# Regulating for Globalization

Trade, Labor and EU Law Perspectives

## Jump the gun and you are out!

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***Is the Commission stricter than the IAAF?***

The European Athletics Championships finished this Sunday. Some athletes "jumped the gun" by beginning a race before the official signal was given. Those athletes might debate with a referee whether they actually left before the starting shot or not, but no doubt they all know exactly what gun-jumping means.

If only competition law could be so simple. We know the standstill obligation enshrined in Article 7 of the European Merger Regulation (***EUMR***) based on which a concentration that triggers a merger notification may not be implemented before it is cleared by the European Commission (***Commission***). The parties to a merger are independent market players until closing and the buyer is prohibited from already exercising decisive influence over the target before clearance (so-called gun-jumping). At the same time, buyers are in principle allowed to ensure that the value of their prospect investment is protected during the period after signing and before closing.

***Recent examples of gun-jumping fines***

What is often far from clear, however, is where to draw the line. And crossing it can become very expensive. This was recently illustrated when the Commission imposed a fine of almost EUR 125 million on Altice for having exercised control over PT Portugal before the deal was cleared back in 2015, and Altice thus having "jumped the gun".

This decision is the latest example of increasing enforcement actions by antitrust authorities against merging parties for gun-jumping. In 2016, the French Competition Authority fined Altice EUR 80 million for taking steps between signing and closing that go beyond mere integration planning of its acquisition of SFR. Also the Department of Justice (***DoJ***) in the US has imposed significant fines for gun-jumping; in 2017 the settlement between DoJ and Duke Energy included a fine of USD 600,000 imposed on Duke Energy for entering into a tolling agreement with the target Osprey before the end of the waiting period. In 2014, Flakeboard and SierraPine received a fine of nearly USD 5 million in a settlement with the DoJ for coordinating competitive behaviour (including the transfer of customers) before the end of the waiting period (this deal was eventually aborted). Moreover, in 2017 in China the Ministry of Commerce imposed a fine of almost EUR 40,000 on Canon for failing to notify a two-step transaction before the first step of implementation. That same year the Commission also announced it was investigating the 'warehousing' structure in the two-step transaction between Canon and Toshiba Medical from a gun-jumping perspective.

***The Altice/PT Decision***

While the Commission's Altice decision was rendered in May (and Altice has meanwhile lodged an appeal against the decision), a non-confidential version of the Altice/PT decision was only published recently.

It follows from the decision that the Commission bases its conclusion on three elements:

- First, veto rights that were granted to Altice in the SPA for the period until closing went beyond veto rights, legitimate to preserve the value of the target business prior to closing. Altice had veto rights over decisions that would normally be considered part of the ordinary course of business. These included the appointment of senior management, a large number of pricing policy decisions and the entering into of a large number of contracts for which a monetary cap applied that was not sufficiently high to fall outside the ordinary course of PT Portugal's business. The Commission also took into account that these rights were not a mere consultation right but actual veto rights. The Commission also clarifies in its decision that the possibility of exercising decisive influence itself is sufficient; while it may support a finding of an infringement, no evidence is required that decisive influence was actually exercised.
- Second, it follows from the decisions that in practice in several cases PT Portugal only made certain commercial decisions after Altice had given its consent even though the SPA did not grant Altice a veto over these decisions. This included the launch of a campaign, the setting of commercial targets and the negotiating strategy for the renewal of several supply and outsourcing contracts and the decision on whether to include certain TV channels in PT Portugal's TV offering (before closing).
- Third, the Commission found evidence that at Altice's initiative and on a frequent basis, a significant amount of competitively sensitive information was shared by PT Portugal outside the context of a clean team or even a confidentiality agreement. This gave Altice considerable insight in the day-to-day operations of PT Portugal's business, including its commercial strategy even though at the time they were still competitors.

***Interplay with the EY/KPMG judgement***

Shortly after this decision, the Court of Justice of the European Union (***Court of Justice***) ruled in the EY / KPMG case that the EU standstill obligation was not violated when KPMG's Danish unit terminated a material contract prior to receiving competition clearance for its merger with Ernst&Young (contrary to the Commission's position in its intervention in this case). A lot has been written about this case already, but in short, the Court of Justice decided that the standstill obligation applies to actions that directly relate to bringing about a change of control over the target. Other conduct (such as exchange of competitively sensitive information) could still lead to a violation of Article 101 TFEU. As agreed in the SPA, KPMG Denmark unilaterally terminated its cooperation agreement with KPMG's international network before clearance and this termination notice was irreversible. Yet, the Court of Justice considered: "*even though that withdrawal is subject to a conditional link with the cooperation in question and is likely to be of ancillary and preparatory nature, the fact remains that, despite the effects it is likely to have on the market, it does not contribute, as such, to the change of control of the target undertaking.*"

In light of this judgment, it could be argued that purely unilateral measures by the target taken with a view to the upcoming merger, but which do not contribute to a change of control, would not fall afoul of the standstill obligation.

Since the Altice/PT decision predates this judgment, it was not taken into account by the Commission. The question remains, however, whether the Commission would have come to a different conclusion in any event. Since the EY/KPMG the judgment was based on very specific facts it still leaves a room for discussion on where to draw the line between legitimate pre-merger conduct and gun-jumping, particularly when it concerns intervening actions by the purchaser. It will therefore be very interesting to see how and if the Court's considerations in the EY/KPMG case may impact the outcome of the appeal lodged by Altice.

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