

Gun-jumping in merger control: the latest EU developments

EU Competition Law Briefing



Gun-jumping in merger control

Christian Haellmigk

Henrik Nordling

Gun-jumping is clearly on the agenda...

“Our ex-ante merger control regime, requires that companies notify transactions with an EU dimension and wait for our approval before the transaction can go ahead. Also, companies must respect the commitments they offer us, on the basis of which we approve a transaction. We take any breach of these procedures very seriously. At this stage, the Commission has gathered sufficient elements to open a formal investigation to determine whether Vivendi has complied with our procedures.”

Margrethe Vestager, Executive Vice-President in charge of competition policy - 25/07/2023

Legal framework (EU Merger Regulation)

- **Article 4:** "Concentrations [...] shall be notified to the Commission prior to their implementation [...]"
- **Article 7:** " A concentration [...] shall not be implemented either before its notification or until it has been declared compatible with the common market [...]"
- **Article 14 (2) and (3):** Failure to notify in accordance with Article 4 and implementation of a concentration in breach of Article 7 can each result in fines of up to 10% of the aggregate turnover of the companies concerned
- **Article 3 (1) and (2):** "A concentration shall be deemed to arise where a change of control on a lasting basis results [...]". "Control shall be constituted by rights, contracts and any other means which [...] confer the possibility of exercising decisive influence on an undertaking [...]"

What does implementation mean?

- It is clear that the standstill obligation comprises all actions that, on their own, de iure or de facto, constitute a concentration, i.e., confer control
- Not so clear whether it also includes actions that, on their own, do not (yet) constitute a concentration (e.g., because they anticipate effects of an intended transaction only in part)

Case law (1)

Electrabel / Compagnie Nationale du Rhône (EC 2008)

- Concentration fully implemented without clearance (acquisition of de facto sole control)
- Fine imposed for breach of Article 7: EUR 20m
- Confirmed by GC (2017) and by ECJ (2020)

Marine Harvest / Morpol (EC 2014)

- Two-step transaction (SPA + public offer)
- SPA-transaction fully implemented without clearance (acquisition of de facto sole control)
- Two fines imposed: for breach of Article 4 and for breach of Article 7
- Total amount: EUR 20m = EUR 10m + EUR 10m
- Confirmed by GC (2017) and ECJ (2020)

Case law (2)

- **Altice / PT Portugal** (EC April 2018)

- Details below

- **EY / KPMG** (ECJ May 2018)

- Breach of standstill obligation by announcing the termination of a material contract to take effect on closing?
- ECJ: "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"
- There needs to be a "direct functional link" with the implementation of the transaction. Actions that are not "necessary" to achieve a change of control do not fall within the scope of the standstill obligation
- The occurrence of market effects (or the lack thereof) is not a suitable criterion by itself

Case law (3)

Canon / Toshiba Medical Systems Corporation (EC 2019)

- Two-step "warehousing" transaction:
 - **Step 1:** Canon paid EUR 5.28bn for 5 % of TMSC's shares and options to acquire all TMSC's shares (exercisable on receipt of antitrust clearances). At the same time, a special-purpose vehicle (created for the purpose of the transaction) paid EUR 800 for 95 % of TMSC's shares;
 - **Step 2:** once regulatory approvals were obtained, Canon acquired 100 % of TMSC by exercising the options and converting them into voting shares.
- EC held that Step 1 was "necessary to achieve a change of control in TMSC, in the sense that it presented a direct functional link with the implementation of the concentration" and these "contributed (at least in part) to the change in control of the target"
- Two fines imposed. Total amount: EUR 28m = EUR 14m + EUR 14m
- Confirmed by GC (2022)

Case law (4)

Illumina / GRAIL (EC 2023)

- Alleged intentional breach of the standstill obligation during the Commission's ongoing in-depth investigation:
 - Illumina strategically weighed up the risk of a gun-jumping fine against the risk of having to pay a high break-up fee
 - GRAIL played an active role
- Fine for Illumina for breach of Article 7: EUR 432m = 10% of Illumina's turnover
- Symbolic fine for GRAIL of EUR 1,000 as this was the first time the EC imposed a fine for gun-jumping on a target

Altice / PT Portugal in detail (1)

- **EC decision** of April 24, 2018
 - Transaction notified and approved subject to divestment commitment on 20 April 2015
 - Three key areas which together contributed to a breach of the suspensory obligation:
 - Rights in the SPA
 - How the rights were exercised in practice
 - Significance and frequency of information exchange
 - Two fines imposed on Altice (one each for Article 4 & Article 7)
 - Total amount EUR 124.5m = EUR 62.25m + EUR 62.25m
- **GC Judgment** of September 22, 2021
 - Confirmed EC decision in substance but reduced fine to EUR 118
- **ECJ Judgment** of November 9, 2023
 - Confirmed GC judgment in substance but reduced fine further to EUR 115

Altice / PT Portugal in detail (2)



Altice já está na PT Portugal para assumir controlo da empresa

economicotv · 26 fev 2015 10:14 · 572 visualizações

A venda ainda não está concluída, mas equipas dos franceses da Altice já estão a trabalhar de forma pontual com a PT Portugal. Negócio deve estar fechado até Junho.

Altice is already in Portugal to take control of the company



The sale is not yet complete, but French teams from Altice are already working on an ad hoc basis with PT Portugal. Deal should be closed by June.

Altice / PT Portugal in detail (3)

- Three SPA rights at issue giving the *possibility* to exercise decisive influence
 - Appointment of senior management
 - Influence on pricing policy and commercial T&Cs with customers
 - Entering, modifying & terminating a wide range of commercial agreements
- Several instances where Altice in fact exercised that influence
 - Approval of a mobile marketing campaign
 - Setting targets for contract renewal
 - Establishing selection process for supplier
 - Defining terms for negotiation and agreement between PT and cinemundo
 - Inclusion of channels in PTs TV offering
- Systematic and extensive exchange of information
 - Ad hoc meetings & bilateral communications
 - EC stresses lack of clean team provisions

Altice / PT Portugal in detail (4)

- Commission assessed communication between PT and Altice in detail, such as regarding a new “post paid” mobile campaign

Communication between the Parties		Commission assement
	On 19 January 2015, [Mr. A] forwarded an email to [Mr. F] (COO of Altice) and to other members of Altice's management, indicating that: <i>"the management of PT Portugal would like Altice's point of view/agreement as regards a new mobile campaign"</i> , and asking who would be available for a call with PT Portugal on this topic. ⁷⁹	<div>① Decision right for Altice</div> <div>② Instructions on manner and objective of launching the campaign</div>
	<div>②</div> <div>①</div> <div>③</div> <div>④</div> <p><i>"Following our today's call I confirm that you have a go for the new campaign to test during 3 weeks an evolution of the postpaid pricing to accelerate your prepaid/postpaid migration with a target to reach up to 100k migration per quarter (vs around 75/80k in Q3/Q4 2014) and with the assumption that we should be able to maintain the ARPU or at least minimize the ARPU decrease to less than [...] euros. [...]. Please let us know exactly when you go on air with the campaign (and share also ASAP the advertisement spot)."</i>⁸⁰</p>	<div>③ Shaping and giving granular instructions</div> <div>④ Altice requiring oversight</div>

Altice / PT Portugal in detail (5)

- **GC judgment approves EC decision**, but reduces fine
 - Rejected argument that SPA provisions were ancillary
 - Limitations were so numerous and broad and monetary thresholds so low, that they went beyond what is necessary to preserve the value of the investment
 - Altice had the possibility to exercise decisive influence from the point of signing, and exercised it
- **ECJ judgment approves GC**, but fine further reduced
 - Confirms that implementation of a concentration includes measures that contribute to a lasting change of control (it is the change that must be lasting, not the measures)
 - Preparatory or temporary measures may implement a concentration and violate the suspension obligation
 - Reduced fine for failure to differentiate reasoning between the two fines, despite differences as regards the failure to notify

Key takeaways (1)

- PCCs will probably always meet the "contribute to" test of the ECJ in EY / KPMG. However, they do not constitute gun-jumping if justified by a legitimate interest of the buyer.
- NB: Any breach of Articles 4 and 7 already takes place on the date the SPA is signed (which, in the EU, must be submitted to the EC together with the notification). Risk of fines is mainly for the buyer, and theoretically the target. According to the GC, the EC should be consulted in advance in case of "slightest doubts".
- In order to be justified, PCCs must be strictly necessary for the legitimate interests of the buyer (e.g., for preserving the commercial integrity of the target / the value of the target)
- Great care must be taken with a view to veto rights regarding the pricing policy, the appointment of senior management, the determination of the budget or the business plan of the target

Key takeaways (2)

- No veto rights for actions within the ordinary course of business, veto rights for actions outside the ordinary course of business are, however, not admissible per se
- GC and ECJ provide no guidance for the setting of monetary thresholds for what is beyond ordinary course of business. In its decision the EC, however, mentions (a) the value of the target, (b) the turnover of the target, (c) the value thresholds for contracts to be uploaded to the VDR or (d) pre-existing thresholds for internal approval within the target as potential points of reference
- Integration planning is a useful – and necessary – tool to ensure a smooth transition but must be framed correctly, in particular where parties have competitive overlaps. Clean teams (or other measures) should be used when necessary to enable compliant planning, EC notably criticizes Altice for not having implemented *any* safeguard measures at all.



Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.

cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice. It was prepared in co-operation with local attorneys.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices; details can be found under "legal information" in the footer of cms.law.

CMS locations:

Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Bergen, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Cúcuta, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Liverpool, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Munich, Muscat, Nairobi, Oslo, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Shanghai, Sheffield, Singapore, Skopje, Sofia, Stavanger, Strasbourg, Stuttgart, Tel Aviv, Tirana, Vienna, Warsaw, Zagreb and Zurich.

cms.law