exercise of decisive influence over a target *is not necessary* to breach the EU rules and that merely having the ability/possibility to exercise decisive influence, including through provisions agreed in an M&A agreement at signing, is sufficient (and their breaching effects instantaneous). It is also not straightforward to determine which types of covenants can still be considered necessary to preserve the target's value, and which are only somewhat related to this aim but are too far-reaching.

There is, therefore, an understandable tension between parties' compliance with the standstill obligations and their legitimate desire to preserve the value and commercial integrity of the target

and prepare (as early and as effectively as possible) for post-merger integration. As such, the following points are worth bearing in mind for transaction parties to ensure any arrangements and pre-closing conducts remain competition law compliant:

- Despite the acquirer typically (and not unreasonably) wanting provisions that preserve the value of the business it has agreed to buy, operational control should always remain with the seller and any activities focused on post-merger integration should be limited to integration planning. Therefore, proposed restrictive clauses should always be carefully scrutinised before they are included in transaction documents.
- The acquirer should be conservative in avoiding any influence on the ordinary course of business decisions of the target. Before required clearances are granted, merging parties should continue to conduct their businesses independently and, in particular, the acquirer should not intervene in the target's day-to-day business decisions. 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 analysed carefully and should not be triggered at relatively low monetary thresholds, compared to pre-transaction board approval rights or the target's typical level of investment.
- Information exchange post-signing is still possible, but only within the same safeguards as pre-signing, i.e., that disclosure of sensitive information should only occur where it is necessary, strictly limited and carried out with appropriate safeguards in place (for example, channelled through external counsel, or dealt with only by 'clean teams'). Where such exchanges are found to be unwarranted, they may be taken as additional evidence of gun-jumping. In the case of mergers between parties which are actual or potential competitors, they also risk breaching the general antitrust rules that prohibit coordination of business conduct between independent firms.

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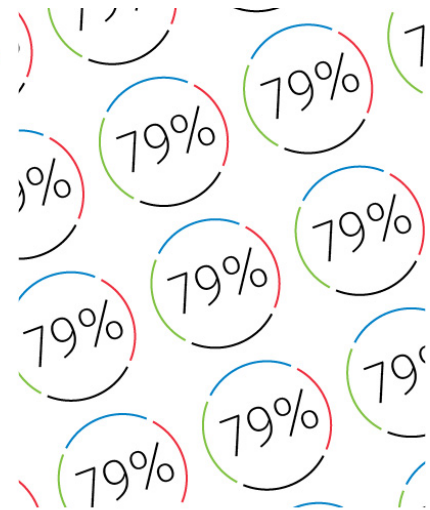
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