



Gun-jumping under the EU Merger Regulation

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I speak in my personal capacity. Please do not attribute what I say to the European Commission or DG Competition.

Legal framework

- Concentration shall not be implemented before notification and clearance = standstill obligation (Art. 7(1) EU Merger Regulation)
- Cornerstone of *ex ante* control
 - Prevent harm to competition while Commission reviews concentration
 - Ensure effective remedies remain possible
 - Avoid need to "unscramble" a harmful transaction
- Fines of up to 10% of turnover (Art. 14(2)(b) EU Merger Regulation)

Precedents

- Electrabel / Compagnie Nationale du Rhône
 - 2009 decision
 - acquisition of *de facto* control prior to notification
 - upheld by EU courts (T-332/09 and C-84/13 P)

- Marine Harvest / Morpol
 - 2014 decision
 - acquisition of *de facto* control prior to notification
 - upheld by General Court (T-704/14)

Altice / PT Portugal (1)

- Acquisition of Portuguese telecom operator by Altice cleared with remedies in 2015
- Decision on gun-jumping (24 April 2018)
- Appeal pending (T-425/18)

Altice / PT Portugal (2) – Commission decision:

- Agreement gave Altice the right to exercise decisive influence over PT Portugal
 - Clauses not aimed at value preservation but also covering ordinary course of business
- Altice actually exercised decisive influence
 - Instructions on commercial decisions (contract negotiations, promotional campaign)
- Exchange of commercially sensitive information
 - Granular and up-to-date
 - Without safeguards
- Taken together: gun-jumping → fine of 124.5 million

Danish gun-jumping case (C-633/16)

- Acquisition of KPMG Denmark by Ernst & Young, cleared by Danish competition authority
- KPMG Denmark terminates agreement with KPMG network prior to approval = gun-jumping?
- Court of justice: "*a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, **contributes to the change in control** of the target undertaking*"
- KPMG Denmark's termination did not contribute to a change in control → no gun-jumping

Practical tips

- Guidance in Commission decisions and case law (e.g. Altice decision)
- Self-assessment
- Possibility of Article 7(3) derogation
 - Effects of standstill obligation on parties and third parties
 - Whether concentration poses threat to competition
 - Possibly subject to conditions