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EU Court of Justice Ruling on M&A 'Gun-Jumping' Sets 115 Million-Euro Fine

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Merger review has become an ever more critical path to successful M&A completion, as enforcement agencies, including the European Commission (EC), apply closer scrutiny to potential anti-competitive effects of M&A deals. With closing timelines extended as a result, and because parties need to comply with mandatory "standstill" rules pending merger clearance, pre-closing integration planning and interaction have become more critical.

But the pressures to complete a signed deal swiftly, and to realize the investment value, must be balanced carefully so the parties avoid "jumping the gun" on the enforcer's assessment. The November 2023 judgment of the Court of Justice of the European Union (CJEU) in ***Altice v. European Commission*** provides critical guidance on permitted and prohibited pre-closing interaction between merging parties.

Background

Altice is a multinational cable and telecommunications company based in the Netherlands. Under a share purchase agreement (SPA) on December 9, 2014, it agreed to purchase PT Portugal, a rival telecommunications and multimedia company active in Portugal, from Oi. The 7.4 billion-euro deal was notified to the EC for review under the **EU Merger Regulation** (EUMR), and the EC **cleared the transaction** (subject to certain conditions) on April 20, 2015, following a Phase I review.

Three years later, on April 24, 2018, the EC adopted a **second decision** concerning the transaction. In this decision, the EC concluded that, in the four-month period between signing of the SPA and the EC's clearance decision, Altice had breached two distinct obligations that the EUMR imposes on transaction parties, because:

1. The SPA's pre-closing covenants afforded Altice the right to exercise decisive influence over PT Portugal.
2. In some instances, Altice had actually exercised decisive influence over aspects of PT Portugal's business.

The rights accrued, and the conduct took place, before the EC had adopted its (conditional) clearance decision, so Altice was found to have breached the "standstill" obligation per Article 7(1) EUMR, which provides that a notifiable transaction must not be implemented prior to clearance. In fact, some rights accrued, and some conduct took place, after the SPA had been signed but before the deal was notified for merger review; Altice therefore also was found to have breached the obligation per Article 4(1) of the EUMR to not implement such a transaction prior to its notification. Altice was fined 62.25 million euros for each infringement – in total, 124.5 million euros.

Altice appealed against the EC's 2018 decision to the General Court of the European Union (GC), requesting an annulment of the decision or a reduction of the fines imposed. In a **judgment adopted on September 22, 2021**, the GC upheld the EC's findings regarding Altice's breaches of the EUMR, but it reduced (slightly) one of the fines to 56 million euros, for a total of 118.25 million euros in fines.

The CJEU, in its **November 9, 2023, ruling** on Altice's final appeal, largely upheld the GC's judgment: The findings regarding infringements were upheld, but one fine was (slightly) adjusted on formal grounds, this time to 52.9 million euros. The total fine of 115.16 million euros was the EU's second-highest fine for a "gun-jumping" violation, exceeded only by a highly contested **432 million-euro fine imposed in 2023**. The CJEU's judgment includes several pointers that dealmakers should consider in order to avoid unnecessary exposure to severe fines in deal-critical pre-closing engagement and integration planning.

Unlawful deal 'implementation'

First, the CJEU confirmed that an M&A deal that is notifiable under the EUMR can be "implemented" prematurely if the acquirer has the possibility, prior to clearance, to undertake certain actions; it is not necessary that those actions are actually carried out.

The CJEU anchored the analysis in its previous ***Ernst & Young P/S v. Konkurrencerådet* ruling**, holding that "implementation" arises as soon as the transaction parties implement operations "contributing" to "a lasting change in the control of the target." Under the EUMR, "control" involves the "possibility" of exercising a decisive influence over the target, and it may be exercised by one firm unilaterally or together with one or more others. In other words, it is not necessary to actually take any action – it is sufficient that an acquirer has been afforded rights, contracts or other means that enable its exercise of decisive influence on the target. The CJEU also held that partial implementation, even by conduct of limited duration, may involve implementation, as such conduct can contribute to a lasting change of control.

Pre-closing covenants involving premature 'implementation'

Second, the CJEU confirmed that the acquisition had been prematurely implemented already when the buyer and seller signed the SPA, as pre-closing covenants in that agreement afforded the buyer the possibility to exercise decisive influence over the target.

The EC had explained in the decision on appeal that it agreed with Altice that it was both common and appropriate to include clauses in an SPA aimed at protecting the value of the target business between signing and closing. However, such pre-closing covenants could only be justified to the extent that they were strictly necessary to ensure that the value of the target was maintained **and** did not afford the buyer the possibility of exercising decisive influence over the target. In its decision, the EC identified three classes of covenants which, in its view, allowed Altice to exercise decisive influence over the target by way of certain veto rights.

More specifically, according to the SPA, the seller had to obtain the buyer's written consent regarding:

1. The target's senior management structure: The buyer's written consent was needed to appoint, dismiss, or make changes to contracts with the target's officers or directors, which gave the buyer powers to co-determine the structure of the target's senior management.
2. The target's pricing policy: The buyer's written consent was in effect required for any decision on changes to the target's pricing and customer contracts, which gave the buyer the possibility to also co-determine those matters.
3. The target's contracts: The buyer's prior written consent was necessary for all the target's material contracts, regardless of whether these were in the ordinary course of business, so in light of the commercial matters covered, and the low monetary thresholds set for consent, the buyer also was granted wide-ranging influence in this respect.

The EC (and the GC, on appeal) found that the veto rights over each item went beyond what was necessary to preserve the value of the target and afforded the buyer the power to exercise decisive influence over the target. Before the CJEU, Altice argued that the nature of the rights it held had been misinterpreted. The CJEU disagreed, and it also held that the fact that Altice was entitled to compensation, if the seller failed to comply with its obligations under the SPA, confirmed that these were indeed veto rights. Because Altice was afforded these rights, which conferred the power to exercise decisive influence, under the SPA, the parties had implemented, at least in part, the acquisition prematurely on execution of that agreement.

Buyer’s involvement in target’s commercial decisions

Third, the CJEU confirmed that the transaction had been implemented prematurely also because the buyer actually had exercised decisive influence over the target. In part, this had occurred as a function of the parties adhering to the SPA’s pre-closing covenants.

The EC had found that the seller or the target on seven occasions prior to merger clearance had requested the seller’s instructions on commercial matters and acted in accordance with the instructions they received in return, and the GC agreed with this assessment. We’ve outlined those seven instances below.

Commercial campaign

The target sought and received the buyer’s agreement concerning the main features of a commercial campaign for post-paid mobile tariff plans. The buyer monitored the results of the implementation of the campaign to decide whether to continue with it or stop it. Thus, the buyer was directly involved in the target’s competitive strategy on the market through the decision-making process related to this commercial campaign.

Distribution contract 1

The target was evaluating whether to renew a contract regarding the distribution of a TV channel, Porto Canal, via the target’s pay-TV service. The buyer and the target discussed and agreed on the negotiation strategy, and the buyer consented to continued negotiations. Consequently, the buyer was directly involved in setting the targets and the negotiating strategy regarding the renewal of the contract, and thus, in the target’s competitive strategy on the market in which the buyer was itself competing via its subsidiaries.

Distribution contract 2

The target was in discussions with a video content supplier, Cinemundo, regarding agreements on content distributed via the target’s pay-TV service. The target sought guidance from the buyer regarding the terms. The buyer provided guidance, with reference to its commercial policy. Therefore, the buyer was directly involved in defining the terms for the negotiation of the supply agreement, and thus, in the target’s competitive strategy on the market in which the buyer was itself competing via its subsidiaries.

Distribution contract 3

The seller sought the buyer’s instructions concerning the potential inclusion of a new TV channel, DOG TV, on the target’s pay-TV service. The buyer denied consent and requested further information. The seller responded with granular details of the revenue sharing model foreseen. Hence, the buyer was directly involved in such decision, which formed part of the target’s competitive strategy on the market in which the buyer was itself competing via its subsidiaries.

Outsourcing contract

The target won a tender to provide outsourcing services and solutions to a Portuguese agribusiness. The seller sought the buyer’s approval for the investments required to provide the services. The seller provided additional information requested by the buyer and, in parallel, the buyer and the target were in telephone contact regarding this contract. Consequently, the buyer was engaged in the commercial policy of the target that formed part of the target's business strategy.

Supplier contracts

The target was planning to reduce the number of radio access network (RAN) suppliers it used. The target asked the buyer for instructions on whether it should continue the selection process or wait until the acquisition had closed, suggesting a preference for continuing with the selection process. However, the buyer decided to wait until the acquisition was closed. Therefore, the buyer was directly involved in establishing the target's selection process for RAN suppliers and, thus, in its competitive strategy.

Joint venture exit

The target received a letter of intent concerning the sale of its shares in SIRESP, a joint venture (JV). The seller informed the buyer that it did not intend to exit or increase its stake by exercising its preemptive rights, and it requested permission to formally reject the offer. The buyer requested and received from the seller further information on the JV's business plan, on a JV service contract, and on the target's valuation of the shares. The buyer confirmed that it was not willing to sell the target's stake in the JV, and that it wanted, instead, the target to make a counteroffer to acquire sole control of the JV. The seller also requested to be involved in the negotiation process. As a result, the buyer was directly involved in decisions related to M&A activity, which formed part of the target's competitive strategy on the market.

Before the CJEU, Altice argued that such consultation as had occurred between the parties did not amount to "implementation." The CJEU flatly rejected this argument, referring to its assessment of the SPA's pre-closing covenants and veto rights (as we explained earlier).

Commercially sensitive information exchanged between target and buyer

Fourth, the CJEU confirmed that information exchanges contributing to the implementation of a concentration should be assessed under the EUMR, and not only under general EU law on anticompetitive conduct between firms (**Article 101 of the Treaty on the Functioning of the European Union**).

In addition to the seven instances discussed above, the EC found that the target and the buyer engaged in "systematic and extensive" information exchanges, where the target provided commercially sensitive information to the buyer. According to the EC, these exchanges contributed to showing that the buyer exercised decisive influence on certain aspects of the target's business, as the buyer only would have been entitled to such granular, strategic and up-to-date data once it had become the target's shareholder.

The GC upheld the EC's findings. Before the CJEU, Altice argued that the GC, in doing so, had unlawfully extended the standstill requirements of the EUMR to cover exchanges that ought to have been analyzed under the general competition law rules on restrictive practices. The CJEU gave this argument short shrift.

Considerations for dealmakers

Parties need to be conscious that unlawful implementation under the EUMR can arise prior to notification as well as after notification and prior to clearance. These are two distinct offenses and even partial implementation of limited duration may cross the line.

EC’s wide discretion

The EC has a wide margin of discretion in identifying unlawful implementation under the EUMR. It is not a question of whether competition has been distorted or was at risk of being distorted, but a formal assessment that centers on whether the buyer prematurely was given the possibility of exercising a decisive influence over the target.

Transaction agreements

That possibility may arise from the transaction agreement, which must be drafted carefully to ensure that interactions between the parties do not cross the line. The basic premise in this context is that, until closing, the parties remain independent, and should make decisions independently of one another prior to merger clearance.

Pre-closing covenants

Pre-closing covenants should be scrutinized closely and justified by the strict need to preserve the value of the target and must not afford the buyer the possibility of exerting a decisive influence over the target. This means that, for instance, operational control should remain with the seller pending completion of the merger review, matters subject to interaction should be calibrated carefully, and consent rights for the buyer should be avoided for issues pertaining to the target’s business operations, the commercial policy and management structure.

Information exchanges

The possibility of exerting decisive influence also can arise from integration planning, which should be focused on post-merger integration. Information exchange after signing is not prohibited but should be subject to the same safeguards as pre-signing. In particular, exchanges of commercially sensitive information should be limited to what is strictly necessary and only occur with established guardrails, such as “clean team” arrangements – or the exchanges may be taken as evidence of premature implementation in breach of the EUMR. In addition, if the firms are actual or potential competitors, the exchanges may also fall foul of the general competition law rules.

Larger ‘gun-jumping’ fines

Premature implementation under the EUMR entails serious financial exposure. In the *Altice* case, the fines imposed exceeded 115 million euros. That is a substantial amount, but the EC is entitled to impose gun-jumping fines of up to 10% of a firm’s aggregate worldwide turnover and, as mentioned, transgressions that take place before and after merger notification constitute separate offenses.

Advance analysis and planning

The risks associated with premature implementation are avoidable. In spite of the *Altice* judgment, it is possible for firms to agree on and protect the full value of M&A investments prior to merger clearance, and to plan for successful integration of the acquired firm for the future. Careful advance analysis and planning, in light of the requirements of the EUMR (and other merger control regimes that may be applicable), is the key to success in this regard.

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