

# European Commission imposes highest ever gun-jumping fine

May 2, 2018

## Introduction

On 24 April 2018, the European Commission (**EC**) announced **a fine of €124.5 million on Altice for implementing its acquisition of PT Portugal before the transaction had been notified and cleared by the EC**. This is the largest antitrust gun-jumping fine ever imposed by a regulator. It surpasses the previous record of €80 million imposed by the French competition regulator in November 2016, also on Altice (in relation to a different transaction).

The EC is clearly determined to impose high-value fines where a company has deliberately or negligently failed to notify a transaction reviewable under the EU Merger Regulation or has implemented a transaction before it has been cleared. Commissioner Vestager noted that companies that “*implement mergers before notification or clearance undermine the effectiveness of our merger control system*” and that the level of fine imposed in the Altice case “*reflects the seriousness of the infringement and should deter other firms from breaking EU merger control rules*”.

## Case Background

In December 2014, Altice agreed to acquire sole control of PT Portugal, then owned by Oi, a Brazilian telecommunications operator. This transaction was notified in February 2015 but the EC raised concerns as to the loss of competition between Altice’s subsidiaries, Cabovisão and ONI, and PT Portugal. Ultimately, the **EC cleared the transaction in April 2015**, conditional upon Altice divesting both Cabovisão and ONI.

In May 2017 the EC sent a Statement of Objections to Altice. It alleged that the PT Portugal purchase agreement had enabled Altice to exercise decisive influence over the commercial strategy of PT Portugal before the transaction was cleared in contravention of EU merger control rules. The EC’s announcement of the fine upheld this view and, in particular, noted that:

1. Altice acquired various post-signing veto rights over PT Portugal, which gave it the ability to influence PT Portugal’s commercial decisions; and
2. Altice had actually exercised decisive influence over PT Portugal’s business pre-clearance by providing instructions on how to carry out a marketing campaign and “*seeking and receiving detailed commercially sensitive information about PT Portugal outside the framework of any confidentiality agreement*”.

Altice intends to challenge the EC’s decision before the General Court, arguing that “*the transaction agreement governing the management of the target during the pre-closing period provided Altice with a consultation right on certain exceptional matters relating to PT Portugal, and was in accordance with well-established M&A market practice*”. The EC gun-jumping decision will not impact the merger clearance.

## Conclusion

EC fines are calculated through reference to the **2006 fining guidelines** and take account of the seriousness and duration of the infringement, whether there are any aggravating or mitigating circumstances, and also the specific and general deterrence objectives of EU competition policy. The EC’s previous record gun-jumping fines were the €20 million fines imposed in each of the **Electrabel** and

**Marine Harvest** cases. In May 2017, the EC also fined **Facebook** €110 million for the provision of incorrect or misleading information during its review of the WhatsApp acquisition in 2014.

Further fines may be announced in the coming months following the **Statements of Objections issued in July 2017** to each of Merck / Sigma-Aldrich and General Electric for the provision of misleading information during EC merger reviews and to Canon for early implementation of its acquisition of Toshiba Medical Systems Corporation. The EC is at the forefront of an intensifying focus by regulators worldwide on compliance with notification and standstill obligations, particularly in those jurisdictions, such as the US, Brazil, China and India, in which companies commonly notify large scale cross-border transactions.

All of this underlines the importance of compliance procedures to ensure staff do not engage in pre-clearance behaviour which may attract regulatory scrutiny. There is currently a particular focus on conduct between signing of a deal and closing, with regulators assessing whether parties are sharing information or otherwise going beyond what is reasonably required to plan for closing. Regulators – both in Europe and elsewhere – are also increasingly focusing enforcement activity on companies who have adopted transaction structures designed to circumvent notification obligations.

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