SULLIVAN & CROMWELL LLP

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French Competition Authority Imposes Landmark Fine for Gun-Jumping

The French Competition Authority Fined Altice EUR 80 Million for Implementing Two Mergers Before It Had Granted Merger Control Approval

SUMMARY

On 8 November 2016, the French Competition Authority fined Altice Group EUR 80 million for implementing two merger transactions before the French competition authority had approved them, thereby breaching the waiting period requirements of French merger control law.

This is, by far, the highest fine ever imposed by the French Competition Authority for so-called "gun-jumping". It is also four times higher than the highest fine imposed to date by the EU Commission for breaching the equivalent waiting period requirement under EU merger control law.

It is noteworthy that the French Competition Authority became aware of Altice's breach of the waiting period as a result of information it received from Altice's competitors. The case also highlights the significant financial (and reputational consequences) of failing to comply with waiting period obligations under French merger control law.

BACKGROUND

Article L. 430-8 of the French Commercial Code prohibits the implementation of transactions that require the prior approval of the French Competition Authority ("**FCA**"). Under Article L. 430-8, II of the French Commercial Code, the FCA can impose a fine of up to 5% of the pre-tax turnover in France during the last financial year of entities that breach this requirement.

In 2014, Altice Group (through its subsidiary Numericable) notified two merger transactions to the FCA:

- The acquisition of SFR, which the FCA approved (subject to conditions) on 30 October 2014, after an in-depth investigation. In April 2016, SFR-Numericable became "SFR Group".
- The acquisition of OTL group (which distributes "Virgin Mobile" in France). The FCA unconditionally approved this transaction on 25 November 2014.

Although the transactions did not close prior to the FCA granting approval, the FCA found evidence indicating that Altice had, in fact, exercised decisive influence over SFR Group and OTL before closing, which gave Altice Group access to a substantial amount of commercially sensitive information about the two companies.

The FCA found that Altice Group actively took part in certain strategic business decisions of SFR Group, namely:

- Between May and October 2014, the terms under which SFR responded to a tender for the development of a fibre optic network in Seine-et-Marne were submitted to Altice Group for approval;
- In October 2014, the renegotiation of a major contract relating to network sharing between SFR Group and its competitor Bouygues Télécom was submitted to Altice for approval;
- From June 2014, Alice actively participated in determining SFR Group's commercial strategy and, in particular, its pricing strategy for access to high speed broadband; and
- SFR and Altice Group closely coordinated their strategy with regard to the (separate) acquisition of control of OTL by Altice (the other transaction for which Altice was fined for gun-jumping).

The FCA also found that Altice and SFR exchanged a significant quantity of commercially sensitive information, including individualised data, as well as forecasts for the coming months. These exchanges occurred at the senior management level of both companies.

As regards Altice's acquisition of OTL, Altice was involved, before obtaining FCA approval, in OTL's strategic decision-making as a result of certain clauses of the sale and purchase agreement between Altice Group and OTL.

According to the FCA, Altice also implemented a system of weekly information-gathering from OTL, which allowed Altice to follow closely OTL's economic performance. According to the FCA, this form of oversight was similar to the oversight of a controlling shareholder over its subsidiary and gave Altice access to commercially sensitive information relating to OTL.

The FCA also concluded that OTL's managing director had begun to exercise his functions in SFR-Numericable before FCA approval, in particular by being directly involved in SFR's new commercial projects and by having access to OTL's commercially sensitive information.

The EUR 80 million fine – the highest fine ever imposed in the world for gun-jumping – was calculated by the FCA on the basis of the following factors:

- The significant size of the transactions involved, both in terms of monetary value and impact on the relevant sector (telecommunications) (Altice acquired SFR for EUR 17 billion and OTL for EUR 325 million);
- The significance and cumulative effect of the various instances of conduct that breached the waiting period – some of the conduct had a direct link with the anticompetitive outcome identified by the FCA in its substantive analysis of the SFR transaction;
- The significance of the activities of SFR and Virgin Mobile directly concerned by the infringing conduct;
- The duration of the conduct, which started before Altice had filed its notifications of the two transactions to the FCA and continued throughout the FCA's review of the transactions; and
- The similar nature of the conduct in both transactions as well as its deliberate nature.

The FCA did, however, reduce the fine because Altice did not contest the facts or the FCA's legal analysis of them.

COMMENT

This is the highest fine ever imposed in the world for gun-jumping. It is also the FCA's first fine specifically for implementing a transaction before the FCA had approved it. In prior cases, the FCA imposed fines for failure to notify a transaction or failure to comply with remedies relating to a conditional approval of the FCA, but not in relation to prior implementation of a notified transaction.[1]

The significance of the fine can be seen when compared with recent fines for gun-jumping in other jurisdictions:

- *Gemstar* in the United States in 2003 (approximately EUR 5 million)
- *Mars/Nutro* in Germany in 2008 (EUR 4.5 million)
- *Electrabel* of the European Commission in 2009 (EUR 20 million)
- *Marine Harvest/Morpol* of the European Commission in 2014 (EUR 20 million)
- *Cisco Systems Inc/Technicolor* in Brazil in 2016 (EUR 8 million)

This case is a strong signal from the FCA of the risks faced by companies when implementing a transaction in breach of a waiting period requirement. It also illustrates the FCA's significant powers of investigation (extending to "dawn raids" on companies under investigation).

The case also highlights the importance of putting in place clear arrangements to enable pre-closing integration planning to occur, in particular (but not exclusively) for transactions that give rise to substantive antitrust issues. In particular, the exchange of sensitive confidential information should be

[1] *See* decision No. 13-D-22 of 20 December 2013 *Group Castel*; decision No. 12-D-12 of 11 May 2012 *Colruyt* and decision No. 11-D-12 of 20 September 2011 *TPS / Canal Plus.*

carefully implemented and monitored by the parties to the transaction to ensure compliance with competition law.

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