

# Dentons Newsletter

## EGC upholds significant fine on Altice for early implementation of transaction, EC and competition office remain vigilant on investigations of gun-jumping

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In April 2018, the European Commission imposed a fine of €124.5 million on French multinational telecommunications and mass media company Altice, for implementing its acquisition of PT Portugal before the Commission had approved the transaction and before the acquisition had even been notified to the Commission in some respects. In its judgment in *Altice Europe v Commission*, issued on September 22, 2021 (Case T-425/18), the European General Court (EGC), as the first instance EU court, dismissed Altice's appeal against the Commission's decision in its entirety, although it did reduce the original fine by €6.2 million, to €118.6 million, given that Altice had eventually notified the transaction.

Fines for gun-jumping have been on the rise recently. And it's not just the Commission that is actively pursuing investigations; national competition authorities are also involved. In recent cases, the Czech Office for Protection of Competition has imposed fines in the order of millions of Czech crowns for that practice. Furthermore, authorities in different jurisdictions are informing each other when they suspect that national merger control rules may have been violated.

Below we summarize for you the basic lessons from the Altice case along with some tips on how you can avoid triggering risks of gun-jumping.

### Lessons learned from Altice

The Commission found that Altice had exercised decisive influence under PT Portugal's share purchase agreement before the transaction was notified and approved by the Commission. The fact that the formal closing of the transaction did not take place until after the Commission had approved the merger did not figure into its assessment of the infringement. Under EU competition rules, any concentration between undertakings (i.e. a merger or an acquisition of sole or joint control of another undertaking) that has a European dimension must first be notified and approved by the Commission, and individual sub-steps of the acquisition must not be implemented until the Commission declares the concentration compatible with the EU internal market (the "standstill rule").

In the case at hand, Altice and PT Portugal entered into pre-closing covenants (preparatory clauses), which came into force before the actual closing of the transaction. Under these clauses Altice had to give written consent to changes made to significant contracts

of PT Portugal and to any changes in its senior management. In addition, competitively sensitive information was exchanged between the two parties. According to European merger control decision-making practice, such contractual restrictions and certain exchanges of information are permissible even before the transaction is approved by the Commission, but only if the purpose is to preserve the value of the target in the transaction. The EGC has now confirmed the Commission's view that, in the case of Altice, this permissible limit had been exceeded.

### More than just fines

The Altice case shows that very high fines can be imposed for infringements of competition rules (up to 10 percent of the annual turnover of the group that the undertakings concerned belong to). But that isn't all. Breach of the standstill obligation can also have private law consequences. In particular, the validity of the newly elected management's decisions carried out between the time of the actual acquisition of control and the approval by the Commission or national competition

authority, as the case may be, could be held invalid. At the same time, the management of the company acquiring control is exposed to a personal liability risk for damage caused by the failure to appropriately notify the transaction to the relevant authority (e.g. liability for compensation of the fine paid by the company). In addition, if the Commission ultimately decides that the transaction is incompatible with the EU internal market, this could affect the validity of the transaction documents (contracts for the sale of the company, assets, or shares), and the Commission can order the dissolution of the transaction, including the disposal of acquired assets or shares in the target companies.

#### Points to take into account

- There are many types of transactions that constitute a concentration between undertakings and that are subject to a notification obligation (either to the Commission or to a national competition authority). In practice, we often see that in the case of smaller transactions, parties make mistakes in thinking that that notification and prior approval are not required. Note that the main criterion for determining whether a transaction is subject to the notification and approval procedure by the competent competition authorities is, with some exceptions, the turnover of the undertakings concerned. The obligation to notify a transaction may thus exist even if the transaction

is completely problem-free from the point of view of competition law.

- Increased caution should be applied where large multinationals are involved—such transactions often need to be notified across several jurisdictions (in some cases, notification to the individual EU member states' authorities may be replaced by a one-stop-shop notification to the Commission).
- Even more often, these mistakes happen in cases of setting up a joint venture—in which case it is necessary to take into account the turnover of all the groups of companies that will jointly control the joint venture.
- Unfortunately, many companies wait until they've reached a more advanced stage (and in some cases not at all) before addressing a transaction's competition law aspects. This can both increase the risk of infringing competition rules, with the associated consequences, as well as significantly prolong the transaction process. Some contemplated transactions will fail completely due to underestimating the competition law aspect. Conversely, a timely legal assessment and an appropriate time plan for individual transaction steps will significantly contribute to the successful completion of the transaction while minimizing risks.

**We will keep you informed about legislative developments in this area. If you have any questions, please do not hesitate to contact us.**

#### Contacts

##### Adam Přerovský

Senior Associate

D +420 236 082 241

M +420 725 004 238

[adam.prerovsky@dentons.com](mailto:adam.prerovsky@dentons.com)



##### Tomáš Pavelka

Associate

D +420 236 082 222

M +420 724 366 991

[tomas.pavelka@dentons.com](mailto:tomas.pavelka@dentons.com)



##### Tomáš Jonáš

Associate

D +420 236 082 260

M+420 732 693 044

[tomas.jonas@dentons.com](mailto:tomas.jonas@dentons.com)

