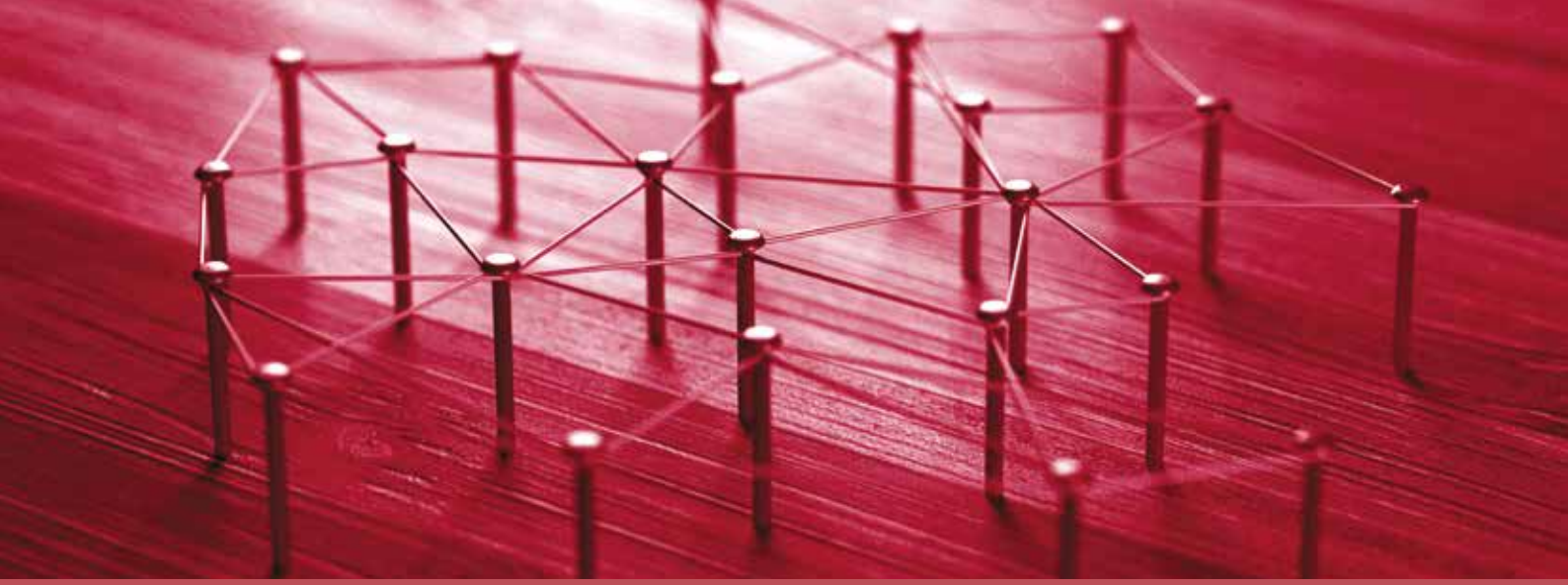

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Merger Control 2019

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A practical cross-border insight into merger control issues

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the fifteenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 55 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Nigel Parr of Ashurst LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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Gun-Jumping: Recent Developments in EU Merger Control Enforcement

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Introduction

In recent years, the European Commission (the 'EC') as well as a number of national competition authorities in the EU have significantly increased the enforcement of procedural infringements of merger control rules, including by imposing heavy fines. This article focuses on the obligations of the merging parties in the time period between signing and completion of a merger.

Under the EU Merger Regulation ('EUMR'), merging firms are prohibited from integrating their businesses or otherwise coordinating their commercial behaviour until the transaction has been approved by the EC (*standstill obligation*). The purpose of the standstill obligation is to provide the EC with an opportunity to evaluate the competitive impact of a proposed transaction before it has any effects on the market or on the merging parties' activities. Merging parties that "jump the gun", *i.e.*, violate the standstill obligation by prematurely integrating their businesses or attempting to influence each other's activities pending the EC's review of their transaction, may face substantial fines. In addition, merging parties that are competitors should refrain from coordinating their commercial behaviour prior to closing. Even if no actual coordination occurs, the mere exchange of competitively sensitive information between actual or potential competitors may compromise competition between the parties.

As a general principle, competition authorities need to recognise the legitimate need of the acquirer to protect the value of its investment (the firm being acquired) in the period between signing and closing of a transaction. Similarly, there is an equally legitimate need for merging parties to perform due diligence and start planning post-closing integration of the merging firm, both of which require the exchange of information, including competitively sensitive information. It is common practice to adopt safeguard processes to govern such exchanges of competitively sensitive information, for example, by entering into so-called clean team arrangements, whereby the exchange is limited to a small group of people who are subject to very strict confidentiality obligations.

In April 2018, the EC imposed a fine of €124.5 million on the multinational telecoms provider Altice for partially implementing its acquisition of the Portuguese telecoms and multimedia operator PT Portugal, before obtaining the EC's approval. Less than two years before, in November 2016, Altice had received an €80 million fine from the French Competition Authority (the 'FCA') for a similar infringement in relation to its acquisition of SFR group and OTL group, approved by the FCA in 2014. In both cases, Altice was found to have gained and exercised decisive influence over the day-to-day business of the target entities in the period between signing and closing. The EC and the FCA concluded that it did so through restrictive covenants in the purchase agreement, effective influence on day-to-day business decisions, both within the scope of and beyond those covenants, and the exchange of competitively sensitive information without the implementation of proper safeguards.

This is an area of merger control law where, until the recent Altice decision, the EC had not issued any decision or provided any other type of guidance. Prior cases did not provide specific guidance on the conduct of companies in the period between signing and closing of a transaction. It is therefore disconcerting that the EC, in its first decision on the issue, decided to impose a fine as high as €124.5 million.

At the very least, *Altice* provides some guidance on where to draw the line between legitimate conduct and the early implementation of a transaction remains subject to debate. Additional guidance can be drawn from the May 2018 judgment of the Court of Justice of the European Union ('CJEU') in the *Ernst & Young* case.

1. The Gun-Jumping Prohibition

The vast majority of the world's leading merger control jurisdictions, including the United States, EU (and most of its Member States), China, Brazil, and many others, require merging parties to not implement their transaction until competition approvals have been obtained. As mentioned, the standstill obligation is aimed at preventing a concentration from causing lasting and irreparable harm to the structure of the market before being approved by competition authorities.

The EUMR contains both a positive obligation on undertakings to notify reportable concentrations (Article 4(1)) and a negative obligation not to close or implement a reportable concentration prior to its approval (Article 7(1)). Under Article 7(1) of the EUMR, concentrations with a Union dimension cannot be implemented before they have been declared compatible with the internal market. The concept of "concentration" is defined by Article 3 of the EUMR, which refers to a "change of control on a lasting basis" as the determining factor. Control is equated with the possibility, conferred by rights, contracts or other means, of exercising decisive influence on an undertaking. The EC can impose fines of up to 10% of the aggregate worldwide group turnover of the undertaking concerned for intentional or negligent violations of the obligation, as well as interim measures (Article 14(2)).

2. CJEU in *Ernst & Young*: EU Gun-Jumping Scope Not Unlimited

On 31 May 2018, the CJEU handed down a judgment on a request for a preliminary ruling from a Danish Court regarding the scope

and application of the standstill obligation, in particular, in relation to the early termination of a cooperation agreement.

In November 2013, KPMG DK and Ernst & Young ('EY') concluded a merger agreement. At that time, KPMG DK was party to a cooperation agreement granting it the right to be included in the KPMG International network and use the KPMG trademarks. The cooperation agreement provided, *inter alia,* that participating firms could not conclude commercial agreements with third parties, such as partnerships or joint ventures. For this reason, at the time of signing the merger agreement, and thus prior to obtaining competition approval, KPMG DK decided to terminate its cooperation agreement with the KPMG International network, with effect from September 2014. The EY/KPMG DK merger was approved by the Danish competition authority in May 2014. Once the merger was approved, KPMG DK and the KPMG International network agreed to end their cooperation earlier, with effect from June 2014. In December 2014, the Danish Competition Council found that the termination of the cooperation agreement was merger-specific, irreversible, and had the potential of having market effects in the period between the notice of termination and the approval of the merger. Even if the termination would only take effect six months after giving notice (and thus, well after receiving competition approval), the Competition Council found that shortly after receiving notice, several KPMG DK customers had switched to KPMG International, which had already set up a competing business in Denmark.

Upon appeal, the Danish Maritime and Commercial Court asked the CJEU to clarify the scope of the gun-jumping prohibition under the EUMR.

The EC intervened in the proceedings before the CJEU pleading in favour of a very broad reading of the EU standstill obligation. It argued that it is not a prerequisite for finding a violation of the standstill obligation that the conduct forms, in whole or in part, in law or in fact, part of the process leading to the actual change of control. Instead, the EC suggested that a merger may, *inter alia*, be (partially) implemented by measures that: (i) consist of preparatory steps in the course of a procedure leading to a change of control; (ii) allow the party obtaining control to gain influence over the structure or market behaviour of the target undertaking; or (iii) otherwise anticipate the effects of the merger or significantly affect the prevailing competitive situation.

The CJEU took a much more limited approach, largely following the recommendations of Advocate-General Wahl. The CJEU concluded 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". This implies that any action that is not contributing to the implementation of the concentration falls outside the scope of the standstill obligation. Although such transactions may be ancillary or preparatory to the concentration, they do not present a "direct functional link" with its implementation and are thus unlikely to undermine the effectiveness of merger control. The fact that such transactions may produce market effects is not in itself sufficient to justify a different interpretation of Article 7 EUMR.

Accordingly, the CJEU concluded that KPMG DK had not jumped the gun, as the pre-closing termination of a cooperation agreement did "not contribute, as such, to the change of control of the target undertaking". The fact that the merger agreement expressly required KPMG DK's withdrawal from the cooperation agreement, and thus that this would likely not have happened absent the concentration, did not change the Court's analysis. The CJEU concluded that the termination of the agreement was KPMG DK's unilateral and independent decision.

The CJEU concluded that EY did not acquire the possibility of exercising any influence over KPMG DK when the latter terminated the cooperation agreement. EY and KPMG DK were found to be fully independent both before and after the termination of the agreement.

Last, the CJEU recalled that any preparatory steps that do not fall within the scope of the standstill obligation could still be caught by the prohibition of restrictive agreements under Article 101 TFEU. In fact, extending the scope of Article 7 EUMR to these preparatory steps, which do not contribute to a lasting change of control, would reduce the scope of Article 101 TFEU.

The *EY* judgment is a welcome clarification of the standstill obligation as it clearly ties the gun-jumping prohibition to the acquisition of control, thus rejecting the EC's expansive proposed approach. It appears from the judgment that purely unilateral and independent measures taken by the target should not be caught by this prohibition, even if they have market effects, and even if they are preparatory to the consummation of the transaction. However, the CJEU remained vague as to what does and what does not contribute to the change in control.

3. The EC *Altice* Decision: The Many Faces of Gun-Jumping

As mentioned above, on 24 April 2018, the EC imposed a fine of €124.5 million on Altice for (partially) implementing its acquisition of its Portuguese competitor PT Portugal before obtaining the EC's approval.

The EC decision predates the *EY* judgment, which came out one month later. The EC followed a similar legal framework, stating that the gun-jumping prohibition covers "(i) the acquisition, prior to notification and/or clearance by the Commission, of the ability to exercise decisive influence; or (ii) the actual exercise, prior to notification and/or clearance by the Commission, of decisive influence; or both". However, the EC nevertheless kept a door open for the future by adding in a footnote that gun-jumping can take different forms and that the above two scenarios are only one of those potential forms. It can be argued that the *EY* judgment closes the door again, by clearly linking the concept of gun-jumping to the notion of the acquisition of control.

The EC's *Altice* decision arose out of Altice's acquisition of PT Portugal from the Brazilian telecom operator Oi, which was approved by the EC in April 2015, subject to the divestment of Altice's Portuguese subsidiaries, Cabovisão and ONI Telecom. In May 2017, the EC raised concerns that Altice may have partially implemented its acquisition of PT Portugal prior to the EC's approval decision, and in some instances, even prior to the notification.

As described in the EC decision, the conduct of PT Portugal between signing and closing was regulated by the sale and purchase agreement ('SPA'), which provided for (i) a positive obligation to carry out activities in the ordinary course of business and in accordance with past practice, unless authorised by Altice, (ii) a negative obligation not to undertake a broad range of corporate, competitive and commercial actions without Altice's prior consent, and (iii) a reporting obligation from Oi to Altice relating to certain actions, depending on the subject matter and the monetary value of such actions.

Between signing and closing, Oi sent nine formal notices to Altice requesting formal approval for PT Portugal's actions that it considered falling within these provisions of the SPA. In addition, the EC found that the communications between Oi and Altice deriving from their obligations under the agreement were supplemented by frequent and direct contact between Altice and PT Portugal via

telephone calls, emails and meetings. PT Portugal sought consent from Altice on a wide range of issues and reported on the progress of various ongoing matters, providing detailed and granular financial information. In addition, Oi sought Altice's input and consent on matters that were not within the remit of the agreement.

The EC decision provides a lengthy discussion regarding the three key areas which, taken together, were found by the EC to result in gun-jumping: (i) the legal rights granted to Altice under the purchase agreement; (ii) Altice's influence over PT Portugal; and (iii) the exchange of competitively sensitive information between Altice and PT Portugal. These findings are summarised below, as they provide a rare overview of the concrete types of measures the EC takes issue with and give at least some indication as to where to draw the line.

As regards the legal rights granted to Altice under the purchase agreement, the EC started by noting that control, *i.e.* the (possibility to) exercise decisive influence over the target, can be acquired on a *de jure* and/or *de facto* basis. Thus, control may be conferred by way of the existence of a legal right (*e.g.* resulting from the transaction agreement) or be determined on the basis of the actual practice of exercising control. The EC concluded that (i) the SPA put Altice *in a position to* exercise decisive influence over PT Portugal already before notification and approval of the transaction, and (ii) in certain instances, Altice *actually* exercised decisive influence over PT Portugal. In particular, the EC found that certain provisions in the SPA granted Altice veto rights over decisions concerning PT Portugal's ordinary business. The EC concluded that having the right to determine the conduct of PT Portugal with regard to the following matters, individually and collectively, went beyond what was necessary to preserve the value of PT Portugal's business pending the closing of the transaction.

- *Veto rights over the appointment and termination of PT Portugal's directors and officers*. The EC recognised that having a degree of oversight regarding the personnel of a target may be justified in order to preserve the value of the business between signing and closing (*e.g.* in respect of 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). However, having a veto right over the appointment, dismissal and changes to the terms of employment of any officer or director (*i.e.* a broad undefined class of personnel), irrespective of whether retention of that director or officer was integral to the value of the business, independently and together with the other veto rights discussed in the decision, conferred on Altice the power to exercise decisive influence over PT Portugal's senior management and therefore, its commercial policy.
- *Veto rights over the modification of PT Portugal's pricing policy and commercial terms and conditions with customers*. The EC stated that decisions on pricing form a fundamental part of a company's commercial policy and the unrestricted ability to set prices is essential for any company to compete independently and effectively in the market. The EC found that Altice's right of prior consent to modifying the target's pricing policies and standard offer prices inherently reduced PT Portugal's discretion and ability to act independently on the market. The EC noted in particular that the relevant clause in the SPA was written in extremely broad terms and gave Altice a veto right over a large proportion of PT Portugal's pricing decisions and terms of business with its customers. The EC therefore concluded that Altice's veto right over PT Portugal's commercial decisions went beyond what was necessary to guard against material changes to PT Portugal's business for the purposes of preserving its value.
- *Veto rights over PT Portugal's decisions to enter into, terminate or modify certain contracts*. The EC recognised that having a degree of oversight over contracts which a target can enter into, and the commitments it can make between signing and closing, may be justified in order to preserve the value of a target, for example, to preserve the perimeter of the business or to guard against commitments of such magnitude that the value of the business could be affected. However, the EC considered that having a veto right over almost all commercial actions, with a low monetary threshold, goes beyond what would be necessary to guard against material changes to a target's business for the purposes of preserving its value. The EC concluded that the monetary thresholds were set at a level that brought contracts that were not relevant to preserving the value of the PT Portugal's business under Altice's oversight.

The EC thus concluded that the SPA, as a contract between Oi and Altice, constituted an agreement by Oi not to take certain actions regarding PT Portugal's business without Altice's prior consent, thereby conferring the latter the ability to determine PT Portugal's commercial actions. The matters covered by the SPA gave Altice a legal right to intervene on the ordinary course of PT Portugal's business and therefore, the possibility to exercise decisive influence over PT Portugal prior to clearance.

In addition to being granted the right and possibility to exercise decisive influence prior to clearance, the EC further concluded that Altice *actually* exercised decisive influence on a significant number of matters relating to PT Portugal's strategic and commercial policies, which were not necessary to preserve the value of its investment. The EC found that Altice was heavily involved in decision making processes at PT Portugal, including in relation to: (i) marketing campaigns; (ii) commercial contracts (setting the targets and the negotiating strategy and terms); and (iii) future investments. In this respect, the EC found that PT Portugal sought consent from Altice on a wide range of issues and reported on the progress of various ongoing matters. The EC found that even in situations where PT Portugal was not obliged to obtain Altice's consent on the basis of its obligations under the SPA, a variety of commercial decisions were not made unless and until Altice consented. The EC noted that it had found no evidence that Altice "*sought at any time to distance itself from Oi's (or PT Portugal's) request for consent or guidance*" regardless of whether the request was being made within or outside of the scope of the SPA. Concrete examples of instances where the EC found that Altice exercised operational control include the following:

- the decision-making process regarding a PT Portugal marketing campaign; Altice also monitored the implementation and results of the campaign;
- setting the targets and the negotiating strategy regarding the renewal of PT Portugal's contract with Porto Canal;
- establishing PT Portugal's selection process for radio access network suppliers;
- defining the terms for the negotiation of a supply agreement between PT Portugal and Cinemundo; and
- the decision whether to include the DOG TV channel in PT Portugal's TV offering.

Last, as regards the exchange of competitively sensitive information, the EC found that PT Portugal provided detailed, confidential and up-to-date information to Altice, that was not limited to instances for which Altice's consent was required. This information, as Altice recognised, was granular, non-historic and by its nature individualised. Competitively sensitive information was provided systematically and extensively by PT Portugal to Altice, either during meetings between the management of the two companies, or on an *ad hoc* basis, and including on specific topics which did not fall within the scope of the purchase agreement. The EC found that many of these exchanges took place at Altice's initiative, with Altice proposing an agenda for the meetings and requesting specific information from PT Portugal in the follow-up of the meetings.

The EC stressed that the exchange of information took place between several of PT Portugal's and Altice's executives, in the absence of any type of confidentiality arrangement, be it a clean team-type structure or any other measure aimed at limiting the number of individuals who would have access to the information and/or the circulation and dissemination of PT Portugal's confidential information within Altice prior to closing.

The EC recognised that exchanges of business-related information between a potential acquirer and a vendor could be considered, if properly conducted, as 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. Such situations generally arise as part of a due diligence process. However, the EC concluded that the information exchanges with Altice were not necessary to preserve PT Portugal's value, but rather gave Altice considerable insight into and influence over the day-to-day operation of PT Portugal's business and its commercial and strategic policy at a time when the two parties were competitors in the same market. The fact that the parties were competitors in Portugal made it difficult for the EC to restore the prior competitive situation. In this respect, the EC stressed the fact that once the information is exchanged, the harm to competition has already been done.

Altice appealed the EC's decision to the General Court on 5 July 2018 (case T-425/18).

4. Conclusion

The CJEU judgment in *EY* as well as the EC *Altice* decision recognise the legitimate need of the merging parties to (i) take certain measures to protect the value of the target between signing and closing, (ii) exchange certain competitively sensitive information in the context of due diligence and integration planning, and (iii) take certain preparatory steps towards closing.

There also seems to be some convergence with regard to the legal scope of the standstill obligation: it should be limited to measures which, in whole or in part, in fact or in law, contribute to the change in control of the target undertaking. There is no need to prove that the decisive influence has actually been exercised, and/or that the measure has resulted in any effects on the market. In this sense, the risk of gun-jumping should be taken into account both (i) before signing – in drafting and negotiating the SPA – to avoid the acquirer being granted the possibility to exercise decisive influence over the target), and (ii) after signing – in the interaction between the merging parties – to avoid the exercise of undue influence on the target's ordinary business.

Despite these clarifications, uncertainty remains as to what concretely is and is not prohibited under the standstill obligation. For example, it is unclear whether all the individual practices at issue in the *Altice* decision qualify as gun-jumping, or whether they need to be seen together in order to result in an infringement.

In addition, the EC decision ascribes part of the infringement to the exchange of competitively sensitive information – it is, however, unclear whether such exchange could, by itself, contribute to a change in control, within the meaning of the *EY judgment*.

While awaiting further clarification, companies should remain vigilant about gun-jumping risks associated with their transactions, and seek legal advice when in doubt.

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