

EUROPEAN COMMISSION GETS TOUGH ON VIOLATIONS OF THE EU MERGER CONTROL RULES - FACEBOOK FINED €110M FOR PROVIDING MISLEADING INFORMATION AND ALTICE FACED WITH GUN-JUMPING CHARGES

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Legal Briefings

On 18 May 2017, the European Commission imposed a record fine of €110 million on Facebook for providing incorrect/misleading information to the Commission during its review of Facebook's acquisition of WhatsApp under the EU merger regulation (**EUMR**). On the same day, the Commission issued a Statement of Objections to Altice alleging it had breached the EUMR's standstill obligation by exercising control over PT Portugal before receiving clearance for the transaction (i.e. gun-jumping).

These developments show the Commission is cracking down on violations of the EUMR rules and will not hesitate to issue heavy penalties on infringers. This comes against a backdrop of similar procedural toughness by merger control authorities worldwide. It is crucial for merging companies to understand and comply with the merger control rules, ensuring that all information submitted is complete and accurate, and limiting pre-completion conduct and integration planning to that acceptable under the gun-jumping rules.

1. Facebook/WhatsApp: provision of misleading information

Legal Background

Under the EUMR the European Commission can impose fines of up to 1% of worldwide group turnover for the intentional or negligent provision of incorrect or misleading information within a notification form or in response to a request for information. This is regardless of whether the information had any impact on the Commission's decision whether to clear the transaction. Where a clearance decision is based on incorrect information supplied by the merging parties the Commission also has the power to revoke its decision.

Facebook/WhatsApp fines

In October 2014, the Commission unconditionally cleared Facebook's acquisition of WhatsApp following a Phase I review. During that review Facebook informed the Commission that automatically matching data between Facebook users' accounts and WhatsApp users' accounts was not possible, both within the Form CO notification and in response to a request for information. In August 2016, WhatsApp announced to its users the possibility of linking their phone numbers with Facebook user identities. During the Commission's subsequent investigation into the potential violation of the EUMR rules it became clear that the technical possibility of automatic matching already existed in 2014, and that Facebook employees were aware of this possibility.

The Commission therefore found that Facebook had breached the obligation to provide complete and accurate information, and that this breach was at least negligent. It did not, however, impact the basis for the Commission's decision (which had assessed the transaction "even if" such matching were possible), and therefore the clearance is not affected.

In setting the €110 million fine, which dwarves fines for similar breaches under the previous version of the EUMR, but is less than half of the maximum possible, the Commission emphasised the serious nature of the breaches. This on the basis that the failure prevented the Commission from holding all relevant information for the assessment of the transaction, and that Facebook was aware of the relevance of user matching for the Commission's assessment. The fine was lower than it could have been due to Facebook's cooperation during the Commission's investigation and its acceptance that it had breached the EUMR.

In its [press release](#) announcing the fines Competition Commissioner Margrethe Vestager stressed the importance of the information rules and laid down a warning to companies of the importance of compliance. Indeed, she has indicated previously that the Commission is investigating a number of similar breaches, in relation to which we may see further fines.

These latest developments follow a previous investigation into the potential provision of misleading information by Munksjö and Ahlstrom, in that case triggered by inconsistencies between market share estimates provided in the Form CO with those in the parties' internal documents. The investigation was closed once the companies had provided adequate explanations for the disparities (see [here](#)).

2. Altice/PT Portugal: allegations of gun-jumping

Legal Background

In common with many other merger control regimes, the parties to a transaction which falls within the scope of the EUMR are required to notify the transaction to the European Commission, and cannot implement the transaction before clearance is obtained (the so called "standstill obligation"). The Commission can impose fines of up to 10% of worldwide group turnover for intentional or negligent breach of the notification and standstill requirements.

In a number of previous cases the Commission imposed significant fines against merging parties failing to notify and obtain clearance for a transaction prior to completion, for example the €20 million fines imposed on Marine Harvest (see our ebulletin [here](#)) and Electrabel (see our ebulletin [here](#)).

The prohibition on gun-jumping also applies to implementation falling short of completion. The European Commission has previously taken enforcement action in relation to such early implementation, but has not imposed fines to date. For example, in the context of the creation of Premiere (a joint digital platform) by Bertelsmann and Kirch, the Commission warned the parties that various marketing activities being carried out in relation to Kirch's digital box by Premiere amounted to a partial implementation of the proposed transaction in breach of the standstill obligation (see [here](#)), which the parties subsequently ceased. The Commission also conducted dawn raids in the Ineos/Kerling case in relation to suspicions that the acquirer had intervened in the management of the target and the companies had shared competitively sensitive information (which can also breach the antitrust rules prohibiting anti-competitive agreements where the parties are competitors), finding on further investigation that no violations had in fact occurred.

Although these cases made it clear that the Commission will closely monitor and intervene in relation to conduct that may constitute early implementation, the Altice case is the first investigation it has launched for some time.

Altice/PT Portugal Statement of Objections

In February 2015, Altice notified the Commission of its plans to acquire PT Portugal. The Commission cleared the transaction subject to conditions in April 2015. Subsequently, the Commission opened an investigation into Altice for potential gun-jumping (amid press reports that Altice executives had made visits to PT Portugal's premises).

In its Statement of Objections, the Commission alleges that Altice partially implemented the acquisition by exercising control over the target prior to clearance (and in some respects prior to notification). Only high level details of the alleged conduct have been made public at this stage. The Commission stated that "*the purchase agreement between the two companies put Altice in a position to exercise decisive influence over PT Portugal before notification or clearance of the transaction, and that in certain instances Altice actually exercised decisive influence over PT Portugal*". Margrethe Vestager [expanded](#) slightly, stating that:

- *"Altice's agreement to buy PT Portugal seems to have allowed it to control its rival even before we approved the merger.*
- *It appears that Altice had already been acting as if it owned PT Portugal. It seems that it gave instructions on how to handle commercial issues, such as contract negotiations.*
- *And it also seems to have been given sensitive information...without any safeguards to stop it misusing that information."*

Altice now has the opportunity to contest the charges before the Commission takes a final decision on whether a breach has occurred and, if so, what penalties to impose.

The Commission's decision will be scrutinised carefully, as there is relatively little precedent in Europe as to what type of pre-completion conduct amounts to infringing gun-jumping and what is permitted transition planning/acceptable protections to preserve the value of the target pre-completion. It remains to be seen whether the Commission will take as strict an approach as that adopted by the French Competition Authority when recently imposing a fine of €80 million for gun-jumping – again on Altice – for conduct including sharing competitively sensitive information and intervening in the operational decisions and strategic planning of the target (see our ebulletin [here](#) for further details).

What is clear is that the Commission is cracking down on such breaches, with Margrethe Vestager stating that *"if companies jump the gun by implementing mergers prior to notification or clearance, they undermine the effective functioning of the EU merger control system. The Statement of Objections sent to Altice shows how seriously the Commission takes breaches of the rules designed to protect the merger control system"* (see [here](#)).

Further guidance on what falls on the right and the wrong side of the line may also be provided by the European Court of Justice, in relation to a pending preliminary ruling request as to whether the termination of an existing cooperation agreement amounted to early implementation of a merger between EY and KPMG Denmark (see [here](#)).

3. Global landscape

These EU developments come against a backdrop of similar procedural toughness in other merger control regimes, with competition authorities worldwide pursuing merging parties for failing to file and other violations of the merger control rules.

For example, China's MOFCOM has ramped up its enforcement against non-notifiers in the last year or so, imposing fines and "naming and shaming" infringing companies, including in relation to foreign-to-foreign transactions and arrangements which fall short of completion (for example the fines imposed in the Canon/TMS case). It is seeking an increase in the fine cap for such breaches and also considering non-pecuniary penalties. The US agencies have also continued to penalise gun-jumping heavily, including in relation to acquisitions of non-controlling minority stakes (such as the recent US\$11 million fine on ValueAct), as have the Brazilian and South African authorities. EU national competition authorities - such as in Romania and Austria - have also been active in this area.

In relation to the provision of information, Hungary's merger control authority recently imposed fines on Infineon and reversed the clearance decision for its acquisition of Wolfspeed due to the provision of misleading information (which came to light as a result of conflicting information having been provided to the US FTC). The Danish authority has also imposed such fines - albeit at a much lower level than the Commission penalties - on METRO in the last few months.

Aside from the potential penalty exposure, such violations also have a reputational impact on the companies involved and can hinder the review process.

4. Key takeaways for businesses

It is clear that the European Commission and other merger control authorities are taking firm action against procedural violations of the merger control rules, not limited to instances of failure to file. Merging parties therefore need to be aware of their obligations and ensure antitrust legal oversight during the deal process.

In particular:

- Merging parties must carefully assess their merger filing obligations and ensure they obtain clearances from relevant regulators prior to completing their transactions.
- Prior to obtaining regulatory clearance and prior to completion of the deal, the merging parties must continue to act independently on the market and limit any cooperation between them to permissible pre-merger planning.
- The provisions of the sale agreement on conduct prior to completion must be scrutinised carefully for competition compliance and clear practical guidance given to the teams involved on what is and is not permissible.
- Procedures must be put in place to ensure competitively sensitive information (in particular current or future prices, marketing plans or strategies) is not shared between the merging parties or only, where strictly necessary, subject to appropriate "clean team" arrangements being in place.

- The merging parties must review carefully all information provided to the European Commission and other merger control authorities within notification forms and in responses to information requests, and check its accuracy, and consistency.
- Any inconsistencies between data in notification forms/responses and the parties' internal documents submitted to the authority should be identified and explained.
- If any potential breach is identified legal advice should be sought immediately in order that steps may be taken to protect the company's position.

KEY CONTACTS

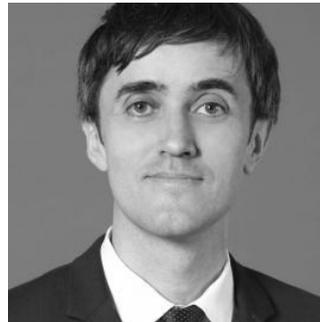
If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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