Newsletter, 27 April 2018

"Gun-Jumping": The European Commission vigorously enforces the standstill obligation in merger control proceedings by imposing a high fine

On 24 April 2018, the European Commission has imposed a EUR 124.5 million fine on Altice for exercising decisive influence prior to merger control approval and thus infringing the so-called standstill obligation.

By its recently imposed fine on Altice in the course of the acquisition of PT Portugal the European Commission („Commission") demonstrated once more that parties who „jump the gun", i.e. infringe the standstill obligation which applies as long as a proposed transaction has not been approved by competition authorities, face increasing enforcement activities.[1] The standstill obligation is not only violated when shares or assets are transferred before merger control clearance has been obtained but also if the sales and purchase agreement ("SPA") grants the purchaser the possibility to exercise decisive influence on the target company between signing and closing, not to mention cases where decisive influence actually has already been exercised. The thin line between measures preparing the integration of the target company into the corporate group of the purchaser which are generally permitted before merger control clearance on the one hand and an unlawful early implementation of the transaction on the other is fluent and not clear-cut.

Background

For the acquiring company it is in general important to integrate the target company into its own corporate group as soon as possible after the deal has been signed with the seller.

The standstill obligation exists in most jurisdictions, i.e. the purchaser has to postpone the integration of the target company until the proposed transaction has been approved by the responsible competition authorities. Until then, the parties to the transaction are obliged to remain independent from each other and act as independent entities in the market. The standstill obligation ensures that the market is prevented from potentially negative effects due to a merger as long as the merger has not been assessed in light of its potential impact on competition in the relevant markets and, finally, been approved.

The standstill obligation thus stipulates that the parties to a transaction are neither allowed to follow any kind of joint strategic approach in their business conduct or act jointly in the market nor to exchange strategic/commercially sensitive information between them since they have to remain two independent entities until the transaction is lawfully consummated.

If a company infringes the standstill obligation the competition authorities can impose high fines, e.g. in Germany and on EU-level of up to 10 % of the companies' annual group turnover.

Decision of the Commission

In February 2015, Altice notified its planned acquisition of PT Portugal to the Commission after signing the SPA in December 2014 with the seller. The Commission approved the proposed transaction on 20 April 2015 subject to conditions.[2]

Two years later, in May 2017, the Commission sent a Statement of Objections to Altice alleging that Altice infringed the standstill obligation before merger control approval for the acquisition of PT Portugal had been obtained – and even before submission of merger control filing for the proposed transaction.[3]

[1] See also Commeo-Newsletter of 31 March 2017: „Gun-Jumping – Antitrust Enforcement in M&A Transactions".

[2] EU-Commission, Press Release, 18 May 2017, IP/17/1368.

[3] EU-Commission, Press Release, 24 April 2018, IP/18/3522.

The Commission's concerns referred to Altice exercising unlawful decisive influence since the company, prior to the notification of the merger,

(i) was granted via the SPA the right to exercise decisive influence over PT Portugal, e.g., via veto rights over decisions concerning conduct of PT Portugal in the ordinary course of business,

as well as between notification of the merger and approval

(ii) actually exercised decisive influence on PT Portugal, e.g. by instructing PT Portugal on how to carry out a marketing campaign.

Furthermore, the Commission concluded that Altice

(iii) was seeking and receiving commercially sensitive information on PT Portugal.[4]

The Commission's decision on Altice is in particular relevant and instructive for the drafting of SPAs in the context of M&A transactions, in particular with regard to clauses allowing the purchaser to exercise decisive influence over the target company immediately following the signing. Even the mere possibility to exercise decisive influence based on contractual provisions is sufficient for a breach of the standstill obligation since the target company has to act fully independently in the market until merger clearance and consummation have taken place. Other examples for early implementations of transactions qualifying for unlawful gun jumping are joint negotiations with business partners or measures which usually can only be implemented by controlling shareholders, e.g. the replacement of company management.[5]

Particular attention should be paid to the fact that the Commission considered in the given case the exchange of commercially sensitive information between signing and merger clearance of the deal as a breach of the standstill obligation. It has to be born in mind that the prohibition to exchange such information also applies between clearance and consummation of the transaction: Until the consummation has taken place the purchaser and the target company have to remain independent from each other in the market and therefore are not allowed to share commercially sensitive information. The exchange of such information is possible only after consummation of the transaction. This is even more so since a planned transaction may still, after merger clearance has been obtained, fail so that the companies will – irrespective of the original merger plans – remain independent competitors in the market.

Comment

It is not the first time Altice has been fined in the context of an M&A transaction. In 2016, the French competition authority imposed a fine of EUR 80 Mio. on the company for gun jumping. Nevertheless, the obviously large fine imposed by the Commission in the given case cannot be linked to former delinquency, but rather, as phrased by Margrethe Vestager, is intended to „*deter other firms from breaking EU merger control rules*".[6]

Margrethe Vestager's statement perfectly fits into the bigger picture of the Commission's general approach to strengthen enforcement of merger control procedural rules. In this context, the Commission has also opened various investigations related to the provision of incorrect or misleading information by companies in the course of merger notification and imposed a fine of EUR 110 Mio. on Facebook for such conduct.[7] Evidently, the Commission is vigorously prosecuting any conduct which undermines the effectiveness of the European merger control regime.

Commeo LLP
Rechtsanwälte und Notar
Speicherstraße 55
60327 Frankfurt am Main
www.commeo-law.com

Dr. Christian Ehlenz

Dr. Jörg-Martin Schultze, LL.M.
Dr. Dominique S. Wagener, LL.M.
Dr. Stephanie Pautke, LL.M.
Dr. Johanna Kübler
Isabel Oest, LL.M.
Christoph Weinert, LL.M.
Josefa Billinger, LL.B./LL.M.
Christoph Krüger
Dr. Christian Ehlenz
Damaris Kosack

Commeo LLP is an independent law firm specialized in antitrust law. We are an established team of experienced lawyers advising clients on all aspects of German and European antitrust law.

[4] See EU-Commission, Press Release, 24 April 2018, IP/18/3522.

[5] See Commeo-Newsletter of 31 March 2017: „Gun-Jumping – Antitrust Enforcement in M&A Transactions" on Higher Regional Court Düsseldorf, decisions of 9 and 15 December 2015, cases VI-Kart 1/15 (V) and VI-Kart 5/15 (V), also referring to EGC, T-704/14 – Marine Harvest ASA, in which the fine imposed by the Commission has already been confirmed, and to ECJ, C-633/16 – Ernst & Young, not decided yet.

[6] EU-Commission, Press Release, 24 April 2018, IP/18/3522.

[7] EU-Commission, Press Release, 18 May 2017, IP/17/1369; Press Release, 6 July 2017, IP/17/1924.