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ANTITRUST CLIENT BRIEFING

Gun Jumping: Review of the GC Judgment in *Altice/PT Portugal*

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At a Glance

The General Court of the European Union (GC) upheld the European Commission's (EC) decision imposing two fines on Altice Europe for gun jumping infringements related to its acquisition of PT Portugal. The GC confirmed in particular that closing before filing and closing before clearance constitute two separate infringements, liable to two different fines.

Key Points:

- Articles 4(1) (obligation to notify the concentration) and Article 7(1) (obligation not to implement the concentration before it has been notified and cleared) of EUMR pursue autonomous objectives, and failure to comply with them constitutes two separate infringements.

- Regardless of the absence of the transfer of shares or assets, restrictive covenants in transactional documents that provide the acquirer with oversight over the ordinary course of business of the target may confer *de facto* control.

- The possibility of exercising decisive influence on an undertaking (rather than actual implementation of control) is sufficient to constitute infringement of Article 7(1) and Article 4(1) of EU Merger Regulation (EUMR).

- Information exchange that goes beyond what is necessary for target valuation may contribute to the exercise of decisive influence.

Background

Altice Europe (Altice) is a French multinational telecommunications and mass media company. PT Portugal (PT) is the largest telecommunications service provider in Portugal. Following the Portuguese government's divestment, PT was acquired by Oi, a Brazilian telecom company, in October 2013. On 9 September 2014, Altice and Oi entered into a share purchase agreement (SPA) whereby Altice agreed to purchase the entire share capital of PT from Oi.

The SPA contained several restrictive covenants which limited PT's behavior prior to closing, and consequently gave Altice a degree of influence over PT. In particular, these covenants included requirement of Altice's consent regarding (i) appointment and dismissal of PT's senior management, (ii) modifications to PT's pricing policies and (iii) PT entering into, modifying, or terminating any material contracts regardless of whether these had any impact on the preservation of PT's value.

Altice pre-notified the transaction on 18 December and notified it to the EC in February 2014. In April 2015, the EC declared the acquisition compatible with the internal market subject to compliance with certain commitments.

In March 2016, following the requests for information prompted by the press coverage regarding visits by Altice executives to PT Portugal prior to obtaining clearance of the transaction, the EC launched an investigation to determine whether Altice had infringed the provisions of the EU Merger Regulation which require that (i) concentrations are notified to the EC before they are implemented and (ii) prohibit their implementation before they are notified and declared compatible with the internal market.

In April 2018, the EC imposed a total fine of €124.5 million on Altice for implementing the transaction before notifying it and before receiving the EC's approval (two different infringements each giving rise to separate fines of €62.25 million). The EC concluded that Altice had had the possibility of exercising decisive influence or had exercised control over PT Portugal prior to the adoption of the EC's clearance decision and, in some instances, even prior to notification of the concentration. In particular, Altice was in a position to use its veto rights in the SPA to exercise decisive influence over PT Portugal's ordinary business before clearance. Moreover, the EC found that Altice actually exercised such influence by instructing PT Portugal on how to conduct a marketing campaign.

Altice brought an action seeking annulment of the EC's decision. On 22 September 2021, the GC dismissed the action in part and largely upheld the EC's decision, while providing clarifications regarding the interpretation and the application of the notification obligation and the standstill obligation for concentrations with a European dimension laid down in the EUMR.

Key themes of the GC judgment

Article 4(1) and Article 7(1) of EUMR pursue autonomous objectives

Altice claimed that the obligation to notify the concentration before closing (article 4(1) EUMR) is redundant in the light of the obligation to obtain clearance before closing (article 7(1) EUMR).

The GC dismissed this plea, explaining that while an infringement of the obligation to notify automatically results in an infringement of the standstill obligation, the converse is not true. In a situation in which an undertaking notifies a concentration prior to implementing it, the undertaking could still possibly infringe the standstill obligation if the undertaking implements that concentration before the EC authorises it. Therefore, these two obligations pursue autonomous objectives in the context of the EC's "one-stop shop" system; namely, first, requiring undertakings to notify the concentration in question prior to its implementation and, second, preventing undertakings from implementing that concentration before the EC declares it to be compatible with the internal market — the first being an obligation to act and the second, an obligation not to act.

The GC further stressed that depriving the EC of the possibility of establishing a distinction, by means of the fines it imposes, between (i) a situation in which the undertaking complies with the notification obligation but infringes the standstill obligation, and (ii) a situation in which that undertaking infringes both those obligations, would not enable the objective of ensuring effective control of concentrations with a European dimension, in so far as infringement of the notification obligation could never be the subject of a specific penalty.

In taking this view, the GC deviated from the view Advocate General (AG) Tanchev took in *Marine Harvest*. In his opinion, AG Tanchev noted that if the same conduct is caught by more than one statutory provision, but one provision is more specific than the other, only the former must be applied. In this regard, the *Marine Harvest* opinion stated that the conduct that breaches the notification obligation and the standstill obligation is one and the same, namely, the closing of the first phase of the transaction. Further, the standstill obligation is more specific than the notification obligation, because the standstill obligation includes all the elements of the latter plus an additional element (namely, the implementation of the transaction in the absence of a notification).

Restrictive covenants in the SPA gave Altice the possibility of exercising control over PT Portugal prior to closing

Altice contested that the restrictive covenants of the SPA gave it the power to block the adoption of strategic decisions. According to Altice, these covenants could not be viewed as veto rights granting it control of PT Portugal. Rather, Altice argued that those covenants played a key role in ensuring the integrity of the commercial activities of the acquired business between signing and closing. As such, the covenants were to be considered as ancillary or preparatory to the transaction and did not amount to early implementation of the concentration. In its reasoning, Altice referred to the Ancillary Restraints Notice, which states that agreements to abstain from material changes to a target's business can be considered directly related and necessary to the implementation of a concentration.

The GC rejected Altice's argument, and agreed with the EC's narrower interpretation of the Ancillary Restraints Notice, which concluded that an agreement which grants the possibility to exercise decisive influence prior to notification or clearance is **only justified if it is necessary to maintain the value of the business**. The GC's assessment with regards to the three groups of the restrictive covenants can be summarized as follows:

- The covenants granted Altice the right to consent to appointment of *any* new officer or director at PT Portugal, or to terminate or amend the terms of their contracts. The power to co-determine the structure of the senior management, on its own, usually confers on the holder the power to exercise decisive influence on the commercial policy of an undertaking. Moreover, the veto right

in this case covered categories of personnel who were not likely to be relevant to the value of PT Portugal's business.

- The covenants enabling Altice to intervene in PT Portugal's pricing policy were extremely broad, and in practice resulted in an obligation of PT Portugal to obtain Altice's written consent to any change in prices. As such, Altice's intervention manifestly exceeded what would be necessary to preserve the value of PT Portugal's business.

- The provisions which gave Altice the opportunity to enter into, terminate, or modify certain types of contracts that PT Portugal could enter prior to the closing of the acquisition — in light of the commercial matters covered by those clauses and the low level of the monetary thresholds that applied to some of those provisions — went beyond what was necessary to prevent any material changes to PT Portugal's business and, consequently, to preserve the value of Altice's investment.

The mere possibility to exercise decisive influence prior to the closing of a concentration constitutes infringement of Article 7(1) and Article 4(1) of EUMR

Altice argued that Article 7(1) and Article 4(1) of EUMR do not prohibit agreements which give the *possibility* of exercising decisive influence on another undertaking, but only prohibit the *implementation* of control on a lasting basis.

The GC rejected this argument, clarifying that the EC must determine whether the result of the implementation of the concentration is to confer on one of the undertakings the power to control the other. That power to control is the *possibility* of exercising decisive influence on an undertaking, in particular if the undertaking with that power is able to impose choices on the other in relation to its strategic decisions.

As the SPA and the respective covenants were effective before the transaction was notified to the EC, during the period between signing and notification the SPA gave Altice the possibility of exercising decisive influence over PT subsequent to the signing of the SPA. In other words, as soon as the SPA was signed, the transaction was being implemented, regardless of whether or not Altice exercised decisive influence. Therefore, there was an instantaneous breach of Article 4(1) EUMR at the moment of signing prior to the notification.

Equally, given that the restrictive covenants went beyond what was necessary to safeguard PT Portugal's value and granted Altice the possibility to exercise decisive influence, the transaction was deemed to be implemented in breach of Article 7(1) EUMR.

Transmission of information contributed to the finding that decisive influence was exercised

Altice claimed that the information exchanges that occurred between Altice and PT Portugal were inevitable and even necessary in the context of the transaction, and as such were insufficient to establish an infringement of Article 4(1) or Article 7(1) of EUMR.

The GC sided with the EC's previous assessment, stating that indeed, exchanges of business-related information between a potential acquirer and a vendor could be considered as a normal part of the acquisition process, provided that the nature and purpose of such exchanges are directly related to the potential acquirer's need to assess the value of the business. However, in the present case, the exchanges of information continued after the signing of the SPA, and therefore went clearly beyond this need, as well as beyond what was necessary to preserve the target's value. Moreover, the parties exchanged certain information regarding PT Portugal ,which was highly sensitive both commercially and competitively, even though some of Altice's subsidiaries were in direct competition with PT Portugal at that time. The exchanged information included detailed and precise information on matters such as PT Portugal's key initiatives in terms of its strategy and commercial objectives, its cost-related strategies, key supplier relationships, recent financial data on its revenues, profit margin, its capital expenditure and budget planning, key performance indicators, network expansion plans, and detailed information on PT Portugal's wholesale business.

For this reason, the GC agreed that these information exchanges had contributed to demonstrating that the applicant had exercised decisive influence over certain aspects of PT Portugal's business.

Practical implications

- The judgment reaffirms the authorities' trend of tougher stands on gun jumping in the recent years. The case sends a clear message that contractual provisions that grant *de facto* decisive influence, pending acquisition of the shares or assets, are subject to close scrutiny and can have far-reaching consequences. Therefore companies contemplating M&A transactions should be extremely cautious when preparing contractual documentation.

- The provisions should not include any restrictions on the target that are not limited to preserving the value of the target business. In practice, this means that the acquiring companies should strictly stay away from any involvement in the target's ordinary course of business.

- This is a rather delicate balance. For instance, while the possibility to co-determine the structure of the senior management is objectively viewed as indication of *de facto* control, the EC in its decision gave examples of similar provisions which it found to be justifiable to preserve the value of the business. These examples included the retention of certain key employees fundamental to the value of the business, or a restriction on employee changes that would have a substantial effect on the cost base of the business.

- Similarly, the EC considered that some oversight over contracts may be justifiable to preserve the value of a business, for example, a requirement for consent with commitments of such materiality that the value of the business could be affected. However, contracts of reasonably low monetary value should not be subject to the acquirer's oversight.

- To further minimize the risk, companies should ensure that sufficient safeguards are implemented for the purposes of information exchange, which should in any case be limited to what is necessary to (i) valuate a target and (ii) to ensure the value of the target is preserved. Such safeguards include clean teams consisting of external advisors of the parties and potentially employees who are sufficiently independent from the management, as well as confidentiality agreements and secured data rooms.

Sources

The GC judgment can be found here.

The EC decision can be found here.