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Private Equity Newsletter

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The European Commission's €125M Gun-Jumping Fine Against Altice: Key Considerations for Post-Signing Conduct of Business Purchase Agreement Protections

PENpoints

The European Commission's recent gun-jumping decision offers new guidance to merging parties on what business protections are (or are not) permissible.

Similar to laws in the U.S. and elsewhere, European merger control rules prohibit a buyer from exercising "decisive influence" over a merging party prior to receipt of required European Commission antitrust clearance, as such influence constitutes prohibited "gun jumping." Last week, the European Commission fined telecoms company Altice €125 million for gun jumping, and its decision offers new guidance to merging parties on what business protections are (or are not) permissible.[1]

There are two aspects to Altice's gun-jumping infringement:

(1) influencing the independent commercial decision-making of the target business (PT Portugal) through extensive interactions and exchange of sensitive information; and

(2) influencing the target through the "gap controls"/conduct of business protections in the purchase agreement.

Extensive Interactions and Exchange of Sensitive Information

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 "clean team" arrangement (whereby a group of designated individuals receive such information and agree to abide by a protocol governing the handling of that information). In Europe (as in other jurisdictions), commercially sensitive information is regarded as any information providing an insight into the future market behavior of a competitor, for example, current or future pricing or cost information.

Gap Controls

It is the decision's findings in relation to what have often been seen as customary gap controls in the purchase agreement which provide new insights into the application of the gun-jumping rules by the European Commission.

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 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.

INSIDE KIRKLAND**PEN**

New California Consumer Privacy Act Impacts Private Equity Portfolio Companies 2
PENbriefs 4
Upcoming Events 5

- **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.**

Conclusion

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.

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

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New California Consumer Privacy Act Impacts Private Equity Portfolio Companies

PENpoints

While the focus of the act is on technology companies that leverage the collection and use of personal information, it also captures other businesses, including brick and mortar retailers and financial investors.

Beginning on January 1, 2020, the new California Consumer Privacy Act of 2018 (the "CCPA") will require most companies doing business in California to update their privacy practices and modify their business processes to accommodate the new consumer privacy rights.

Portfolio Companies Will Be Affected

While the focus of the law is clearly on technology companies that leverage the collection and use of personal information as part of their revenue generation, the CCPA also captures other businesses, including brick and mortar retailers and financial investors. For a business to fall under the remit of the CCPA, it must be for profit, collect "personal information" about California consumers (whether electronically or through other means), and do business in California. Additionally, to be covered under the CCPA a business must either (1) have gross revenue in excess of $25 million, (2) annually buy, sell, or share the data of more than 50,000 consumers, or (3) derive over 50% of its revenue from selling consumers' personal information.

Personal Information Goes Beyond the Expected Categories of Data

The CCPA uses a broad definition of personal infomation which includes the expected categories, such as contact details, social security numbers and drivers licenses, but also captures other information that could "reasonably be linked" to a particular consumer or household. Examples for such unique identifiers are IP addresses, browsing histories or geolocation data. Remarkably, the law also protects inferences drawn from such information, which means that customer profiles created using such data could be subject to the CCPA. The breadth of captured "personal information" will create challenges for many companies, but affect certain business models more than others, such as advertisement technology companies who are particularly reliant on the creation of behavioral consumer profiles by tracking certain unique identifiers.

Rights of Consumers

The CCPA specifies several consumer rights, including:

- The right to know what personal information a business collects, sells or discloses, and the underlying purposes for doing so;
- The right to access such information;
- The right to opt out of the collection or use of personal information and the deletion thereof.

In addition, the CCPA creates a sort of right to "equal service," prohibiting discrimination against consumers exercising their rights, such as the denial of goods and services or providing a different level or quality of goods or services. Businesses can offer financial incentives to consumers for allowing their personal data to be collected and sold, and can offer consumers differing prices or qualities of goods and services when the difference in value is "reasonably related" to the value the consumer's data that was not provided, but the breadth of these exceptions is unclear at this time.

General Implications for Businesses

Affected businesses will need to:

- Update their privacy policies and procedures;
- Implement organizational structures to handle "opt out" and information requests from consumers, which may require them to improve capacity to identify and segregate personal information.[1]

It is expected that there will be additional regulatory guidance on implementation in advance of the CCPA coming into effect on January 1, 2020, and companies should follow the legislative developments to ensure that specifics are reflected.

The potential fines for non-compliance under the CCPA are up to $7,500 per violation. It is unclear at this time whether California regulators or courts will interpret a "violation" as affecting only a single consumer's personal information (thus non-compliance affecting 1,000 consumers could result in a $7.5 million fine).[2]

Consequences for M&A Transactions

Buyers in M&A transactions will want to evaluate whether target companies are subject to and compliant with the CCPA, which will involve additional legal and technical due diligence. In addition to potential monetary damages from compliance-related enforcement actions brought by the California Attorney General or in consumer class actions, companies that do not implement the CCPA would potentially face image and branding damages and may lose consumer trust due to what could be perceived as insufficient privacy protection, which could ultimately affect their valuation.

Companies selling personal information to third parties are subject to additional obligations under the CCPA and will have to provide specific notices and opt out options to consumers in that context. It is worth noting that acquisitions of entire companies or lines of business generally do not qualify as a "sale" of data under the CCPA, but companies involved in M&A transactions would still have to provide updated privacy notices if the collection and use of consumer personal information is materially altered post-closing and allow consumers to opt out.

1 The work required to comply with the CCPA is not likely to perfectly overlap with the work a company has completed to comply with the European General Data Protection Regulation (GDPR). CCPA-specific implementation steps, such as particular opt out procedures and CCPA-based privacy policies, are required.

2 Also, consumers in certain circumstances can bring class actions under the CCPA in connection with data breaches.

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PENbriefs

Exemptive Relief Granted Under the Political Contributions Rule After Clearing Significant Procedural Hurdles

In a positive sign for investment advisers, the Securities and Exchange Commission (SEC) recently approved an application for exemptive relief pursuant to rule 206(4)5 under the Investment Advisers Act of 1940, allowing an investment adviser to retain the full $37 million of fees at issue following a Political Contribution Rule violation by a covered employee, indicating the SEC's willingness to consider exemptive relief even in cases involving potentially large disgorgements. To learn more, see our recent *KirklandAIM*.

CFIUS Reform at the Finish Line

In July, the U.S. Senate and House of Representatives released the agreed-upon text of the Foreign Investment Risk Review Modernization Act (FIRRMA). While many of the granular changes to the CFIUS review process remain to be worked out through implementing regulations, FIRRMA provides a new framework that will fundamentally transform how the U.S. assesses and manages national security risk arising from foreign direct investment. To learn more, see our recent *Alert*.

U.S. Announces Further Round of $200 Billion in Potential Tariffs on China

On July 10, 2018, the United States Trade Representative announced that, pending a two-month review process, the U.S. was planning to impose new 10% tariffs on an additional $200 billion of Chinese imports. This follows the Trump administration's previous announcement of 25% tariffs on roughly $50 billion of Chinese goods, and means that approximately half of Chinese imports to the Chinese imports to the U.S. may soon be subject to higher duties. It is essential for companies and investors to examine the exposure of their enterprise value chains to the rising U.S.-China trade risks. To learn more about the latest round of tariffs, see our *Alert* from July. For more information on the earlier round of tariffs, see our June *Alert*.

EPA's New Owner Clean Air Act Audit Program Could Streamline Acquisition Process for Upstream Oil and Gas Assets

The U.S. Environmental Protection Agency (EPA) is in the process of developing a New Owner Clean Air Act Audit Program for the upstream oil and gas sector. If finalized, the Audit Program could streamline the process of acquiring upstream oil and gas assets and allow parties to more easily manage Clean Air Act compliance risks. To learn more, see our recent *Alert*.

Supreme Court Cautions that Companies May Not Be Able to Rely on Foreign Governments' Interpretations of its Laws

The U.S. Supreme Court issued its opinion in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co Ltd.*, holding that in the event a company is required to participate in conduct in a foreign jurisdiction that may result in an antitrust violation in the U.S., companies may not be able to conclusively rely on the defense that the company was required by a foreign government to participate in such behavior. To learn more, see our recent *Alert*.

PENnotes

Thomson Reuters Annual Loan and CLO Conference
New York, NY, September 12, 2018

Kirkland is a sponsor of this event, which has a comprehensive program exclusively devoted to the latest trends across the credit markets with a focus on the global loan market. Kirkland partner Eric Wedel will moderate a panel on the "Private Equity Perspective: Sponsored Leveraged Finance in 2018." Click here for more information.

Kirkland Registered Adviser Seminar & CCO Summit
New York, NY, September 25, 2018
Boston, MA, September 27, 2018
Chicago, IL, October 2, 2018
Houston, TX, October 9, 2018
San Francisco, CA, October 18, 2018
Los Angeles, CA, November 13, 2018

Designed specifically for private fund manager CCOs, general counsel and other senior executives, this annual event enables firms to navigate the evolving regulatory landscape and get timely updates about SEC policy and enforcement developments affecting private fund managers. Click here for more information.

PLI Understanding the Securities Laws
Chicago, IL, September 26-27, 2018

This program will provide an overview and discussion of the basic aspects of the U.S. federal securities laws by in-house and law firm practitioners, as well as SEC staff. Emphasis will be placed on the interplay among various regulations, as well as significant legislative and regulatory changes and proposals. Kirkland partner Maggie Flores will be a panelist. Click here for more information.

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Kirkland & Ellis' nearly 500 private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and fund formations on behalf of more than 400 private equity firms and hedge funds around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named "Private Equity Group of the Year" in each of the last seven years by *Law360* and was commended as being the most active private equity law firm of the last decade in *The PitchBook Decade Report*. U.S. News Media Group and Best Lawyers have ranked Kirkland as a Tier 1 law firm for Leveraged Buyouts and Private Equity Law for seven consecutive years and as a top-tier firm for Private Funds/Hedge Funds Law since 2012. The Firm was recognized as the #1 law firm for private equity in the 2018 Vault 100 rankings, and, in 2016, Private Equity International named the Firm "Law Firm of the Year in North America: Fund Formation" for the third year in a row.

In 2012-2017, Chambers and Partners ranked Kirkland as a Tier 1 law firm for Investment Funds in the United States, United Kingdom, Asia-Pacific and globally. The Firm was ranked as the #1 law firm for both Global and U.S. Buyouts by deal volume in Mergermarket's *League Tables of Legal Advisors to Global M&A for Full Year 2011-2017*, and has consistently received top rankings among law firms in Private Equity by The Legal 500, the Practical Law Company and IFLR, among others.

The Lawyer magazine has recognized Kirkland as one of its "Transatlantic Elite," having noted that the Firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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