

KIRKLAND ALERT

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The European Commission's €125M Gun Jumping Decision Against Altice: Key Considerations for Post-Signing Conduct of Business Protections & Activities

It is a well-established principle of European merger control that the exercise of decisive influence over a merging party prior to receipt of clearance under the European Commission's mandatory and suspensory regime can amount to gun jumping. Last week, the European Commission published its decision to fine telecoms company Altice €125 million for gun jumping, which offers new guidance on this issue (especially in the context of often used conduct of business protections) to merging parties.¹

There are two aspects to Altice's gun jumping infringement: i) influencing the independent commercial decision making of the target business (PT Portugal) through extensive interactions and exchange of sensitive information; and ii) through the gap controls/conduct of business protections in the transaction agreement. The first aspect of the decision is unsurprising — any advice on compliance with the gun jumping rules will specify that, prior to receipt of competition clearance, an acquirer cannot take steps to influence the commercial behaviour of the target nor can the parties exchange commercially sensitive information outside of a carefully controlled process that limits distribution of the information. It is the decision's findings in relation to what have often been seen as customary gap controls in the transaction agreement which provide new insights into the application of the gun jumping rules by the European Commission.

Gap Controls

The following guidance can be drawn from the Altice/PT Portugal decision on the boundaries of acceptability in terms of gap controls for transactions which are subject to merger control clearance in the EU:

- **A veto in relation to commercial policy, such as the target business's pricing policy, standard offer prices and terms and conditions, will be considered as gun jumping.** That is the case even if such a veto exists only in respect of deviations to policy beyond the pre-existing budget parameters (as in the Altice case).
- **A veto right in relation to the appointment, termination or amendments of terms of all of the target business's senior staff will be considered as gun jumping.** The decision recognises that some degree of oversight of personnel may

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be justified to preserve the value of the business between signing and closing (for example, the retention of key employees); however, veto rights extending to all officers and directors of the target company go beyond what is necessary for value preservation purposes.

- **Veto rights with respect to commercial agreements must be limited to a category of key agreements.** In the Altice case, veto rights in relation to entry into or termination or modification of “Material Contracts” was found to extend to all commercial, financial and administrative matters. The high number of contracts covered was seen to show that this veto gave Altice influence over the ordinary course of business of the target (rather than an extraordinary veto right linked to preserving the value of the target business pre-closing).
- **Materiality thresholds above which veto rights apply, such as in relation to debt commitments, liabilities and M&A activity by the target, must be based on objective criteria such as the size and scope of the target’s activities (by reference to the total transaction value and target global revenues) or the value of the target’s contracts.** The European Commission considered the fact that the target business had pushed back on the materiality thresholds during the transaction negotiations, claiming that compliance would be burdensome, as evidence that they enabled Altice to direct the target’s ordinary course activities pre-closing. A specific provision in the transaction agreement which lowered the applicable monetary thresholds after the first month from signing was also considered problematic in the Altice case.
- **A broad provision stating that the target business must continue to be operated in the normal course of business and in accordance with past practice in the period prior to closing, is not sufficient to save any gap controls which go too far.**

Exercise of Decisive Influence and Managing Information Exchange

The decision affirms best practice for managing information exchange between competing merging parties in the period prior to receipt of clearance.

The decision repeatedly refers to the fact that information was exchanged between the parties without any safeguards, across a wide range of operational and competitively sensitive topics.

Supposedly, there was no confidentiality or non-disclosure arrangement in place, or a clean team arrangement (whereby a designated group of individuals receive competitively sensitive information on a strictly limited basis).

Information was exchanged on a series of topics beyond what was strictly necessary, for example, in relation to required consents under the gap controls in the transaction agreement. Altice asked for and received detailed information on PT Portugal’s up-to-date commercial plans, including its future pricing, its views on competitive conditions and its contractual negotiations. This included matters such as a market-

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ing campaign, the terms of supply arrangements and whether to add a particular TV channel to PT Portugal's offering. The decision concludes that Altice exercised control over PT Portugal in the time between signing and closing.

The European Commission learned about the extensive interactions between Altice and PT Portugal through document production requests, including inbox collections, which are increasingly a feature of European merger control. In any substantive merger control review (such as Altice/PT Portugal, which went through a phase II review by the European Commission), potential gun jumping infringements can easily come to light and so extra caution is required.

The guidance set out in the Altice decision can be expected to be a blueprint for national competition regimes within the EU and also further afield — there are many jurisdictions which are influenced by European Commission guidance, and most merger regimes apply gun-jumping rules.

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1 The decision is available here: http://ec.europa.eu/competition/mergers/cases/decisions/m7993_849_3.pdf.

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