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CLIENT MEMORANDUM

Gun-Jumping in French Merger Control Proceedings: the Altice Decision of the French Competition Authority Raises Serious Concerns Regarding M&A Processes Before Closing

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On November 8, 2016, the French Competition Authority (the "FCA") imposed an €80 million fine on telecom operator Altice for implementing its acquisition of rival telecom operators SFR and OTL before obtaining the FCA's green light.[1]

Widely anticipated by commentators as a rare opportunity for obtaining guidance on the scope of the standstill obligation in merger control proceedings, the Decision – unfortunately – raises as many questions as it answers.

1. The Decision

In 2014, Altice filed with the FCA the acquisition of two different companies: SFR and OTL. On both counts, the FCA found that Altice had violated its obligation to refrain from implementing the transactions before obtaining clearance (known as "gun-jumping"). The conclusion of the FCA is based on a number of findings, the most important of which are summarized below.

[1] The decision itself, explaining the reasons for qualifying this behavior as a violation of the standstill obligation, was made available on the website of the FCA at the end of December 2016 (the Decision).

First, between signing and closing, the FCA noted that Altice involved itself in the business conduct of SFR in various ways:

- SFR sought Altice's approval for certain business decisions (even though the share purchase agreement (the "SPA") did not provide that Altice's approval should have been sought): in particular, Altice approved SFR's participation in a public bid and vetoed certain IT expenditures.

- Despite the absence of any supporting provision in the SPA, Altice weighed in to have SFR cease a particular promotional offer.

- Altice and SFR agreed that Altice should replace SFR as the acquirer of another telecom operator SFR was negotiating with.

Second, according to the FCA, Altice and SFR "reinforced their economic links," notably by preparing together a wholesale offer using Altice's network that SFR would propose to its customers. The offer was not proposed to customers before clearance, but the parties held meetings and information exchanges before clearance was obtained in order to have this offer ready on day one.

Third, the FCA highlights that exchanges of sensitive commercial information took place between the management of Altice and that of its two targets after the signing – but before the closing – of the transactions.

Altice chose not to challenge the gun-jumping qualification in both transactions and obtained in return a fine reduction.

If the outcome of this case is not entirely surprising given the unusual level of cooperation between buyer and seller (and given Altice's decision not to dispute the allegations of the FCA), certain aspects of the Decision seem to reveal a very restrictive approach on the part of the FCA as to what can take place in an M&A context without triggering gun-jumping issues.

2. Practical consequences for M&A transactions subject to FCA review

This concerns mostly information exchanges and the management of the target between signing and closing.

a. Information exchanges

Up until the closing, acquirer and target of course remain independent companies (sometimes competitors) and neither the M&A process itself nor the preparation of integration can justify unlimited exchanges of sensitive information between them.

The FCA recognizes in para. 259 that preparing an M&A transaction usually requires the exchange of much information between the buyer and the seller at various stages of the process, including both due diligence and integration preparation.

However, the FCA in the Decision suggests that there can be no exchange of sensitive information at all between the acquirer and the target before clearance is obtained.

Indeed, para. 260 of the Decision states: "whatever the reasons for which the companies may need to exchange information, it is their duty to put in place measures that eliminate any communication of strategic information between independent undertakings." Likewise, focusing on the integration preparation phase (post-signing), para. 266 of the Decision states: "exchanges of strategic information that have as their object or effect the preparation of the implementation of the transaction once FCA's clearance is obtained *constitute de facto* an unlawful bypassing of the standstill rule of merger control proceedings."

These sweeping statements therefore suggest that no exchange of strategic information should ever take place **directly** between a putative acquirer and the target; the only exception in the FCA's view would therefore seem to be **indirect** exchanges (i.e. through third parties such as bankers, lawyers and auditors).

Indeed, the FCA also views negatively clean team mechanisms that include employees of the concerned undertakings and states (para. 318): "in-house counsels, unlike outside counsels, are not bound by professional secrecy. To the contrary they are placed under the authority of their hierarchy and cannot be considered as independent from the management of the company they work for. Therefore, it must be considered that when they access commercially sensitive information, this entails that the entire company they work for accesses the said information."

It therefore seems that the FCA tolerates only methods for exchanging information whereby outside advisors exclusively access the sensitive information and report to their principals using desensitized presentations: "outside advisors, as opposed to employees of the concerned undertakings irrespective of whether they have operational responsibilities, may consult and analyze the strategic information. The result of their analysis may then be presented in a sufficiently aggregated or anonymized format, to avoid revealing strategic information" (para. 262).

Despite these very far-reaching statements, a number of practical uncertainties remain.

First, it is not clear whether exchanging information via a third party is indeed the only available option in the FCA's view, since it also declares that "using a third party is not an obligation" (para. 261).

Perhaps the FCA meant to exclude cases where the employees (and especially in-house lawyers who are not involved in day-to-day business) are bound by a personal nondisclosure agreement. Indeed, it could be argued that an NDA prevents further dissemination of the information within the company and therefore addresses the FCA's concerns. However, this interpretation can hardly be reconciled with the very general statement made at para. 318 that excludes employees from clean teams because, unlike external attorneys, they are not bound by legal privilege. The Decision does not provide clear guidance on this issue.

Another question is whether the FCA's restrictive approach applies also to the due diligence phase (before signing) or only to the integration preparation phase. Most of the standstill violations identified in the present case took place exclusively between signing and closing, i.e. during the integration preparation phase. The FCA even uses this fact to conclude that the information exchange was not necessary to establish an offer (para. 288), thus suggesting that the information exchange would have been tolerable had it happened during the due diligence phase. However, when it describes the modus operandi that must be followed, the FCA systematically refers to the "suspensive period," which includes both due diligence and integration preparation phases. It is therefore far from clear that the restrictive approach taken by the FCA was not meant to apply to the due diligence phase.

This could potentially have far-reaching consequences for transactions subject to FCA review in the future: no employee of the acquirer could have access to commercially sensitive information of the target until clearance, and third-party ("black-box") mechanisms should systematically be used.

To be thorough, let us recall that "commercially sensitive" or "strategic" information is traditionally defined as information that "reduces the parties' decision-making independence by decreasing their incentives to compete"[2] and generally relates to prices, customer lists, production costs, quantities, turnovers, sales, capacities, marketing plans, etc.

b. Management of the target between signing and closing

In order to protect its investment, it is common (and indeed advisable) for the acquirer to include in the SPA certain restrictions on the target's business conduct until closing.

The Decision contains hints as to the FCA's view of this type of provision. Indeed, after having described the relevant mechanisms of the SPA at paras. 200 to 202 of the Decision (a duty for the target (i) to conduct its business as a *bonus pater familias* and (ii) to refrain from deciding any off-budget expenditure above a certain threshold as well as a price adjustment in case this is not complied with), the FCA concludes that "the acquirer was therefore protected from the financial impact of any off-budget decision adopted between signing and closing, without intervening directly in the decisions of the target" (para. 204).

It stems from this that the FCA views positively provisions prohibiting any expenditure above a certain threshold, but that it views **unfavorably** provisions whereby the acquirer must be consulted before the target can take a certain decision.

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[2] European Commission Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, para. 86.

The facts of the case may explain this fairly general statement: SFR consulted Altice on certain decisions even though it was under no duty to do so under the SPA, so that such consultation did not appear to be aimed at protecting Altice's investment and therefore constituted gun-jumping.

However, can this set of facts lead to the conclusion that any provision requesting the putative acquirer's approval for certain decisions necessarily constitutes gun-jumping? One can think of circumstances under which the acquirer is consulted (for example on expenditures above a certain threshold) so that it can judge for itself whether the decision in question affects the value of its investment. Such a provision seems less restrictive than banning all investments above a certain threshold. Therefore, whether a provision protects the acquirer's investment or constitutes gun-jumping should depend more on the type of decisions that are involved and on the thresholds level than on the way in which the acquirer can express its consent.

However, given the level of generality used by the FCA in the Decision, caution is once again warranted: this type of provision should clearly aim only at protecting the acquirer's investment (and not allow it to meddle with the target's business conduct) and the chosen modus operandi should in practice be scrupulously followed (any deviation from the terms of the SPA will be seen as an intrusion in the target's business conduct).

3. Conclusion

As the questions raised above show, precise guidance on the topic of standstill obligation and gun-jumping would be extremely valuable. The Decision released by the FCA currently constitutes one of the few decision addressing specifically and in some detail this issue (be it at the French or the EU level) and will therefore *de facto* constitute the main reference for the time being. General guidelines on this topic, especially addressing systematically the issues raised in M&A contexts, would be most welcome, whether from the FCA or the European Commission (note that two gun-jumping cases are currently pending, one before the General Court and one before the Court of Justice). These guidelines should in particular define precisely what constitutes, in the context of an M&A process, commercially sensitive information, and address the different mechanisms that can be used to implement the information exchanges that are indispensable to such M&A processes.

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