CLIENT ALERT

The European Commission fines Altice €124.5 million for "gun-jumping" in relation to its acquisition of PT Portugal

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On 24 April 2018, the European Commission (the "**Commission**") imposed a fine of €124.5 million on Altice, the Dutch telecommunications company active in France via SFR, for implementing its acquisition of PT Portugal (the "**Transaction**") before having received the Commission's merger clearance[1] (the "**Altice decision**"). This is the highest fine ever imposed by the Commission for "gun-jumping".

The Altice decision is therefore – for now – the "high-water" mark for European "gun-jumping" fines and another example of the close scrutiny by regulators on the interaction between merger parties before all mandatory and suspensory merger clearance decisions have been obtained.

1. Facts

In December 2014, Altice entered into an agreement with the Brazilian telecom operator Oi to acquire sole control over PT Portugal. In February 2015, Altice reported the merger to the Commission. The Transaction was cleared by the

[1] As announced in the press release "Mergers: Commission fines Altice €125 million for breaching EU rules and controlling PT Portugal before obtaining merger approval," 24 April 2018. *Available at* http://europa.eu/rapid/press-release_IP-18-3522_en.htm.

Commission after a Phase 1 review in April 2015, subject to the divestment of Altice's fixed telecommunications businesses in Portugal, i.e. Oni and Cabovisão.

In May 2017, the Commission, which apparently had not raised this issue during its merger review, sent a statement of objections (essentially a civil charge sheet) to Altice raising concerns that the telecommunications company had "jumped the gun", i.e. implemented the acquisition of PT Portugal before having received EU merger clearance. Now that the Commission has adopted a final infringement decision, Altice has indicated that it intends to appeal the decision to the General Court of the EU.

2. Legal analysis

Under the EU Merger Regulation, transactions which exceed certain turnover thresholds must be notified to the Commission for review and clearance (the "**notification obligation**") before they can be implemented (the "**stand-still obligation**").

While the stand-still obligation applies, the parties must continue to act as competitors in the market and in particular: (i) refrain from exchanging any commercially sensitive information; and (ii) continue to independently determine their respective commercial policies. This is often in direct conflict with the desire of the purchaser to: (i) learn as much as it can about the company and its operations during the due diligence phase to properly assess the value of the company; and (ii) ensure that the company is operated "as is" (and that its value does not decline) in the period between signing and closing.

As the Altice decision is not yet public, we do not know which precise conduct led the Commission to conclude that Altice had violated the stand-still obligation. Based on the Commission's press release, it would appear that the Commission focused on Altice's influence on the conduct of the target business between signing and closing. In this regard, the Commission concluded that:

i. the purchase agreement gave Altice the *possibility to exercise* decisive influence over PT Portugal (e.g. the right to veto the target's ordinary business decisions) before clearance; and

ii. Altice *actually exercised* such decisive influence over PT Portugal (e.g. by giving instructions on a marketing campaign to the target and receiving commercially sensitive information from the target).

When companies intentionally or negligently breach the notification or stand-still obligations, the Commission can impose a fine of up to 10% of their aggregated worldwide turnover in the preceding financial year.[2] The amount of the actual fine must reflect the nature, gravity and duration of the infringement, as well as any mitigating and aggravating circumstances and the need for deterrence. The fine in the present case significantly exceeds the level of fines imposed for similar offenses in the past. This suggests that Altice may have deviated materially from the generally accepted practices and may have done so "knowingly" (not just "negligently").

3. What does the Altice decision mean in practice?

The Altice decision re-confirms the Commission's increasing determination to punish companies for procedural errors in merger proceedings. In the past, the Commission generally dealt with such matters, including a failure to notify in the first place, in a fairly lenient manner. In a number of cases, the Commission did not even impose a fine.[3]

However, the Commission's approach has changed in recent years, with the Commission imposing material fines for "gun-jumping" in the *Electrabel*[4] and *Marine Harvest*[5] cases.

The Commission also recently imposed a fine of €110 million on Facebook for having provided incorrect or misleading information in the context of the Commission's review of Facebook's WhatsApp takeover.[6]

The Altice decision constitutes another warning by the Commission to companies that procedural violations in merger cases are taken very seriously indeed by the Commission. It follows the closely watched decision of the French Competition Authority against Altice (again), in which a fine of €80 million was imposed for "gun-jumping" in the context of Altice's acquisition of SFR.[7]

2 Article 14(2) of Regulation N° 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

3 *See e.g.* Case IV/M.166 – *Torras/Sarrio*, Commission Decision of 24 February 1992, paras. 2-3 (parties had difficulty calculating turnover and assessing the applicability of the Merger Regulation); case COMP/J.V.55 – *Hutchison/RCP/ECT*, Commission Decision of 3 July 2001, para. 7 (parties mistakenly notified the transaction as a cooperative agreement rather than a joint venture); case COMP/M.2650 – *Haniel/Cementbouw/JV*, Commission Decision of 26 June 2002, paras. 28-32 (parties mistakenly believed the merger to be part of another transaction authorised by a national authority and therefore not notifiable); case COMP/M.5802 – *RWE Energy/Mitgas*, Commission Decision of 17 June 2010, para. 7 (acquiring party mistakenly believed it already held full control over the target and no notification was necessary).

4 Case COMP/M.4994 – *Electrabel/Compagnie Nationale du Rhône*, Commission Decision of 10 June 2009.

5 Case COMP/M.7184 – *Marine Harvest/Morpol*, Commission Decision of 23 July 2014.

6 http://europa.eu/rapid/press-release_IP-17-1369_en.htm.

7 French Competition Authority Decision n° 16-D-24 of 8 November 2016. Cf. also the various cases of the German Federal Cartel Office; e.g. in December 2008, it imposed a fine totalling €4.5 million on the American company Mars for "gun-jumping" in relation to its acquisition of Nutro Products.

As noted above, because the Altice decision is not yet public, it is not clear how far the covenants or consent requirements in the Altice case varied from covenants typically used in transaction documents. In addition, there is no formal guidance by the Commission on which covenants are acceptable and which are not.

Covenants for the conduct of the target business between signing and closing are standard. They generally provide for a somewhat limited corridor of behavior of the target to protect the value of the target. They typically require consents for changes to the target’s constitutional documents as well as for significant decisions that are not made in the ordinary course of business. Typical clauses contain requirements to obtain buyer approval for material investments, expenditures, loans or similar financial commitments above a certain “materiality” threshold value and obligations not to dismiss management or employees other than in the ordinary course of business. Companies and their advisors must take great care when drafting such covenants to strike the right balance between protecting the value of the target and not unduly influencing the target’s commercial decision-making freedom pre-closing.

Looking ahead, a number of pending investigations will provide further clarity on the enforcement practice of the Commission: in July 2017, the Commission sent a statement of objections to Canon for allegedly implementing a merger before notification and clearance. The operation concerned the acquisition of Toshiba Medical Systems Corporation and was previously cleared in September 2016. Canon had used a “two-step warehousing transaction structure”, involving an interim buyer. As a first step, the interim buyer acquired 95% in the share capital of Toshiba Medical Systems for (just) €800, whereas Canon paid €5.28 billion for both the remaining 5% and share options over the interim buyer’s stake. This first step was carried out prior to notification to or approval by the Commission. As a second step, following approval of the merger by the Commission, the share options were then exercised by Canon, leading to the acquisition of 100% of the shares of Toshiba Medical Systems.

The Commission will have to determine whether advance payment alone can be regarded as “gun-jumping”, irrespective of other transactional elements.

Companies should keep in mind that “gun-jumping” may also run afoul of the competition laws of other jurisdictions. In the United States, in particular, when a pre-merger filing is required pursuant to the Hart-Scott-Rodino Act (“**HSR**”), the parties may not consummate the proposed acquisition until the HSR pre-closing waiting period has expired. Consistent with the U.S. antitrust laws, the parties must continue to conduct themselves as separate entities, implement safeguards against disclosure of competitively sensitive information, and continue to compete with one another to the same extent as if the purchase agreement had not been executed until closing.

Subject to antitrust counsel, however, the parties may engage in some discussion and integration planning intended to facilitate post-closing management, provided that the actual integration does not occur until after closing. Antitrust counsel can facilitate the timing and content of such integration planning to maximize the efficient implementation of the merger and minimize “gun-jumping” risks.

Given this enforcement trend, it is essential for companies to include sound antitrust safeguards in their due diligence processes and their transaction agreement. Companies should in particular be aware of the following issues:

- Information exchange between the parties: It is clearly legitimate for a purchaser to undertake due diligence into the target's affairs to determine whether to proceed with an acquisition and at what value. However, it is important that any due diligence assessment be structured so as to ensure that commercially sensitive information is effectively ring-fenced to the buyer's deal team and not shared with the buyer's commercial teams. The use of "clean team" arrangements is fairly standard to ensure that this is the case. In this regard, the following information is typically particularly sensitive from an anti-trust perspective: customer details, specific and current prices and supply terms, margins, planned marketing campaigns, pending bidding processes and R&D and innovation projects. In certain cases, particularly sensitive information may be shared with the parties' "outside advisors" only under a "black box" procedure. The advisors can then report back on their analysis by means of a high-level summary which aggregates and anonymizes the data reviewed by them in an appropriate manner. Antitrust counsel should be closely involved throughout this process.

- Management of the target between signing and closing: The buyer has a significant legitimate interest to ensure that the target's value is not diminished in the period between signing and closing. However, at the same time, the target must continue to conduct its business independently and may not be directed or influenced by the buyer when determining its ordinary-course commercial activities. However, it is customary that the parties negotiate covenants which provide for a corridor for commercial behavior of the target that ensures the target maintains its value. As noted above, parties should take great care with respect to the structure of those covenants and, in particular, to the scope of the buyer's positive consent or negative veto rights. These must not go beyond what is strictly necessary to preserve the value of the target and must not interfere with the target's ability to conduct its activities in the ordinary course. Otherwise, there is a risk that the company will be regarded as having implemented the transaction prematurely, i.e. "jumped the gun".

- Antitrust clearances as a condition to closing: It is customary that the closing of transactions is conditional upon having obtained (at least) all required mandatory and suspensory merger control consents. However, it is important to note that the stand-still obligation under the EU merger control regime (and similar regimes) applies irrespective of the terms of any transaction documents. Parties must therefore carefully consider issues such as a possible long-stop date for obtaining clearances and the desirability of agreeing on a break-fee in case clearances are not obtained. Where parties have failed to identify a mandatory clearance or the clearance is not obtained in a timely manner, the resulting unwinding of the transaction can be complex and costly.

Ultimately, the appropriate deal terms and due diligence arrangements must always reflect the specific circumstances of each deal and bespoke solutions are therefore required in each case.

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