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European Commission Gets Tough on Gun Jumping

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On 24 April 2018, the European Commission fined multinational telecoms company Altice €124.5 million (c.$150 million) for breaching EU merger control rules by implementing its acquisition of Portuguese telecoms operator PT Portugal before the transaction had been cleared by the Commission. Although Altice did not acquire a controlling stake in PT Portugal until clearance had been received, the Commission concluded in this case that Altice's contractual rights under the acquisition agreement, combined with pre-closing interaction with PT Portugal, amounted to *de facto* early implementation of the transaction.

This is the latest in a series of recent decisions by the Commission aimed at safeguarding the integrity of the EU merger control regime. The level of this fine, which is an EU record for gun jumping, indicates the Commission's determination to ensure compliance by companies in this area. (Other cases concern the provision of incomplete or misleading information by parties, as well as gun jumping.[1])

While the underlying legal principles are well-recognised, this new focus on procedural issues, together with the level of fine imposed by the Commission in this case, sends a strong message to merging companies of the need to draft their merger agreements and manage their pre-closing interactions very carefully.

Legal context

Under the EU merger control regime, a transaction that falls within the scope of the EU Merger Regulation (EUMR) must be notified to the Commission in advance (the notification requirement) and must not be implemented until cleared by the Commission (the standstill obligation). Implementation occurs through acquiring decisive influence over the target, which may arise by obtaining a majority stake or by gaining control over the target's commercial strategy through other means. This can include a contractual right to veto the target's strategic decisions or by the buyer gaining access to the target's commercially sensitive information and subsequently using it when formulating its own strategy.

While purchasers are entitled to access certain sensitive data of the target during due diligence, this must be tightly controlled to avoid accusation of anticompetitive information exchange (a form of gun jumping). Similarly, while purchasers are entitled to include provisions in a merger agreement to preserve the target's value during any period between signing of the agreement and closing of the transaction, this cannot extend to giving the purchaser de facto control over the target's day to day business during this interim period, as that would amount to putting the merger into effect prematurely. That is permitted only on closing, which itself can take place only once a transaction has been approved by the Commission.

Merging companies must therefore continue to act independently, with no integration or uncontrolled sharing of commercially sensitive information, until the Commission has issued its decision. Failure to notify a transaction before implementation or implementing a transaction prior to clearance is punishable with fines of up to 10% of a company’s worldwide turnover.

Similar requirements apply in most European national merger control regimes.

Background to the Altice decision

On 9 December 2014, Altice signed an agreement with Brazilian telecoms operator Oi to acquire the latter's Portuguese telecoms business, PT Portugal. Altice duly notified the Commission of the merger on 25 February 2015. The Commission cleared the merger in April 2015, on condition that Altice divest its competing business in Portugal. That divestment was duly carried out in September 2015.

Just over two years later after that clearance decision, the Commission announced that it had sent a Statement

of Objections to Altice, raising concerns over Altice's compliance with the EUMR's notification and standstill obligations. The Commission has now definitively concluded that Altice breached both, since:

- the merger agreement with Oi conferred on Altice a legal right to exercise decisive influence over PT Portugal in advance of closing, for example, through contractual veto rights over decisions concerning PT Portugal's day to day business conduct; and
- Altice in practice exercised actual decisive influence over PT Portugal in advance of closing, for example, by instructing PT Portugal on how to carry out a marketing campaign and by receiving detailed commercially sensitive information from PT Portugal "outside the framework of any confidentiality agreement."

As Competition Commissioner Margrethe Vestager put it in a May 2017 speech:

Altice had already been acting as if it owned PT Portugal. It seems that it gave instructions on how to handle commercial issues, such as contract negotiations. And it also seems to have been given sensitive information. Information that only PT Portugal's owner should have had – and without any safeguards to stop it misusing that information.
Elaborating on this in a speech made on 26 April 2018, shortly after the fine was announced, Commissioner Vestager noted that:

[A] merger can be a very big investment. Altice paid nearly seven and a half billion euros for PT Portugal. And like someone who's agreed to buy a house, but hasn't yet got the keys in her hand, businesses need reassurance that the property they get will be the one they agreed to pay for. That's why merger agreements include terms to preserve the value of the company. […]

But there have to be limits on how far that can go. It's one thing to insist that the seller of a house doesn't knock down a wall without checking with you. But that doesn't mean you need a say in how the flowers are arranged.
As this decision deals with a procedural failing, it will have no impact on the Commission's original clearance decision. Altice has nevertheless confirmed that it will launch an appeal of the fine before the General Court.

Conclusion

While the principles underpinning this decision are well-established, there has been limited precedent to make the obligations set out in the EUMR tangible for parties. The level of the fine in this case, combined with other ongoing cases, addresses this gap.

It is clear that it remains perfectly acceptable for buyers to impose obligations on sellers to continue operating the business that is to be acquired "in the ordinary course" for the period between signing and closing, to ensure that they acquire what they have agreed to acquire. Going beyond this is not permissible, however, unless and until the Commission has given its clearance decision.

The decision is also a reminder of the need to maintain close control over the disclosure of confidential information to prospective buyers. As the Commissioner has noted with respect to this case, not only was Altice not yet the owner of PT Portugal at the time it acquired this information, it did not know for certain if it ever would be. The fact that Altice was at the relevant time still in control of competing Portuguese businesses, which the Commission subsequently required it to divest before allowing it to acquire PT Portugal, made this breach particularly severe.

Merging companies should take note of the Commission's increased focus on gun jumping and other procedural issues and ensure that their pre-closing interactions are carefully managed to avoid the risk of substantial fines.

Notes

1. On the latter, see the announcement in July 2017 that the Commission had issued a Statement of Objections to Canon in connection with its acquisition of Toshiba Medical Systems. The final decision in that case remains outstanding at the time of writing.

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