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ALERT MEMORANDUM

Gun Jumping in M&A: General Court Judgment Affirms Strict Approach in *Altice*

November 19, 2021

On September 22, 2021, the General Court upheld the European Commission's decision to fine Altice Europe NV, a multinational telecommunications company, for prematurely implementing its acquisition of PT Portugal.[1] Altice had engaged in conduct that contributed to the change in control of PT Portugal before it had formally notified the merger to the Commission, and before the Commission had approved it. Specifically, Altice had (i) acquired rights under the transaction agreement to veto PT Portugal's ordinary-course business decisions; (ii) actually influenced PT Portugal's commercial activities on several occasions; and (iii) received competitively-sensitive information from PT Portugal.

The General Court confirmed Altice's fine of €124.5 million, but reduced part of the fine by 10% because Altice had intended to notify the transaction and had engaged with the Commission before it acquired control.

The General Court judgment endorses the Commission's stringent approach to gun-jumping and its heightened scrutiny of procedural violations.[2]

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1 Altice Europe v Commission (Case T-425/18) EU:T:2021:607.

2 The Commission levied two fines totalling €20 million on Mowi (previously Marine Harvest) in 2014 for implementing a transaction before a formal notification and clearance (upheld on appeal by the Court of Justice in Case C-10/18 P); fined Facebook €110 million in May 2017, General Electric €52 million in April 2019, and Sigma-Aldrich €7.5 million in May 2021 for providing incorrect or misleading information during the Commission's investigation of their transactions; and imposed two fines totaling €28 million on Canon in June 2019 for acquiring Toshiba Medical Systems Corporation through a so-called "warehousing" two-step transaction (Canon's appeal is pending before the General Court in Case T-609/19). In August 2021, the Commission opened proceedings against Illumina for completing its acquisition of Grail while merger review was ongoing, and has adopted interim measures to prevent the companies from integrating while it completes its investigation.

This Alert Memo summarizes the General Court's judgment and identifies the implications for merging parties.

Prohibition on Gun Jumping under the EU Merger Regulation

Transactions falling within the scope of the EU Merger Regulation must be notified to the Commission and cannot be implemented until the Commission has approved the transaction or the administrative deadlines have expired. This restriction on gun jumping ensures the Commission can exercise effective *ex ante* merger control, since transactions can be complex to unwind and may irreparably compromise competition before they can be reversed.[3]

In a prior judgment, the Court of Justice confirmed that the EU Merger Regulation imposes two distinct obligations against gun-jumping, which may attract separate fines.[4]

(a) Article 4(1) obliges a company to notify a concentration to the Commission prior to implementation (the "notification obligation").

(b) Article 7(1) prohibits a company from implementing a transaction, even partially, before receiving Commission approval (the "standstill obligation").

A company may comply with Article 4(1) but subsequently infringe Article 7(1), if it formally notified the transaction but proceeded to implement it before receiving Commission approval. Conversely, an infringement of Article 4(1) automatically results in an infringement of Article 7(1), as occurred in this case. Altice infringed Article 4(1) at the moment it signed the transaction agreement ("SPA") that conferred excessive veto rights over the operations of the target's business pending completion.[5] The instantaneous infringement under Article 4(1) also triggered a continuing infringement under Article 7(1), which lasted until the transaction received Commission approval.

The Commission imposed two separate fines of €62,250,000 on Altice for its infringements of Article 4(1) and Article 7(1). The General Court upheld the two fines and, following the Court of Justice's judgment in *Mowi (Marine Harvest)*,[6] dismissed Altice's argument that Article 4(1) was a redundant provision in the EU Merger Regulation given the existence of Article 7(1), and that the two fines were disproportionate and amounted to double jeopardy. The General Court nevertheless reduced Altice's fine for its infringement of Article 4(1) by 10% to account for the gravity of the infringement. The General Court did not believe that the infringement was as serious as the Commission suggested, as Altice had informed the Commission of the transaction and had taken preliminary steps to notify it shortly after signing the SPA.

What Constitutes Gun Jumping under the EU Merger Regulation?

The General Court's judgment confirms that gun jumping occurs where an acquiring company prematurely engages in behavior that contributes to the lasting change of control represented by the main transaction.[7] This may be the case if the company acquires the possibility of exercising, or actually exercises, "decisive influence" over the target—and in particular where the company is able to determine or

[3] Preparatory steps and other coordination between the merging parties that do not infringe the prohibition on gun-jumping under the EU Merger Regulation can still be caught by Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits anticompetitive agreements and information exchange. And while the prohibition on gun-jumping expires once the transaction is cleared, Article 101 TFEU continues to govern any information exchange or coordination between the parties until completion has taken place. *See* Ernst & Young P/S v Konkurrencerådet (Case C-633/16) EU:C:2018:371, para. 57.

[4] Mowi v. Commission (Case C-10/18 P) EU:C:2020:149.

[5] Altice signed the SPA on December 9, 2014 and formally notified the transaction on February 25, 2015.

[6] Mowi v. Commission (Case C-10/18 P) EU:C:2020:149.

[7] Altice Europe v Commission (Case T-425/18) EU:T:2021:607, paras. 85 and 96.

significantly influence the target's strategic commercial decisions.

The Commission had penalized Altice for three categories of behavior. They concerned (i) pre-closing covenants in the SPA; (ii) involvement in PT Portugal's commercial activities; and (iii) the exchange of competitively-sensitive information. Altice argued that the Commission had adopted an excessively broad interpretation of early implementation, because these actions fell short of a full consummation of the transaction through the transfer of PT Portugal shares and did not involve a "lasting" change of control. The SPA provisions, for instance, were limited in duration and the information exchanges were incapable of conferring control. The General Court dismissed these arguments, as the key question was whether the main concentration involved a lasting change of control and whether the various acts contributed to this change, including by enabling Altice to exercise decisive influence over PT Portugal.

Pre-Closing Covenants in the SPA

The transaction agreement required PT Portugal to seek Altice's consent before taking certain commercial decisions during the pre-closing period. The Commission concluded that these rights gave Altice the possibility of exercising decisive influence over PT Portugal. While the General Court agreed with the Commission that it was "*common and appropriate*" for transaction agreements to include such provisions, the relevant clauses "*went beyond what was necessary to protect the value of PT Portugal*" and could not be justified as necessary for the planned transaction.[8] The General Court suggested, however, that these provisions could in certain circumstances be justified if they served other legitimate purposes beyond the protection of the target's value—such as where they seek to "*ensur[e] the integrity of the commercial activities of the acquired business between signing and closing […] regardless of whether they end up preserving, increasing or decreasing its value*."[9] The key consideration was whether the covenants allowed Altice to intervene in the target's *"ordinary course of business"* (as opposed to instances where the value or the integrity of the target may be appreciably affected). Interestingly, the General Court notes that is irrelevant whether the pre-closing covenants give the acquirer actual veto rights or only a possibility to claim damages if the target breached the covenants.

Appointment of directors or officers. Altice's consent was required for the appointment, dismissal, or changes to the terms of employment of any director or officer. The Commission did not consider these consent rights to be indispensable to carry out the main transaction because they were "*extremely broad and cover[ed] an undefined class of personnel not all of whom are likely to be relevant to the value of the target*."[10] The General Court found this to be factually incorrect, observing that the relevant persons were listed in annexes and "*related only to the management of PT Portugal*", which included PT Portugal's Board of Directors (eight individuals) and two "administrators". Nevertheless, the General Court agreed with the Commission's position that these provisions conferred decisive influence because they enabled Altice to co-determine the structure of PT Portugal's senior management.

While the judgment is somewhat unclear, it confirms that consent rights over the target's key employees are permissible where they are integral to the value of the business.[11] The Commission itself endorses the principle that veto rights over the personnel of the target business may be justified when (i) the key employees are clearly identified (as opposed to an indefinite, broad, category) and (ii) in order to preserve the value of the business (such as where the employees are "*integral to the value of the business*").[12]

8 *Ibid.*, paras. 108 and 131.

9 *Ibid.*, paras. 92 and 101. The judgment did not go on to discuss what the "*preservation of commercial integrity*" entailed, since Altice had not submitted any evidence on this point.

10 *Ibid.*, para. 111.

11 *Ibid.*, paras. 113-114.

12 Commission Decision of April 24, 2018 in Case M.7993 – *Altice / PT Portugal*, para. 75 ("*the retention of certain key employees who are integral to the value of the business, or in order to prevent material changes to the cost base of the business*").

Commercial transactions and policies. Altice's consent was also required for a range of commercial decisions, including changes to PT Portugal's pricing policies and standard terms, new financial commitments or liabilities, entry into or changes to material contracts, and the acquisition of assets outside PT Portugal's annual budget. These veto rights were subject to narrow exceptions, including a very low monetary threshold of €5 million, decreasing to €1 million after one month from the signing date. By way of comparison, PT Portugal's turnover in 2014 was €2.5 billion with its business valued at €7.4 billion.

As with the appointment of personnel, the Commission considered that the buyer's consent rights should not go beyond what is necessary to preserve the value of the target's business. To determine which contracts fell within this category, the Commission analyzed:[13]

— the contracts that the seller had disclosed during the due diligence stage, which in the Commission's view gave "*a good indication of the contracts that are likely to affect the value of the business*"; and

— whether a contract fell within the ordinary course of a target's business, which it regarded as "*a good indication (although not decisive) of whether it is likely to have a material impact on the value of the target*".

The General Court concluded that the contractual limitations were "*so numerous and broad and the monetary thresholds so low*" that they went beyond what was necessary to preserve the target's value.[14] By way of illustration, the seller had "*interpreted the SPA as meaning that it was obliged to seek the applicant's consent to all material contracts, whether or not they were in the ordinary course of business*."[15]

Involvement in Commercial Decisions

Between the signing of the transaction agreement and the transaction's approval, the Commission found that Altice had actually exercised control over PT Portugal's business on seven occasions. These incidents were often prompted by the seller's efforts to comply with the broad pre-closing covenants in the SPA. Altice participated in various discussions concerning PT Portugal's operations, including decisions on (i) the launch of a marketing campaign for certain mobile services; (ii) the renewal of a television channel supply agreement; (iii) the selection of radio access network equipment suppliers; (iv) the conclusion of a video-on-demand contract; (v) the addition of a new television channel; (vi)the acquisition of shares in a national telecommunications network and (vii) the participation in a tender for outsourcing services.

With the exception of the fifth instance, discussed below, the General Court agreed with the Commission that Altice's involvement in these decisions was not justified by the need to preserve the value of the target business. These activities formed part of PT Portugal's ordinary business and were not commercially or financially important (for instance, a number of these contracts were below the monetary thresholds in the SPA). It was irrelevant that Altice's involvement may not have actually changed PT Portugal's commercial strategy.

The General Court considered that Altice's involvement may have been justified in relation to PT Portugal's decision to include a new television channel that was aimed at dogs rather than human beings. While the annual value of the contract was low, this was an "*unusual proposal*" that "*could have had negative effects on PT Portugal's image*," such that Altice's intervention may be necessary in order to "*preserve PT Portugal's image or even the value that might result from such an image*."[16] Interestingly, the General Court thus accepted that an impairment to the target's image or reputation may be enough to justify a veto right despite the low monetary value of the relevant contract.

13 *Ibid.*, paras. 97 and 99.
14 Altice Europe v Commission (Case T-425/18) EU:T:2021:607, para. 117.
15 *Ibid.*, para. 118.
16 *Ibid.*, paras. 204–205.

Finally, Altice argued that its actions were akin to those examined by the Court of Justice in *Ernst & Young.*[17] There, the Court held that the termination of a cooperation agreement between the target business (KPMG Denmark) and its global affiliate (KPMG International) did not constitute early implementation, because it did not give the acquirer (Ernst & Young) the possibility of exercising decisive influence over the KPMG Denmark (the target). The General Court dismissed Altice's argument because, contrary to the facts in *Ernst & Young*, Altice had actually exercised control over many aspects of PT Portugal's business.[18]

Access to Competitively-Sensitive Information

Between the signing of the transaction agreement and the transaction's approval, the Commission found that Altice and PT Portugal had had several meetings and bilateral exchanges where PT Portugal provided Altice with competitively-sensitive information. This included detailed and precise information on PT Portugal's strategy and commercial objectives, price and cost-related strategies, key supplier relationships, recent financial data on revenues, profit margin, capital expenditure and budget planning, network expansion plans, future pricing strategies, and weekly reports on key performance indicators.

The General Court agreed with the Commission that sharing competitively-sensitive information with the buyer "*could be considered as, if properly conducted, a normal part of the acquisition process, if the nature and purpose of such exchanges are directly related to the potential acquirer's need to assess the value of the business*."[19] In this case, the information sharing took place after the parties had signed the SPA and involved highly sensitive information, as the parties were direct competitors. Importantly, the sensitive information was shared with a large group of Altice managers, including operational staff, as opposed to a limited "clean team".[20] The Court therefore agreed that the information exchanges "*contributed to demonstrating that the applicant had exercised decisive influence*" over PT Portugal.[21]

The Commission's decision provides a useful list of examples of the type of data that may be considered competitively sensitive. In the context of PT Portugal's telecommunications, broadband internet access, and pay-TV businesses, the following information was considered competitively sensitive:[22]

— PT Portugal's tariffs, margins, costs, and ARPU (average revenue per user);

— PT Portugal's plans to reduce churn in the B2B (business) segment;

— Current information about PT Portugal's network-sharing agreement with Vodafone, including its implementation status and issues with the network roll-out;

— PT Portugal's fiber network and network costs per type broken down by type of area;

— A summary of PT Portugal's contracts with TV-content providers, including value and expiry dates;

— The evolution of PT Portugal's revenues by segment (voice, leased lines, roaming, and submarine cables);

— Current financial results of PT Portugal's business in the B2C (consumer) segment, B2B (business) segment, and international wholesale segment, as well as PT Portugal's revenues, cost, churn, and net-add information presented in a more granular and current format than typical quarterly reports;

— The number of PT Portugal's base-transceiver stations (and how many were fiber connected), detailed calculation of the cost per home passed in

17 Ernst & Young P/S v Konkurrencerådet (Case C-633/16) EU:C:2018:371. *See also* Cleary Gottlieb's alert memo 'EU Merger Control Standstill Obligation – EY Judgment', June 25, 2018.

18 Altice Europe v Commission (Case T-425/18) EU:T:2021:607, para. 178.

19 *Ibid.*, para. 229.

20 Commission Decision of April 24, 2018 in Case M.7993 – *Altice / PT Portugal*, para. 422.

21 Altice Europe v Commission (Case T-425/18) EU:T:2021:607, para. 235.

22 Commission Decision of April 24, 2018 in Case M.7993 – *Altice / PT Portugal*, paras. 411–419.

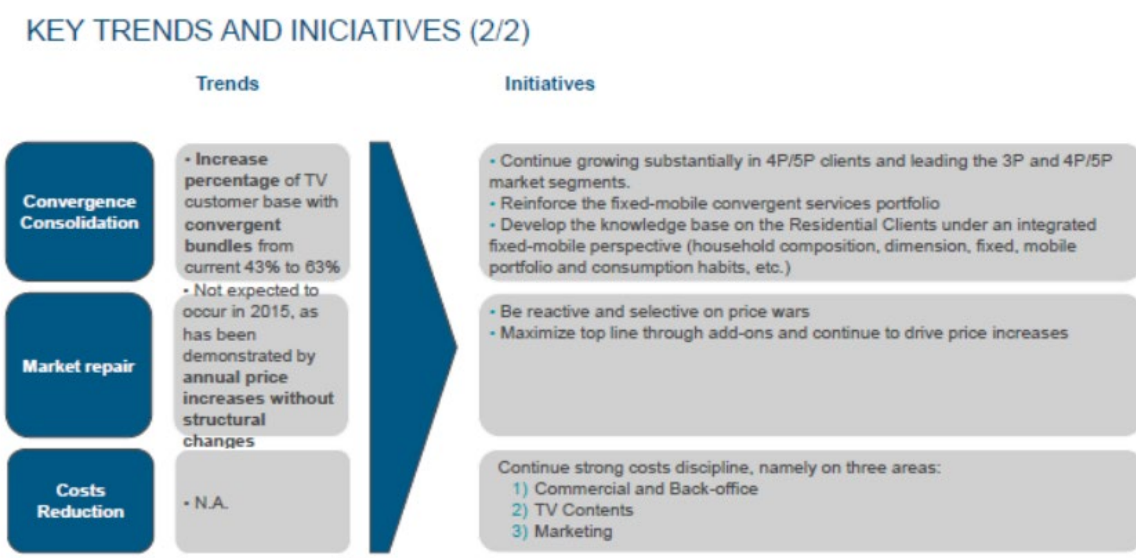
each area, maintenance cost and power cost of PT Portugal's copper network and satellite platform;

— Detailed weekly KPIs (while aggregate KPIs are only published on a quarterly basis by some Portuguese telecommunications companies);

— The key market trends for the forthcoming calendar year and PT Portugal's strategy to respond to them, as presented in the slide below.[23]

Altice argued that this slide was vague and imprecise and that it would be extremely difficult to draw any meaningful commercial conclusions from it.[24] The Commission disagreed, arguing that it "*clearly spell[ed] out PT Portugal's strategies and initiatives for the following year.*"[25]

Example of Competitively-Sensitive Slide from PT Portugal



The General Court's judgment does not address whether information exchange for integration planning (as is common practice during a merger process) would be legitimate, because this was not directly at issue.[26] It also leaves open whether improper information exchanges could—in isolation—be considered early implementation: the General Court confined itself to endorsing the Commission's conclusion that these exchanges, combined with Altice's participation in PT Portugal's commercial decision making, meant that Altice had exercised decisive influence over PT Portugal.[27]

23 *Ibid.*, para. 385, Figure 7.
24 *Ibid.*, para. 430.
25 *Ibid.*, para. 442.
26 During the procedure before the Commission, Altice had argued that information exchanges in the context of merger transactions were lawful for various purposes, including (among others) integration planning (Commission decision, para. 425). However, these arguments were not addressed in the Commission decision.
27 Commission Decision of April 24, 2018 in Case M.7993 – *Altice / PT Portugal*, para. 448. While this was the Commission's final finding, the Commission also commented earlier in its decision that an improper exchange of information could in itself represent an exercise of decisive influence and therefore amount to gun-jumping: "*[W]hen it actively requested and received the information, Altice did exercise decisive influence over the Target: Altice actively sought, and was provided with granular, strategic and up to date information of the type that it would have been entitled to as PT Portugal's shareholder, but that should not be transmitted between competitors*" (para. 440).

Conclusion

This judgment confirms that the EU merger control regime imposes strict limitations on the interactions that merging parties may have with each other pending merger clearance, to ensure there is no premature implementation of the transaction. It establishes that "gun-jumping" encompasses a potentially broad range of activities: it is not limited to an actual exercise of control over the target company, but extends to the possibility of exercising such influence over the company (such as through pre-closing veto rights) or other behavior that "*contributes to the change in control*" represented by the main transaction.

Since the *Altice* decision was issued in 2018, the Commission and other antitrust agencies have continued to enforce vigorously against gun-jumping.[28] Potential violations are detected through the agencies' monitoring system or complaints.[29] It is therefore more important than ever for companies to establish clear guidelines for advisors and employees when planning and preparing for a transaction.

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Guidance for Dealmakers

General principles

Up to completion of the transaction, merging parties should comply with these general principles when interacting with each other.

— The parties remain separate companies and must continue to operate independently and carry on "business as usual" in all respects.

— The parties must continue to treat each other as they would any company that is or may become a competitor.

Consistent with this, the parties should not seek to influence or control how the other conducts their business, in particular in the ordinary course, and should not disclose information that they would not typically share outside the company.

As an exception to these rules, the parties may, where this is necessary in order to carry out the merger, (i) exchange information, including to assess the value of the business during due diligence, or (ii) coordinate commercial decisions to preserve the value or commercial integrity of the target business in the intervening period up to completion.

Compliance

— In transactions where the merging parties are (actual or potential) competitors, establish clean team arrangements before exchanging any competitively-sensitive information. By limiting information access to clean teams, the parties help ensure that such information does not affect their competitive behavior. Clean teams should consist only of third party advisors (such as external legal counsel) and/or identified employees who are not involved in day-to-day management or commercial decisions. Clean team members should sign confidentiality undertakings, with

28 In 2021 to date, the competition regulators in China, Austria, Portugal, Israel, and COMESA, have issued fines or opened investigations against companies for failing to notify mergers.

29 In *Altice*, the Commission began investigating Altice's conduct following press reports that Altice executives had visits and meetings with PT Portugal before the transaction was approved. In *Canon/Toshiba Medical Systems* (Case M.8179), the Commission was alerted to potential breaches by an anonymous complainant.

appropriate "garden leave" arrangements to prevent them from making use of such information in commercial roles while the information retains commercial significance. Where necessary, "black-box" arrangements *i.e.*, a third party expert group, should be set up to exchange the most highly-sensitive data, such as future tender decisions or key pricing decisions. Parties should ensure that the restrictions put in place before the signing of the SPA are not indirectly overridden by broad and unqualified pre-closing information sharing obligations included in the SPA.

— Be cautious when identifying "competitively-sensitive" information, and include any information, whether recent or forward-looking, which could be of appreciable value to a competitor, such as pricing policies, detailed cost structures, margins, revenues, investment plans, R&D pipelines, product launches, and commercial strategies, particularly in relation to specific customers or projects.

— Only exchange competitively-sensitive information when it is demonstrably required to assess the value of the target, or in order to preserve its value or commercial integrity.

— Provide training and guidance on gun-jumping rules to advisors and staff before information exchanges occur.

— Document meetings between the merging parties with agendas and minutes, and be aware that antitrust agencies could seek disclosure of such materials, and any other documents relevant to the transaction.

Pre-closing covenants in the transaction agreement

— The SPA should not restrict a party's freedom to conduct its business in the ordinary course as it sees fit, unless this is demonstrably required to preserve the value of the target business or its commercial integrity. Avoid, in particular, imposing any form of control over pricing and day-to-day commercial operations and strategy.

— Any interim conduct restriction should be clearly defined and narrowly tailored to these objectives. Avoid using standard lists with vague terms such as "material contracts", without reference to appropriate monetary or other deal-specific thresholds, and avoid relying on open-ended "catch-all" provisions.

— Pre-closing covenants should reflect the specific risks that are relevant to the target business. These risks should be clearly identifiable and material. This means, in particular, that any form of control or influence over commercial decisions (*e.g.*, new commercial contracts) should be limited to matters that are material and outside the ordinary course of business of the target, by reference to sufficiently high monetary thresholds or by including exceptions for actions "in the ordinary course of business" wherever appropriate. Pre-closing covenants that address certain categories of risk *e.g.*, those affecting brand image and reputation, may also be acceptable, even though such risks are not specifically quantifiable.

— Any restrictions on the target's ability to appoint, dismiss, or change the employment terms of its directors and staff should be limited to a select list of key individuals who are integral to the value or commercial integrity of the business or in order to prevent material changes to the cost base of the business.

Other guidance

— Should the company become aware of potential instances of gun jumping, seek legal advice and take steps to remedy the situation as soon as possible. This could limit the duration of any infringement, and consequently, the size of any fine.

— If the parties determine that certain implementation steps are required, seek legal advice and consider requesting a derogation from the European Commission under Article 7(3) of the EU Merger Regulation (or a national equivalent).