Tough love: EU pulls the trigger on gun jumping

Buyer beware...and behave

‘Jumping the gun’ is a term derived from track and field races. It means someone trying to get an illegal head start. In M&A deals, it actually has a similar meaning (but with more costly consequences...).

On 24 April 2018, the European Commission imposed a record fine of EUR 125 million on Altice for “gun jumping” – implementing a merger before receiving Commission approval - in the acquisition of PT Portugal, the Portuguese telecommunications operator.

The fine imposed on Altice shows that the Commission is putting into action the words of Commissioner Vestager in May 2017: that gun jumping will be taken seriously. The case against Altice is not a one-off; it was initiated at the same time as a similar pending case against Canon for its acquisition of Toshiba Medical Systems. Interestingly enough, in late 2016, Altice was also fined EUR 80 million by French authorities for violating gun jumping rules in its acquisition of SFR.

Two days after the fine was publicly announced on 24 April 2018, Commissioner Vestager noted that “(...) like someone who’s agreed to buy a house, but hasn’t yet got the keys in her hand, businesses need reassurance that the property they get will be the one they agreed to pay for. (...) But there are limitations on how far that can go. It is one thing you insist that the seller of a house doesn’t knock down a wall without checking with you. But that doesn’t mean you need a say in how the flowers are arranged”

While EU law does not clearly define gun jumping, the Altice decision clearly indicates that parties enter the danger zone when:

- the buyer obtains the right to exercise decisive influence over the target, for example by granting the buyer veto rights over decisions concerning the target’s ordinary business
- the buyer actually exercises decisive influence over aspects of the target’s business by giving the target instructions on how to pitch for new contracts
- the buyer actually exercises decisive influence over aspects of the target’s business by receiving commercially sensitive information about the target outside the framework of any confidentiality agreement.

The Altice decision means that potential buyers (and their M&A advisors) should draft their contracts carefully; do not go overboard with pre-closing covenants, and do not act as if you have already purchased the business. You may not get away with jumping the gun so
easily.