



EU, COMPETITION AND REGULATED MARKETS

Altice Fined €124.5 million for “Gun Jumping”

by **Marco Hickey**

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A fine of €124.5 million has been imposed on Altice by the European Commission for breaching EU merger control rules by implementing its acquisition of PT Portugal before the transaction had been cleared by the Commission.

Altice, based in the Netherlands, is a multinational telecoms operator and PT Portugal is a Portuguese telecoms operator.

Although Altice did not acquire a controlling stake in PT Portugal until the clearance was received, the Commission concluded that Altice's contractual rights under the acquisition agreement, combined with pre-closing interaction with PT Portugal, amounted to de facto early implementation of the transaction.

The decision in relation to the fine was announced on 24 April 2018.

Factual Background

Altice entered into an agreement with the Brazilian telecoms operator, Oi, on 9 December 2014 to acquire Oi's Portuguese telecoms business, PT Portugal. The transaction was notified to the Commission on 25 February 2015. The Commission cleared the merger in April 2015, on the condition that Altice divest its competing business in Portugal. The divestment was duly carried out in September 2015.

Legal Background

The EU Merger Regulation (EUMR) requires that merging companies notify certain transactions prior to their implementation (the notification requirement), and not implement such transactions until they have been notified and cleared by the Commission (the standstill obligation). The obligation to notify concentrations prior to their implementation safeguards the Commission's ability to detect and investigate concentrations. The standstill obligation prevents the potentially negative impact of transactions on the market, pending the outcome of the Commission's investigation. In its press release on 18 May 2017, the Commission stated that “The early implementation of transactions in breach of EU merger review procedural obligations is a very serious infringement, as it undermines the effective functioning of the EU merger control system”.

Implementation can occur through acquiring decisive influence over the target, which may arise by obtaining a majority stake or by gaining control over the target's commercial strategy through other means. This can include a contractual right to veto the target's strategic decisions or by the buyer gaining access to the target's commercially sensitive information and subsequently using it when formulating its own strategy.

While purchasers are entitled to access certain sensitive data of the target during due diligence, this must be tightly controlled to avoid accusation of anti-competitive information exchange (a form of gun jumping). Similarly, while purchasers are entitled to include provisions in a merger agreement to preserve the target's value during any period between the signing of the agreement and the closing of the transaction, this cannot extend to giving the purchaser de facto control over the target's day-to-day business during this interim period, as that would amount to putting the merger into effect prematurely. Such change of control is permitted only on closing, which can only take place once a transaction has been approved by the

Commission.

Commission Statement of Objections and Decision

On 18 May 2017, two years after the Commission approval, the Commission announced that it had sent a Statement of Objections to Altice, raising concerns over Altice's compliance with the EUMR's notification and standstill obligations. In its Statement of Objections, the Commission expressed its preliminary view that "Altice actually implemented the acquisition prior to the adoption of the Commission's clearance decision, and in some instances, prior to its notification."

In the April 2018 Commission decision, the Commission reaffirmed this view and concluded that Altice was in breach of the EU Merger Regulations for the following reasons.

1. The merger agreement between Altice and Oi conferred on Altice a legal right to exercise decisive influence over PT Portugal in advance of closing, for example, through contractual veto rights over decisions concerning PT Portugal's day-to-day business conduct.
2. Altice, in practice, exercised actual decisive influence over PT Portugal in advance of closing, for example, by instructing PT Portugal on how to carry out a marketing campaign, and by receiving detailed commercially sensitive information from PT Portugal "outside the framework of any confidentiality agreement."

In her speech on 26 April 2018, Margrethe Vestager, the Competition Commissioner noted as follows:

[A] merger can be a very big investment. Altice paid nearly seven and a half billion euros for PT Portugal. And like someone who's agreed to buy a house, but hasn't yet got the keys in her hand, businesses need reassurance that the property they get will be the one they agreed to pay for. That's why merger agreements include terms to preserve the value of the company.

...

But there have to be limits on how far that can go. It's one thing to insist that the seller of a house doesn't knock down a wall without checking with you. But that doesn't mean you need a say in how the flowers are arranged.

Altice has stated that it intends to appeal the Commission decision.

Businesses Should Take Note

The case underscores the importance for merging companies to continue to act independently, with no integration or uncontrolled sharing of commercially sensitive information, until Commission approval. Failure to notify a transaction before implementation or implementing a transaction prior to Commission clearance is punishable with fines of up to 10% of a company's worldwide turnover.

It is clear that it remains acceptable for buyers to impose obligations on sellers to continue operating the business that is to be acquired "in the ordinary course" for the period between signing and closing, to ensure that they acquire what they have agreed to acquire. Going beyond this is not permissible, however, until the Commission has issued clearance.

The decision is also a reminder of the need to maintain close control over the disclosure of confidential information to prospective buyers. Merging companies should take note of the Commission's increased focus on gun jumping and other procedural issues and ensure that their pre-closing interactions are carefully managed to avoid the risk of substantial fines.

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