

*CPI's Europe Column Presents:*

# The scope of the Standstill Obligation in the EU Merger Control Regulation

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February 2019



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*In a ruling of May 31 2018 (C-633/16, EY/KPMG), the European Court of Justice ("the ECJ") ruled on the scope of the standstill obligation in the EU Merger Control Regulation ("the EUMR"). The ECJ held that "a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change of control of the target undertaking". The landmark ruling by the ECJ is likely to have a significant impact on the future application of the standstill obligation, which until now has been characterized by great uncertainty. But what is the precise content of the ECJ's ruling and does the ruling answer all questions in relation to the standstill obligation?*

## **Introduction**

A major worry for the parties in a transaction process has been the uncertainty of what kind of preparatory measures they may undertake without running the risk of violating the standstill obligation with ensuing possible serious fines.

It is therefore not surprising that the standstill obligation - or the prohibition against "gun jumping" as it is more popularly referred to - has been subject to an increased focus in the EU (and in the EU member states) as well as globally.<sup>2</sup>

It is this uncertainty as to the more precise scope of the standstill obligation which led to the ECJ's preliminary ruling in C-633/16, EY/KPMG, where the ECJ considered the scope of the standstill obligation for the first time. This important ruling creates more legal certainty for the future application of the standstill obligation not only on an EU level, but also on a national level in jurisdictions where the national standstill obligation is to be interpreted in accordance with the standstill obligation in the EUMR<sup>3</sup>.

This article aims at assessing the content of the ECJ's ruling in EY/KPMG and whether the ruling actually answers all questions relating to the standstill obligation.

The article will lead with an introduction of the relevant rules governing the standstill obligation and the previous predominant view regarding the scope of the standstill obligation, as applied in particular by the European Commission ("the Commission").

Then, the article will review the facts and the reasoning of the EY/KPMG case, as well as the Commission's decision in COMP/M.7993, Altice/PT Portugal, which also deals with the scope of the standstill obligation. The Commission's decision in the Altice case was rendered after Advocate General Nils Wahl's opinion in EY/KPMG, but prior to the ECJ's preliminary ruling. In order to maintain the sequential order, Wahl's opinion in EY/KPMG will therefore be reviewed first, then the Commission's Altice decision and, lastly, the ECJ's preliminary ruling in EY/KPMG.

Finally, the article will consider whether all questions relating to the standstill obligation are now answered.

## **The EU Merger Control Regulation**

Recital 5 of the EUMR states that its purpose is to ensure that the process of reorganization does not result in lasting damage to competition. Therefore, the EUMR contains an *ex ante* control mechanism for certain transactions amounting to a concentration with an EU dimension, as stated in Article 1.

### The concept of a concentration

Article 3(1) states that a "concentration" comprises a number of different transactions resulting in a *change of control* on a lasting basis:

1. The merger of two or more separate undertakings or parts of undertakings,
2. the acquisition of control by one or more undertakings of one or more other undertakings, and
3. the creation of a full-function joint venture.

Thus, the concept of a change of control is essential to the concept of a concentration. Control is defined in Article 3(2) as *the possibility of exercising decisive influence* on an undertaking. Such control can be constituted by rights, contracts or any other means which, either separately or in combination, in fact or in law, confer the possibility of exercising decisive influence on an undertaking.

Accordingly, the possibility of exercising decisive influence on an undertaking can be acquired on a *de jure* basis as well as on a *de facto* basis and can take the form of sole or joint control. Furthermore, control can be either positive or negative.<sup>4</sup>

### The concept of *ex ante* control

A transaction amounting to a concentration with an EU dimension is subject to *ex ante* control, which implies that the concentration must be notified to the Commission in accordance with Article 4(1) and must not be implemented either prior to notification or before it has been declared compatible with the common market, as per Article 7(1).

As set out in Recital 34 of the EUMR, both provisions have the aim of ensuring the effective enforcement of the *ex ante* control of concentrations. Accordingly, the Commission stated in connection with the imposition of a record high fine of EUR 124.5 million on Altice in April 2018: "*Companies that jump the gun and implement mergers before notification or clearance undermine the effectiveness of our merger control system*".<sup>5</sup>

More specifically, the notification obligation in Article 4(1) ensures that the concentration is brought to the Commission's attention, whereas the standstill obligation in Article 7(1) aims at preventing that the concentration is implemented before the Commission has declared it compatible with the common market.<sup>6</sup>

### **The standstill obligation**

Article 7(1) does not in itself clarify the scope of the standstill obligation, but only makes it clear that the provision prohibits the "*implementation*" of a "*concentration with a Community dimension*" (or a concentration to be examined pursuant to Article 4(5)).

The question therefore remains what precisely is meant by the term "*implementation*" - when is a concentration with an EU dimension illegally implemented?

### Prior to EY/KPMG

Prior to the ruling in EY/KPMG, the ECJ had not considered the precise scope of the standstill obligation in Article 7(1).

The only decisions from the EU Courts (the ECJ and the General Court) regarding the standstill obligation prior to EY/KPMG concerned situations in which a concentration had been fully implemented prior to clearance (and sometimes even before notification).<sup>7</sup>

However, no rulings had been rendered regarding the prohibition's "lower limit", more specifically regarding the demarcation line between legitimate preparatory measures and partial implementation.

### The predominant view on the scope prior to EY/KPMG

In a couple of cases prior to the EY/KPMG ruling the Commission had expressed its view towards the scope of the standstill obligation.

In connection with Bertelsmann's and Kirch's acquisition of joint control over Premiere through the creation of a full-function joint venture, the Commission published a press release indicating that the merging parties had implemented the concentration partially prior to clearance in violation of the standstill obligation. The Commission stated that the concentration had been implemented partially, since Bertelsmann and Kirch had started the use of Premiere as a joint marketing platform for Kirch's d-box technology prior to clearance. In the assessment of whether the measure amounted to partial implementation, the Commission placed emphasis on the fact that:

- the measure was inseparably linked with the intended concentration and was an immediate result of the merger agreement;
- the measure was one of the substantial competitive consequences of the merger; and
- the measure could hardly be reversed.<sup>8</sup>

In contrast, the Commission did not address whether a change of control had occurred prior to clearance.

Bertelsmann and Kirch subsequently gave a formal undertaking to the Commission that they would immediately suspend the use of Premiere as a joint marketing platform. Accepting that, the Commission refrained from issuing a formal decision finding that the parties had in fact violated the standstill obligation.<sup>9</sup>

Another press release regarding the scope of the standstill obligation stems from the Commission's unannounced inspections - so-called "dawn raids" - at the premises of two S PVC producers in the UK due to its suspicion that the merging parties had infringed the standstill obligation as well as Article 101 TFEU by an anticompetitive exchange of information.<sup>10</sup>

It appears that the Commission's view on the scope of the standstill obligation has been quite broad, suggesting that the provision not only prohibits a change of control, but also, for example, a coordinated behavior or an exchange of information between the merging parties prior to clearance. Furthermore, it appears that the Commission has been of the opinion that the conduct of the merging parties can constitute an infringement of the standstill obligation in Article 7(1) and of Article 101 TFEU at the same time.

In the competition law literature, the standstill obligation has accordingly been described as prohibiting merging parties from "*coordinating their commercial activities; integrating business expertise; coordinating price, production, or research strategies; and/or engaging in joint marketing or advertising*", stating that this conduct may be a violation of the standstill obligation as well as Article 101 TFEU.<sup>11</sup>

## **The EY/KPMG case**

### Background

The ECJ's judgment of 31 May 2018 in the EY/KPMG case stems from a Danish reference for preliminary ruling in a case, where the Danish Competition Council ("DCC") found that the two firms, KPMG Denmark

("KPMG DK") and Ernst & Young ("EY"), both active within the field of financial audit, tax and other advisory services, had breached the Danish standstill obligation under national merger control law - which corresponds to the standstill obligation in Article 7(1) - in connection with EY's acquisition of KPMG DK.

EY and KPMG DK entered into a transaction agreement on 18 November 2013, which was subject to notification to and approval by the Danish Competition and Consumer Authority ("DCCA").

The transaction agreement obliged KPMG DK to terminate its cooperation agreement with the international network, KPMG International, that KPMG DK was a member of at the time. The termination would allow KPMG DK to become part of the EY group without breaching the cooperation agreement with KPMG International. KPMG DK therefore terminated its cooperation agreement with KPMG International the same day the transaction agreement was entered into with expiration on 30 September 2014 in accordance with the prescribed termination notice.

On 19 November 2013, the transaction was publicly announced, and on 20 November 2013, KPMG International publicly announced its intention to remain on the Danish market through the new undertaking KPMG 2014. At subsequent annual general meetings of a number of KPMG DK's clients, a change of accountant was decided.

The concentration was approved, subject to commitments, on 28 May 2014 and closed on 1 July 2014. Consequently, KPMG DK and KPMG International agreed to end the cooperation prior to the expiration of the termination notice.

However, on 17 October 2014, the DCCA sent a statement of objections with regard to an infringement of the standstill obligation caused by the termination notice by KPMG DK to KPMG International prior to clearance of the concentration.<sup>12</sup> On 17 December 2014, the DCC issued a decision finding that the standstill obligation was in fact infringed.

### The DCC's decision

With reference to, *inter alia*, the Commission's earlier-mentioned press releases, the DCC applied a test in which it placed emphasis on the fact that the termination:

1. was merger specific;
2. was irreversible; and
3. had the potential to create market effects.

In contrast, the DCC did not find it necessary to establish whether the termination notice granted EY the possibility of exercising decisive influence on KPMG DK prior to clearance.

The DCC found that these three criteria were fulfilled in the specific case:

The termination was *merger specific*, as it was a direct result of the obligation in the merger agreement and would not have taken place in the absence of the merger agreement.<sup>13</sup>

The termination was *irreversible*, as it was final and absolute.<sup>14</sup>

The termination had the *potential to create market effects*, since there were certain reactions in the market after the termination, but prior to the approval, and the impact on the market had thus been expedited because of the termination. In addition, the DCC found that the termination had the effect that KPMG DK's position on the Danish market would become uncertain, since KPMG DK potentially would be without an international network, if the concentration was not approved.<sup>15</sup>

The DCC found that it was not decisive whether these effects in the market had alternative

explanations. Thus, it was not decisive whether they derived from the termination or merely the publication by KPMG DK and EY of the merger agreement, as the termination at least had the potential to create market effects.<sup>16</sup>

On these grounds, the DCC found that the termination amounted to partial implementation of the concentration in violation of the standstill obligation.

The merging parties did not agree with the DCC's finding and chose to bring an action seeking the annulment of the DCC's decision before the Maritime and Commercial Court in Denmark on 1 June 2015.

A violation of the Danish standstill obligation is - as the standstill obligation in Article 7(1) - subject to fines. On 11 June 2015, the case was therefore referred to the State Prosecutor for Serious Economic and International Crime for the purpose of criminal prosecution.

In the case before the Maritime and Commercial Court, the court chose to stay the proceedings and refer a number of questions to the ECJ for a preliminary ruling seeking a clarification on the scope of the standstill obligation, including whether the standstill obligation only prohibits measures forming part of the actual change of control on the target undertaking:

"(1) What criteria are to be applied in assessing whether the conduct or actions of an undertaking are covered by the prohibition in Article 7(1) of Regulation No 139/2004 (the prohibition of implementation prior to approval), and does implementing action within the meaning of that provision presuppose that the action, wholly or in part, factually or legally, forms part of the actual change of control or merging of the continuing activities of the participating undertakings which – provided the quantitative thresholds are met – gives rise to the obligation of notification?"<sup>17</sup> (our underlining)

### AG Wahl's opinion in EY/KPMG

Advocate General Nils Wahl delivered his opinion in the case on 28 January 2018, noting in his introductory remarks that "*lack of judicial review seems to have allowed the Commission to continue its regulatory activities unchecked*".<sup>18</sup> Thus, Wahl implied that a clarification of the scope of the standstill obligation was needed.

However, Wahl rejected the three criteria of the DCC's decision, which had been supported by the Commission in the proceedings.<sup>19</sup>

Wahl specifically rejected the DCC's three criteria for the following reasons:

That a measure is *merger specific* is a prerequisite for the application of the EUMR, including the standstill obligation. The EUMR only applies to transactions amounting to a "concentration" with an EU dimension and, consequently, a criterion of merger specificity adds no value in determining the scope of the standstill obligation.<sup>20</sup>

*Irreversibility* must also be rejected. The Commission's possibility to reverse a pre-implemented concentration in accordance with Article 8(5)(a) and (c) in the EUMR would seem contradictory if only irreversible measures could amount to pre-implementation.<sup>21</sup>

At last, a measure's *potential to create market effects* is also irrelevant in determining the scope of the standstill obligation. Firstly, almost all commercial measures have or may have some effect on the market. Secondly, placing emphasis on a measure's potential to create market effects in relation to the standstill obligation would overlap with and pre-empt the substantive assessment of the concentration. Lastly, it would disregard the complexity of the economic assessment.<sup>22</sup>

Wahl agreed that both full and partial implementation should be covered by the standstill obligation,

but stated that the standstill obligation should be defined in accordance with the scope of the EUMR as set out in Article 1. Consequently, Wahl was of the opinion that the standstill obligation should only cover measures leading to a change of control - defined in the EUMR as measures granting the *possibility of exercising decisive influence on a target undertaking*.

Instead of a positive enumeration of criteria in determining the scope of the standstill obligation - as applied by the DCC - Wahl suggested a negative definition for delimiting the scope. Wahl more specifically suggested that the standstill obligation "*does not affect measures which, although taken in connection with the process leading to a concentration, precede and are severable from the measures actually leading to the acquisition of the possibility of exercising decisive influence on a target undertaking.*"<sup>23</sup> (our underlining)

Wahl consequently suggested that the parties had not infringed the standstill obligation. KPMG DK's termination of its cooperation agreement with KPMG International was a necessary prerequisite for the implementation of the concentration, but it did not contribute to a shift in control, giving EY the possibility of exercising decisive influence on KPMG DK and thus did not implement the concentration.

### **The Commission's decision in COMP/M.7993, Altice/PT Portugal**

After Wahl's opinion in EY/KPMG, but prior to the ECJ's ruling, the Commission rendered its decision in Altice/PT Portugal, in which it imposed a record high fine of EUR 124.5 million on the multinational cable and telecommunications company Altice. The fine was imposed for infringing the standstill obligation in connection with the acquisition of the Portuguese telecommunications and multimedia operator PT Portugal.

The Altice decision is important as it is the first actual decision of the Commission regarding partial implementation. In addition, the Commission - in contrast to its earlier statements - placed emphasis on whether Altice had acquired the possibility of exercising decisive influence on PT Portugal prior to clearance in the assessment of whether the measures in the case amounted to partial implementation. Thus, the Commission appears to have taken Wahl's opinion into account - at least to a certain extent - in deciding the case.

In the decision, the Commission found that the parties had implemented the transaction partially in violation of the standstill obligation due to the following reasons:

#### Covenants in the transaction agreement

The transaction agreement between the parties contained a number of covenants, including veto rights, which granted Altice the possibility of exercising decisive influence on PT Portugal.

The covenants granted Altice veto rights regarding the appointment of PT Portugal's senior management staff, the setting of PT Portugal's pricing policies and the entering into, termination and modification of PT Portugal's contracts.

The Commission explicitly recognized the use of covenants which are aimed at protecting the value of the target business between signing and closing of the transaction and stated, with reference to the Commission Notice on Ancillary Restraints, that such clauses can be directly related and necessary to the implementation of a concentration.<sup>24</sup> However, measures granting the acquiring undertaking the possibility of exercising decisive influence over the target undertaking prior to clearance are only justified, if they are strictly limited to what is necessary to protect the value of the target undertaking between signing and closing.<sup>25</sup>

The Commission found that the covenants both individually and collectively gave Altice the possibility

of exercising decisive influence on PT Portugal and went beyond what was necessary to protect the value of PT Portugal between signing and closing.<sup>26</sup> Thus, upon the transaction agreement coming into effect on the signing date, these covenants constituted a breach of the standstill obligation.

#### Intervention in commercial decisions

In a number of instances, PT Portugal sought Altice's instructions, even though the transaction agreement did not require such adherence. This included, *inter alia*, Altice's involvement in the decision making process concerning PT Portugal's "post-paid mobile campaign", in the renewal of a distribution contract with Porto Canal and in establishing the selection process of a RAN supplier.<sup>27</sup>

The Commission found that such intervention constituted an actual exercise of decisive influence by Altice on PT Portugal. Some of the instances, in which Altice intervened, did not even reach the materiality thresholds in the transaction agreement (which, as described, were too low), and the intervention was therefore not necessary to protect the value of PT Portugal between signing and closing.

#### Information exchange

At last, Altice and PT Portugal engaged in an information exchange which amounted to pre-implementation.

With reference to its Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements<sup>28</sup>, the Commission found that the nature of the information exchanged between Altice and PT Portugal was strategic, up-to-date, extensive and granular.

In addition, the exchanges involved the entire management of Altice, including operational employees and it took place after the due diligence phase and without any safeguards such as clean teams or confidentiality agreements.<sup>29</sup>

For these reasons, the exchanges contributed to the Commission's finding that Altice actually exercised decisive influence on PT Portugal prior to clearance. Additionally, the Commission noted that the exchanges made it difficult for the Commission to restore the prior competitive situation.<sup>30</sup>

#### **The ECJ's ruling in EY/KPMG**

On 31 May 2018, the ECJ rendered its judgment in the EY/KPMG case in which it largely followed Wahl's opinion.

Firstly, the ECJ agreed that the DCC's three criteria were of no use in determining the scope of the standstill obligation. The ECJ explicitly rejected the criterion of potential to create market effects, as the standstill obligation is a purely procedural provision and therefore applies to all measures amounting to an implementation of a concentration with an EU dimension, regardless of whether they create market effects.<sup>31</sup>

Secondly, the ECJ agreed with Wahl that the standstill obligation should be tied to the concept of a concentration, and thus the concept of control. However, the ECJ did not apply the exact same definition of the standstill obligation as the one proposed by Wahl.

Wahl had stressed that a negative definition of the standstill obligation should be applied, whereas the ECJ applied a positive definition. Also, Wahl precluded all measures not "leading" to a change of control, whereas the ECJ's definition instead focused on whether the measures "contribute" to the change of control:



"Article 7(1) of Regulation No 139/2004 must be interpreted as meaning that 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."<sup>32</sup> (our underlining)

The wording of the ECJ's definition appears broader than Wahl's definition, and thus, one may consider whether the ECJ's definition is intended to be broader than Wahl's definition: Does the word "contribute" to the change in control imply that a measure, which does not in itself lead to a change of control, but which together with other measures leads to a change of control (and thus *contributes* to a change of control), can amount to an infringement of the standstill obligation before the other measures have occurred and consequently before the change of control has occurred?

Accepting such an interpretation would essentially undermine the underlying idea that the standstill obligation should be tied to the change of control and would make it very difficult to navigate through the rules - how are you supposed to know if a measure in connection with other measures, that have not occurred yet, is going to contribute to a change of control? And what if these other measures never occur?

Consequently, a more correct interpretation seems to be that some kind of change of control must have occurred before there is a violation of the standstill obligation. It is, in this regard, important to remember that the term "change of control" is broad and covers both *de jure* and *de facto* control. For a change of control to occur it is therefore not necessary that the concentration is fully implemented. A change of control occurs as soon as the *possibility* of exercising decisive influence on a target undertaking has occurred, regardless of whether there are still outstanding transaction obligations between the parties.

Accordingly, the ECJ underlines in its ruling that the standstill obligation covers both full and partial implementation. As an explanation of why partial implementation must be covered by the standstill obligation, the ECJ, similarly to Wahl, refers to interrelated transactions. As set out in the EUMR Recital 20, separate transactions that are closely connected because they are linked by condition must be treated as a single concentration to avoid circumvention of the merger control rules.<sup>33</sup> In the same way, a partial implementation must be covered by the standstill obligation in order to avoid that the merging parties circumvent the standstill obligation by carrying out measures that have the same effect as a concentration, namely a change of control with a target undertaking.

However, measures that are carried out in the context of the concentration only amount to partial implementation in violation of the standstill obligation, if they are necessary to achieve a change of control, although they might be ancillary or preparatory to the concentration.<sup>34</sup>

In contrast, the ECJ found that measures which do not contribute to a change of control - and which are therefore not covered by the standstill obligation - must be assessed solely pursuant to Article 101 TFEU. The ECJ thus rejected the Commission's view that the standstill obligation and Article 101 TFEU apply in parallel.

In the ruling, the ECJ underlines that Regulation No 1/2003<sup>35</sup> does not apply to concentrations covered by the EUMR, as stated in Article 21(1) of the EUMR. An application of the standstill obligation to measures that do not contribute to a change of control would therefore not only extend the scope of the EUMR contrary to Article 1 in this regulation, but it would at the same time reduce the scope of Regulation No 1/2003 and, consequently, the application of Articles 101 and 102 TFEU.<sup>36</sup>

The ECJ thus found that there is a clear demarcation line between the *ex ante* rules in the EUMR, including the standstill obligation, and the *ex post* competition rules, including Article 101 TFEU, and that these two set of rules do not apply in parallel.

It therefore follows from the ruling that the scope of the standstill obligation is in fact not as broad as advocated by the Commission and assumed in the literature. The Commission and at least some national competition authorities consequently have to change their practice and take the ruling into account in future cases. Furthermore, some competition law literature must be reconsidered. As an example, it is now clear that the standstill obligation does not prohibit the parties from "*coordinating their commercial activities*" or "*coordinating price, production, or research strategies*", unless these measures contribute to a change of control, including for example to the establishment of joint control.<sup>37</sup> In contrast, these measures must be assessed solely pursuant to Article 101 TFEU.

### **Are all questions answered?**

The ECJ's ruling in EY/KPMG clarifies that the standstill obligation only prohibits conduct that contributes to the change of control of a target undertaking. In contrast, measures which do not contribute to a change of control must be assessed solely pursuant to Article 101 TFEU.

This distinction is important as Article 101 TFEU only prohibits conduct that fulfills the conditions in the provision. For example, a coordinated behavior between two or more independent undertakings must form part of an agreement, a decision by associations of undertakings or a concerted practice, and it must be anticompetitive, meaning that it must have as its object or effect the prevention, restriction or distortion of competition. In contrast, the standstill obligation in Article 7(1) in the EUMR - as a procedural rule - applies to all measures contributing to a change of control regardless of the effects on the market. The distinction is especially important in relation to non-horizontal mergers, where for example information exchange is not as problematic pursuant to Article 101 TFEU as an information exchange between parties to a horizontal merger (i.e. competitors).

The wording "*contributes*" to a change of control is vague and it still remains to be seen how the test will be applied in practice, and consequently where the exact demarcation line to Article 101 TFEU is drawn. It is clear that the ECJ's definition is not intended to include measures that do not lead to a change of control. It is, however, not clear exactly when a measure contributes to a change of control.

The question of what the parties may agree to do in practice prior to clearance, including to what extent the acquiring undertaking may insert an obligation in the transaction agreement for the target undertaking to abandon certain activities, which the acquiring undertaking does not want to take over (e.g. customer agreements, supplier agreements etc.) therefore still remains unanswered.<sup>38</sup> We know that the relevant criteria is whether the measure *contributes to the change in control of the target undertaking*, but what precisely lies herein is unclear.

Presumably, the measures in the Altice decision which granted Altice the possibility of exercising decisive influence on PT Portugal, i.e. the covenants in the transaction agreement and the allowance of intervention in PT Portugal's commercial decisions outside the framework of the transaction agreement, would also amount to partial implementation in violation of the standstill obligation pursuant to the definition established by the ECJ in the EY/KPMG case.

In contrast, an information exchange as the one in the Altice decision should presumably be assessed pursuant to Article 101 TFEU. However, in the Altice decision, the Commission provides a number of general observations in relation to the information exchange that are supposedly relevant in the assessment pursuant to Article 101 TFEU, including observations regarding safeguards such as clean teams.

An interesting statement in the Commission's Altice decision is that the possibility of exercising decisive influence on the target undertaking does not amount to a violation of the standstill obligation, if it is strictly limited to that which is necessary to ensure that the value of the target undertaking is maintained between signing and closing. Despite the fact that it remains to be seen if the ECJ agrees

with this, it seems convincing that this is the case, as it would otherwise be impossible for the acquiring undertaking to ensure that the value of the acquired business is preserved between the time of signing the transaction agreement and closing.

Altice has announced its intention to appeal the Commission's decision, and it is to be expected that the General Court will take a stand on this point.

Despite the fact that the ECJ's ruling in EY/KPMG has provided welcome guidance regarding the scope of the standstill obligation, a number of questions therefore still remain to be answered. Hopefully, some of these will be answered by the General Court in the Altice case.

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<sup>2</sup> Besides the EU cases, C-633/16, EY/KPMG and COMP/M.7993, Altice/PT Portugal, there have also been national cases on the topic, e.g. the French Altice decision (Décision n° 16-D-24 du 8 novembre 2016 relative à la situation du groupe Altice au regard du II de l'article L. 430-8 du code de commerce).

<sup>3</sup> Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

<sup>4</sup> Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

<sup>5</sup> Press release IP/18/3522 "Mergers: Commission fines Altice €125 million for breaching EU rules and controlling PT Portugal before obtaining merger approval" of April 24, 2018

<sup>6</sup> COMP/M.7993 – ALTICE / PT PORTUGAL, paras 38-41.

<sup>7</sup> See e.g. case T-332/09 and C-84/13 P, *Electrabel v Commission*; and case T-704/14, *Marine Harvest v Commission* currently pending before the ECJ in case C-10/18.

<sup>8</sup> Press release IP/97/1062 "Commission warns BERTELSMANN and KIRCH against infringement of European merger control" of December 1, 1997, and press release MEMO/07/573 "Mergers: Commission has carried out inspections in the S PVC sector" of December 13, 2007.

<sup>9</sup> Press release IP/97/1119 "BERTELSMANN AND KIRCH AGREE ON IMMEDIATE SUSPENSION OF SALES OF D-BOX DECODER BY PREMIERE" of December 15, 1997.

<sup>10</sup> Press release MEMO/07/573 "Mergers: Commission has carried out inspections in the S PVC sector" of December 13 2007.

<sup>11</sup> Jones, Alison and Brenda Sufrin: *EU Competition Law*. 6th edition. Oxford University Press, 2016, page 1126. See also Bailey, David and Laura Elizabeth John: *Bellamy & Child: European Union Law of Competition*. 8th edition. Oxford University Press, 2018, page 663-665.

<sup>12</sup> The standstill obligation is a procedural provision and, consequently, it can be infringed even though the transaction is not problematic substantively. Thus, the DCC's case regarding the potential violation of the standstill obligation was a separate case from the DCCA's case regarding the substantive assessment and approval of the merger between KPMG DK and EY.

<sup>13</sup> DCC's decision of 17 December 2014, paras. 110-114.

<sup>14</sup> DCC's decision of 17 December 2014, paras. 115-120.

<sup>15</sup> DCC's decision of 17 December 2014, paras. 127-128. The DCC found that it was of critical importance for KPMG DK to be part of an international network in order to maintain its profile in relation to international clients, see *inter alia* paras 127-

<sup>16</sup> DCC's decision of 17 December 2014, paras. 121-143.

<sup>17</sup> Case C-633/16, para. 27. The other questions asked by the Maritime and Commercial Court are less relevant as a consequence of the ECJ's (and Wahl's) answer to the first question. However, the other questions were the following:

(2) Can the termination of a cooperation agreement, such as in the present case, which is announced under circumstances corresponding to those described [in the order for reference] constitute an implementing action covered by the prohibition in Article 7(1) of Regulation No 139/2004, and what criteria are then to be applied in making a decision?

(3) Does it make any difference in answering Question 2 whether the termination has actually given rise to market effects relevant to competition law?

(4) If the answer to Question 3 is in the affirmative, clarification is requested as to what criteria and what degree of probability should be applied in deciding [in the case in the main proceedings] whether the termination has given rise to such market effects, including the significance of the possibility that those effects could be attributed to other causes.

<sup>18</sup> Wahl's opinion in case C-633/16, para. 43.

<sup>19</sup> Wahl's opinion in case C-633/16, para. 42. The Commission had argued that illegal partial implementation covers a number of measures not necessarily leading to a change of control, including the acquiring undertaking's influence on the structure or the market behavior of the target undertaking and other measures pre-empting the effects of the merger or affecting the prevailing competitive situation.

<sup>20</sup> Wahl's opinion in case C-633/16, paras. 48-49.

<sup>21</sup> Wahl's opinion in case C-633/16, paras. 50-52.

<sup>22</sup> Wahl's opinion in case C-633/16, paras. 53-56.

<sup>23</sup> Wahl's opinion in case C-633/16, para 78.

<sup>24</sup> Case COMP/M.7993 - ALTICE / PT PORTUGAL, para. 70. See the Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03), para. 14.

<sup>25</sup> Case COMP/M.7993 - ALTICE / PT PORTUGAL, para. 71. As an example, the Commission notes that a degree of oversight with respect to the target undertaking's employees can be viewed as necessary to protect the value of the target business, if it only concerns certain key employees that are integral to the value of the target business, cf. case COMP/M.7993 - ALTICE / PT PORTUGAL, para. 75.

<sup>26</sup> Case COMP/M.7993 - ALTICE / PT PORTUGAL, para. 73.

<sup>27</sup> Case COMP/M.7993 - ALTICE / PT PORTUGAL, pages 38-46, 46-53 and 53-58.

<sup>28</sup> Commission Notice on Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01).

<sup>29</sup> The Commission defined a clean team as "*a restricted group of individuals from the business that are not involved in the day-to-day commercial operation of the business who receive confidential information from the counter party to the transaction and are bound by strict confidentiality protocols with regard to that information*", see COMP/M.7993 - ALTICE / PT PORTUGAL, footnote 35 and 221, and thus as including in-house business people.

<sup>30</sup> Case COMP/M.7993 - ALTICE / PT PORTUGAL, para. 424.

<sup>31</sup> Case C-633/16, paras. 50-51

<sup>32</sup> Case C-633/16, para. 62.

<sup>33</sup> Case C-633/16, paras. 47-49 and Wahl's opinion in case C-633/16, paras. 63-67. See also the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), paras. 38-47.

<sup>34</sup> Case C-633/16, para. 49.

<sup>35</sup> Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

<sup>36</sup> Case C-633/16, paras. 55-58.

<sup>37</sup> It remains to be seen how the ECJ's definition is applied with regard to joint ventures. A joint venture only amounts to a concentration covered by the EUMR if it is full-function, see e.g. case C-248/16, Austria Asphalt GmbH v Bundeskartellamt. Thus, the standstill obligation can supposedly not be violated before the acquiring undertakings have obtained joint control, *and* the joint venture has become full-function.

<sup>38</sup> The Commission and the General Court have in earlier cases implicitly recognized that the acquiring undertaking can carry out a "winding up" of the target undertaking's activities prior to closing, in order to prepare the target undertaking for the merger, without violating the standstill obligation, see case COMP/M.588, Ingersoll-Rand/Clark Equipment and T-3/93, Air France v Commission. In both cases the divestment of some of the target undertaking's activities, however, entailed that the concentrations were not covered by the EUMR.