

CLIENT ALERT

EU Court Upholds Highest European Commission Gun-Jumping Fine – Interim Covenants and Information Exchanges Under the Spotlight

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On 22 September 2021, the EU's General Court handed down its [judgment](#) dismissing a challenge brought by Altice Europe NV (**Altice**) against a “gun-jumping” fine imposed on it by the European Commission (the **Commission**). The €124.5m fine, which was reduced on appeal by €6m in consideration of certain limited mitigating factors, remains the highest imposed by the Commission for gun-jumping offences in merger cases to date. The fine was imposed because the Commission considered that interim covenants in the Sale and Purchase Agreement (**SPA**) to acquire PT Portugal SGPS SA (**PT Portugal**), as well as other conduct between the parties, conferred on Altice the possibility to exercise decisive influence over PT Portugal before merger clearance was obtained.

Under EU merger rules, parties are prohibited from implementing deals which fall under the Commission's mandatory merger filing regime until the Commission has granted its approval. The Commission's fine, and the judgment upholding it, form part of a clear enforcement trend against procedural violations of EU merger rules.

Altice argued that its conduct reflected worldwide established practice in mergers and acquisitions. The Commission did not accept this argument and the General Court confirmed the Commission's assessment. Altice can now appeal the

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decision to the EU's highest court, the European Court of Justice, on points of law. In the remainder of this alert we provide details of the infringing conduct.

Altice is a multinational cable and telecommunications company. In December 2014, Altice entered into an SPA to acquire PT Portugal, a Portuguese telecommunications and multimedia operator (the **Transaction**). The Transaction was formally notified to the Commission in February 2015 and was cleared after a Phase 1 review in April 2015. In that same month the Commission sent Altice a request for information relating to its interaction with PT Portugal, which had taken place at meetings of their executives in February and March 2015, of which the Commission had become aware through press reports. In 2016, the Commission opened an investigation into suspected gun-jumping conduct by Altice and, in 2018, imposed two fines of €62.25m each on Altice for (i) implementing the Transaction before notifying it to the Commission (breach of the **Notification Obligation**) and, having notified the Transaction, for (ii) implementing the Transaction before clearance under the EU Merger Regulation (breach of the **Standstill Obligation**).

At issue were certain interim covenants in the SPA which, the Commission concluded, gave Altice the possibility to exercise decisive influence over PT Portugal. These covenants afforded Altice rights to co-determine the senior management of PT Portugal, and to intervene in PT Portugal's pricing policies, contracts and standard terms and conditions. PT Portugal was precluded from taking certain actions in relation to these matters without Altice's written consent. Some of these covenants were, according to the General Court, "extremely broad" (regarding Altice's influence over pricing and client contracts) and the Court considered the monetary thresholds applied in the interim covenants too low, given the target's total revenues and the purchase price.

In particular, as regards the monetary thresholds applied, the Commission found that instead of objective criteria, such as the size and scope of PT Portugal's activities or the value of the contracts which were examined during due diligence, the materiality thresholds were the result of the parties' negotiation and had ultimately been negotiated down from higher numbers in early drafts of the SPA. Furthermore, the Commission found that the scope of the contracts which required Altice's consent fell within the ordinary course of PT Portugal's business. The General Court upheld the Commission's findings in this regard.

The Commission had also held in its 2018 decision that an interim covenant which required Altice's consent to "recruit any new director or officer" meant that Altice could co-determine the structure of the senior management of PT Portugal and that this went beyond what was necessary to preserve the value of Altice's investment. Again, the General Court agreed with the Commission.

The General Court also upheld the Commission's findings that Altice had requested and received confidential and competitively sensitive information post-signing and pre-clearance from the target, which could not be justified by: (i) the need to assess the value of the target (as the SPA had already been signed at that point); or (ii) the aim of maintaining the

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value of the target. The Commission had concluded that such information exchanges had contributed to demonstrating that Altice had exercised decisive influence over PT Portugal.

In its defence, Altice submitted, among other things, that the relevant interim covenants only gave it a consultation right because they precluded Altice from unreasonably withholding its consent. The General Court rejected this argument on grounds that they concerned the reasons why Altice might refuse consent, not the existence of a veto as such, and concluded that the existence of Altice's right to compensation, if Altice's written consent were not obtained, confirmed that those interim covenants constituted a veto right.

The General Court also confirmed, what is now settled case-law, that being afforded the *mere possibility* to exercise decisive influence over a target business (through contractual rights or other means) is sufficient to constitute a breach of the Notification Obligation and the Standstill Obligation. That said, the General Court agreed with the Commission's finding that on a number of occasions, Altice did in fact intervene in the day-to-day running of PT Portugal. This is a factor which was taken into account by the General Court in assessing the appropriateness of the fines and was reflected in the severity of the fines.

The General Court's judgment is an important reminder that, while acquirers are entitled to exercise rights which are strictly necessary to protect their investments between signing and completion, they must ensure that the agreed interim covenants and other pre-completion rights do not exceed what is proportionate and *necessary* to preserve the value of the target before obtaining the Commission's clearance.

The judgment also confirms a number of important procedural points regarding the Commission's fining powers in relation to gun-jumping.

- Deal parties can receive multiple fines for the same conduct. Applying the European Court of Justice's findings in the *Marine Harvest* judgment in 2020, the General Court upheld two separate fines on the acquirer for taking pre-emptive action, both before notifying the Transaction (an "instantaneous" breach of the positive Notification Obligation), and, after notification, for breaching the Standstill Obligation (a "continuous" breach of an obligation not to acquire the ability to exercise decisive influence before the Commission has cleared the Transaction).
- Acquirers can be fined for taking pre-emptive action and exchanging competitively sensitive information in the period between signing and pre-notification, even if they have informed the Commission about a proposed transaction and a draft notification is submitted promptly after signing. The fact that Altice informed the Commission of the Transaction prior to signing and entered into pre-notification immediately after signing did not dispose of the breach. It was also not a defence that Altice had – as is standard practice – provided the Commission with a copy of the SPA at an early stage of the notification procedure. That said, these circumstances were relevant for the General Court's exercise of its

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unlimited jurisdiction to re-assess the Commission's fine, in reducing the fine for breach of the Notification Obligation by 10%.

For further commentary on the Commission's original fining decision and practical implications on deal processes, please see our previous client alert [here](#). For our commentary on other notable gun-jumping fines imposed by the Commission on General Electric in relation to its acquisition of LM Wind in 2019 and by the UK's Competition and Markets Authority on PayPal in its acquisition of iZettle, please see our previous client alerts [here](#) and [here](#).

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