

Newsletter, 22 December 2023

“Gun Jumping” under EU merger control laws

The recent ECJ ruling *Altice* and the record fines imposed by the EU Commission in the *Illumina / Grail* case in summer 2023 illustrate the relevance of antitrust compliance in the context of M&A transactions

In its ruling of 9 November 2023¹, the European Court of Justice (ECJ) largely upheld a fine imposed by the EU Commission on the company Altice for implementation of a concentration before its notification and merger control clearance. The ECJ once again confirmed the EU Commission’s strict stance on infringements of the notification and standstill obligations under EU merger control laws. In July 2023, the EU Commission in its *Illumina/Grail* case² had already imposed a record fine of EUR 432 million on the company Illumina for closing prior to the authority’s approval. Notably, the EU Commission also imposed a symbolic fine of EUR 1,000 on Grail, the first time a target company has been fined for a gun jumping infringement.

Notification and standstill obligation under EU merger control rules

According to Art. 4(1) EU Merger Regulation³, a concentration of parties meeting the turnover thresholds of the ECMR must be notified to the EU Commission prior to its implementation (notification obligation). The so-called standstill obligation pursuant to Art. 7(1) ECMR requires that a concentration subject to notification must not be implemented by the parties without a clearance decision by the EU Commission. In the event of an infringement of the notification and standstill obligations (so-called “gun jumping”), the parties are subject to severe fines of up to 10% of the companies’ annual turnover, as the two most recent decisions in *Altice* and *Illumina/Grail* confirm.

The ECJ’s Altice ruling

In February 2015, Altice notified the European Commission of the acquisition of sole control over

PT Portugal after an SPA was signed in December 2014. The Commission cleared the concentration subject to conditions in April 2015.

Around three years later, the EU Commission imposed a fine of approx. EUR 124.5 million on Altice⁴. According to the EU Commission’s findings, Altice had violated Art. 4(1) and Art. 7(1) ECMR, as certain clauses of the SPA provided Altice with veto rights and thus the possibility of exercising decisive influence over PT Portugal’s strategic business decisions prior to adoption of the clearance decision. Furthermore, the Commission found that Altice had been involved in PT Portugal’s day-to-day operations prior to clearance. The fact that Altice and PT Portugal exchanged commercially sensitive information between signing and closing was seen as corroborating evidence that Altice exercised a decisive influence over the target company prior to the EU Commission’s clearance decision.⁵

In 2021, the General Court confirmed the gun jumping infringement found by the EU Commission⁶, but partially reduced the fine for the infringement of Art. 4(1) ECMR. In its ruling of November 2023, the ECJ confirmed the decisions of both the EU Commission and the General Court, but again reduced the fine for the infringement of Art. 4(1) ECMR to a fine of now approx. EUR 53 million. The ECJ, like the General Court before it, upheld the fine for the infringement of the standstill obligation under Art. 7(1) ECMR without any reductions.

The EU Commission’s Illumina/Grail decision

In a case that is certainly unique in its circumstances, the EU Commission imposed a record fine of EUR 432 million on the life science company Illumina in July 2023 for implementing a concentration before merger control approval by

¹ ECJ, decision of. 9.11.2023, C-746/21 P - *Altice Europe v Commission*.

² EU Commission, decision of 12.7.2023, case M.10483 - *Illumina / Grail*.

³ Council Regulation (EC) No. 139/2004 of 4.1.2004 on the control of concentrations between undertakings (“ECMR”).

⁴ EU Commission, decision of 24.4.2018, case M.7993 - *Altice / PT Portugal*.

⁵ See also the [COMMEO Newsletter](#) 04/2018 on the EU Commission’s initial case.

⁶ General Court, decision of 22.9.2021, T-425/18 - *Altice Europe v Commission*.

the EU Commission in violation of the standstill obligation under the ECMR. Illumina had completed the acquisition of the cancer research company Grail in August 2021 while merger control proceedings before the EU Commission were still ongoing. Illumina's decision to complete the transaction before clearance was driven by a very high break-up fee of USD 300 million on the one hand, and by pending court proceedings⁷ on the other hand in which Illumina contests the EU Commission's competence to review the concentration under EU merger control rules in the first place.⁸ In its decision, the EU Commission found that Illumina had strategically weighed up the risk of a gun jumping fine against the risk of having to pay the break-up fee, also considering the potential profits it could obtain by jumping the gun, even if it were ultimately forced to divest GRAIL. The EU Commission considered this intentional behavior a serious infringement which required the imposition of the maximum fine allowed under the ECMR.

Notably, the EU Commission found that the target company Grail played an active role in the infringement and imposed a fine of EUR 1,000 against Grail. As this was the first time that the EU Commission had fined a target company, the authority decided to impose only a symbolic fine. In future, target companies can certainly expect higher fines in similar cases.

Key takeaways on gun jumping under EU merger control for M&A transactions

The most recent decisions at European level on gun jumping provide an opportunity to highlight the most important rules on antitrust compliance in the preparation and implementation of M&A transactions:

- Infringements of the notification and standstill obligations are punished by the EU Commission with **high fines**, which can affect both the acquirer and the target.
- A **partial implementation** of a concentration may already exist if the parties **take actions that contribute to a lasting change of control over the target company**. Even temporary actions that are not absolutely necessary for a lasting change of control can already contribute to a (partial) implementation.

- The standstill obligation and **pre-closing covenants** such as **conduct of business clauses in the SPA**, which are intended to preserve the target company's value between signing and closing, are often in conflict. It is generally permissible to impose limits on the target company's behavior during this time, for example by making certain measures of the target company subject to approval of the acquirer, as long as these limitations or acquirer rights **do not allow the acquirer to influence the strategic or operational behavior of the target company**. In *Altice*, the ECJ clarified that the mere possibility of exercising decisive influence on the target company through veto rights or comparable contractual constellations can lead to a gun jumping infringement.
- An **exchange of commercially sensitive information** between notification and clearance of a concentration can be used as corroborating evidence for a gun jumping infringement. **Clean team agreements** and guidelines on integration planning can prevent an antitrust infringement through the exchange of information.
- A particularly thorough review is also required for **multi-stage M&A transactions**, e.g. in case of **warehousing structures**.⁹



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⁷ Proceedings currently pending before the ECJ in case C-611/22 P - *Illumina v Commission*.

⁸ See [COMMEO Newsletter](#) 04/2021 on the referral mechanism under Art. 22 ECMR.

⁹ See the General Court's decision T-609/19 - *Canon* from 2022, in which the General Court confirmed the EU Commission's decision to impose a fine on Canon for a gun jumping infringement due to certain *warehousing structures*, see [COMMEO Newsletter](#) 08/2022.