European Court Confirms Commission's Highest Fine to Date for Gun-Jumping

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On September 22, 2021, the European General Court issued its judgment upholding the decision by the European Commission (Commission) to fine Altice for gun-jumping in the acquisition of Portugal Telecom (PT) in 2015. The General Court did grant Altice a limited 5% reduction of part of the €124.5 million fine imposed.[1]

This remains the highest fine imposed by an antitrust authority for gun-jumping, indicating that compliance with the standstill obligation under the European Merger Regulation (EUMR) is an important enforcement priority for the Commission.

The decision follows a growing list of Commission cases imposing fines for similar violations: two companies were both fined €20 million, in 2014 and 2019 respectively; Canon was fined €28 million in 2019; and the Commission is currently investigating possible gun-jumping related to Illumina's acquisition of Grail.

The *Altice* decision is particularly relevant for identifying the conduct and transaction covenants that trigger gun-jumping enforcement risk. The case highlights the importance of carefully reviewing transactional documents and of implementing compliance mechanisms, such as incorporating "clean teams" of persons who are not involved in the parties' day-to-day business operations, to mitigate antitrust compliance risks.

In a trend similar to the Commission's, national competition authorities in Europe have also been increasingly aggressive in enforcing gun-jumping rules in the past five years, resulting in material fines for companies that violate standstill rules, for example in Austria (Facebook/Giphy), Czech Republic (Skyport), France (Altice/SFR), Portugal (Fidelidade SGOIC) and Germany.

The General Court judgment in *Altice* endorses this enforcement trend and sends a strong signal that the Commission will continue to prioritize enforcement of the EUMR's procedural rules.

Background of the *Altice* Case

The European Commission Decision

In December 2014, Altice, a multinational cable and telecommunications company, entered into a transaction agreement with Oi, the Brazilian telecommunications operator, to acquire sole control of PT, a Portuguese telecommunications operator.

The transaction was notified to the Commission in February 2015 and approved in April 2015, subject to the divestment of Altice's Portuguese subsidiaries at the time, Cabovisão and ONI.

In March 2016, after becoming aware of information in the press, the Commission launched an investigation to determine whether Altice had violated the EUMR's standstill provisions. In May 2017, the Commission raised concerns that Altice may have partially implemented its acquisition of PT before obtaining the Commission's clearance, and in some instances, even before its notification of the transaction. In particular, the Commission considered that the purchase agreement between Altice and PT had put Altice in a position to exercise decisive influence over PT before notification or approval of the transaction had occurred, and that in some instances Altice actually had exercised decisive influence over PT.

[1] Case T-425/18, *Altice v. European Commission*, judgement of the General Court, September 22, 2021.

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For example, the Commission held that certain provisions in the stock purchase agreement (SPA) granted Altice veto rights over decisions concerning PT's ordinary business. According to the Commission, Altice did then exercise decisive influence over aspects of PT's business, for example, by giving PT instructions on how to carry out a marketing campaign and by seeking and receiving detailed commercially sensitive information about PT outside the framework of any confidentiality agreement.

As a result, in a decision on April 24, 2018, the Commission imposed two fines on Altice totaling €124.50 million — (i) a fine of €62.25 million for infringing the obligation to notify the concentration and (ii) a fine of €62.25 million for failing to comply with the prohibition on implementing the concentration prior to its notification to, and its approval by, the Commission.

On July 2018, Altice appealed the decision to the General Court.

The General Court Judgement

Despite dismissing Altice's appeal, the General Court ordered a reduction of the fine relating to the breach of the obligation to notify the concentration to the Commission by €6.22 million, which represents a 5% reduction of the overall €124.5 million fine imposed.

Articulation of EUMR Articles 4(1) and 7(1)

First, the General Court dismissed Altice's argument that the obligation to notify the concentration (per EUMR article 4(1)) and the fine applicable in cases of noncompliance with that obligation (per EUMR article 14(2)(a)) are redundant in the light of the obligation not to implement the concentration before it has been notified and cleared (per EUMR article 7(1)) and the fine applicable in cases of infringement of that obligation (per EUMR article 14(2)(b)).

The General Court considered that the decision did not infringe the principle of proportionality or the prohibition of double punishment, and that to declare such provisions unlawful would conflict not only with the objective of the EUMR, which is to ensure effective control of concentrations, but would also deprive the Commission of the possibility of establishing a distinction, by means of the fines which it imposes, between (i) a situation in which the undertaking complied with the notification obligation but infringed the standstill obligation and (ii) a situation in which the undertaking infringed both obligations.

Pre-closing Covenant Clauses of the SPA

Altice argued that the pre-closing covenant clauses of the SPA functioned in an ancillary nature and did not amount to an early implementation of the transaction.

In this regard, the General Court disagreed and held that the pre-closing covenants enabled Altice:

- to appoint and to terminate the employment of the senior management of PT, conferring on Altice the power to exercise decisive influence on the commercial policy of PT;
- to intervene in PT's pricing policy by requiring PT to obtain written consent from Altice for any change in prices and for any amendments to its standard terms and conditions; and
- to enter into, terminate or amend a wide range of PT's contracts — because those clauses, which carried a right to compensation in the event they were infringed, obliged PT to request Altice's prior consent to all material contracts, whether or not they were in the ordinary course of business and irrespective of their economic value.

On that basis, the General Court found that Altice had not proved that these pre-closing covenants were necessary to ensure that the value of PT was preserved or to avoid its commercial integrity being compromised, and that these clauses gave Altice the possibility of exercising control over PT by conferring on Altice the ability to exercise decisive influence over PT's business.

However, exercising its unlimited jurisdiction, the General Court determined that reducing the €62.25 million fine for infringement of the notification obligation under EUMR article 4(1) by 10% was appropriate, to account for the facts that Altice had informed the Commission of the transaction it was to undertake before the signing of the SPA and that the company had sent a request for allocation of a case team to the Commission immediately after signing.

Takeaways

To ensure adequate measures are in place to prevent enforcement risk during mergers, companies should consider the following:

- A careful review of transactional documents is key to ensure that the buyer does not acquire control of a planned acquisition prematurely (though veto rights over decisions outside of the ordinary course of business may be acceptable).
- The parties must continue to behave independently until closing.
- The parties should organize integration activities to ensure that such activities remain limited to planning.
- Companies should channel the exchange of commercially sensitive information through appropriate mechanisms (*e.g.*, by creating clean teams supported by outside counsel).

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