BRUSSELS À JOUR

New Year, Same Problems? – Altice and the Fine Line of Pre-Closing Covenants

Markus Röhrig, Christian Dankerl and Christoph Sielmann report on the latest developments from the European capital of competition law.

Happy New Year, and welcome to our first Brussels à Jour issue in 2024! We hope you had a wonderful holiday season and a great start to the new year, which we are certain will be an exciting one for EU competition law. After our traditional Christmas edition brought you a review of the most important developments in 2023 and an outlook for 2024, in this issue, we delve deeper into a major recent decision of the European Court of Justice: Its judgement on Altice's appeal of the General Court's decision, mostly confirming the Commission's fine decision. So let's talk gun-jumping. (Spoiler alert: While the ruling does bring some important consequences for the transaction practice, you probably don't have to rewrite your pre-closing covenants as a result of it.)

The Case Before the Court of Justice

The roots of the case reach back to 2014, when Altice, a Dutch cable and telecommunications company, signed an SPA with Oi SA, according to which Altice would acquire PT Portugal, a Portuguese telecommunications operator. The SPA provided that the implementation of the deal was subject to, *inter alia*, the Commission's merger control clearance and, as usual, contained several (not necessarily usual) pre-closing covenants.

In the spring of 2015, the Commission cleared the transaction (after Altice had made divestment commitments), and Altice announced its closing. Yet, a few months later, the Commission launched a formal gun-jumping investigation into the matter and, in April 2018, determined that Altice had indeed violated Articles 4(1) EUMR, which obliges parties to notify relevant transactions before their implementation, and 7(1) EUMR, which forbids parties from implementing transactions before notification or clearance. The Commission found fault in the veto rights that the SPA had granted Altice over PT Portugal and in the exchange of sensitive information between the two companies. Based on this, the Commission set a (then) record fine of EUR 124.5 million, EUR 62.25 million for each violation (this record was shattered in the summer of 2023, when the Commission fined Illumina EUR 432 million for gun-jumping).

Altice brought the case before the General Court, which only slightly reduced the fine by 10% and only for the Article 4(1) EUMR violation (i.e., about EUR 6 million), arguing that Altice had proactively informed the Commission of the planned transaction weeks before the SPA was signed. Altice appealed the General Court's decision. After the Advocate General had supported the General Court's view, the Court of Justice mostly affirmed the ruling, too, only reducing the fine for the violation of Article 4(1) EUMR by another (approximately) EUR 3 million.

Same Same But Different – The Parallelism of Articles 4(1) and 7(1) EUMR

As a central line of its argument, Altice challenged the Commission's ability to impose separate fines for violations of Articles 4(1) and 7(1) EUMR, arguing that they both pursued the same objective as part of an *ex-ante* merger control system, and that the Commission's approach violated the principle of prohibition of double punishment, or *ne bis in idem*.

The Court of Justice rejected this argument:

- Firstly, the Court held that while a breach of the obligation to notify a transaction (Article 4(1) EUMR) automatically entailed a breach of the standstill obligation (Article 7(1) EUMR), and the two provisions were "linked", it remained possible to infringe Article 7(1) EUMR without breaching Article 4(1) EUMR: The parties may well notify a transaction, but then implement it before receiving clearance. The Court, thus, confirmed its judgement in *Marine Harvest*. Based on these differences, the Court argued that the two provisions pursued autonomous purposes.
- The Court argued, secondly, that the imposition of two fines for the same material conduct by a single fine decision did not violate the *ne bis in idem* principle. The court again confirmed its judgement in *Marine Harvest* in which it had reiterated that the principle only prevented the repetition of fine proceedings concerning the same material conduct that had previously been subject to a final fine decision.
- The Court, thirdly, emphasized that Article 4(1) EUMR contained an obligation to act, while Article 7(1) contained an obligation *not* to act, and that a breach of the former was instantaneous in nature, while a breach of the latter was of a continuous kind (lasting from the first implementation measure until clearance is obtained).

Ultimately, the Court concluded, even if the two provisions might have "some overlap", the Commission was entitled to determine two separate infringements and impose two separate fines with a single fine decision. Accordingly, the Commission had not infringed the *ne bis in idem* principle either.

However, in this context, the Court also gave Altice the one small bright spot of the ruling: Given the different durations of the two violations, the Court argued, the Commission had not sufficiently explained, and the General Court had not sufficiently ascertained, why the two fines were identical in amount. The Court of Justice, however, also made it clear that in general, the infringements of the two provisions might be charged with identical fines.

Veto Rights and Information Exchange – The Substance of the Gun-Jumping Allegations

In line with the Commission and the General Court, the Court of Justice found, firstly, that the SPA's pre-closing covenants effectively enabled Altice to exercise decisive influence over PT Portugal's business, and that Altice actually exercised this influence. The relevant covenants provided that PT Portugal had to ask Altice for their consent before adopting "numerous decisions" regarding its business operations, commercial policy, and management structure. The Court also highlighted that Altice could claim compensation for any violation of these covenants. The General Court had found that these clauses had gone beyond what was necessary to protect PT Portugal's value until closing of the acquisition. The Court of Justice did not dispute this finding.

In this context, the Court also made clear that a "partial implementation" of the concentration could already violate Articles 4(1) and 7(1) EUMR, and that it was the change of control that must be lasting, but that even conduct that is only temporary may contribute to such lasting change.

Secondly, the Court of Justice affirmed the General Court in finding that the exchange of sensitive information further "contributed" as evidence to the finding that Altice had decisive influence over PT Portugal. The Court argued that information exchange was not solely governed by Article 101 TFEU and Regulation 1/2003, but also fell within the scope of the EUMR. Since the Commission had looked at the incidents of information exchange only as contributory evidence, the Court did not have to decide whether or not, and under what circumstances, information exchange in itself may qualify as a standalone gun-jumping violation, leaving this question to be answered in future decisions.

Finding That Fine Line – Avoiding Gun-Jumping While Safeguarding Legitimate Pre-Closing Interests

The Court of Justice's *Altice* judgement brings clarity in that it confirms the Commission's tough stance on gun-jumping (most recently underlined by the Commission's *Illumina/Grail* decision). In particular, the Court's affirmation of the Commission's view that gun-jumping can separately infringe Article 4(1) and Article 7(1) EUMR potentially doubles the amounts of fines.

Yet, the ruling, unfortunately, does not bring (or, to be fair, could not bring, given the case before the Court) much clarity as to *what* precisely qualifies as gun-jumping, neither with respect to pre-closing covenants nor to exchange of information: The abstract legal requirements have long been established, and the Altice judgement does not change them – the covenants at issue in the *Altice* case were indeed quite extensive, and their categorization as gun-jumping doesn't really come as a surprise. So if your pre-closing covenants were lawful pre-*Altice*, they remain so post-*Altice*. This is the good news for the transaction practice. The bad news is that there remains a gray area where it is not entirely clear where gun-jumping begins and where legitimate safeguarding ends.

All of this reinforces the importance for parties to be cautious when drafting pre-closing covenants and sharing information between signing and closing. After all, whether or not a seller's pre-closing covenants could potentially violate the obligation to notify and/or the obligation not to implement the transaction before having obtained merger control clearance will have to be determined on a case-by-case basis, bearing in mind that the legitimate aim of the seller's pre-closing covenants is to protect the target business's value until closing against measures taken outside the ordinary course of business, but at the same time, it must ensure that the target can operate its ordinary course business until closing independently from the acquirer.

Until next time, beat the winter blues, and don't forget to follow us on LinkedIn for your favorite EU Competition Law topics!"

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