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News Flash

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First-ever French Fine for Integrating Before Merger Clearance

Altice was fined €80 million for jumping the gun when it acquired SFR and Virgin Mobile/OTL in 2014.

Please note that this Client Alert *is based on the press release published by the French Competition Authority.*

Summary

On 8 November 2016 the French Competition Authority (FCA) imposed a hefty fine on Altice for implementing two acquisitions in the telecoms sector before obtaining merger control clearance. This ground-breaking FCA decision serves as a reminder that merging companies must continue to compete and conduct their business independently until they have received antitrust clearances. Robust internal processes implemented in the period between signing and closing can prevent competition law infringements and fine exposure.

Background

In the summer of 2014, Altice (through its subsidiary Numericable) notified two mergers to the FCA: first, the acquisition of the SFR group (in June), and second, the acquisition of the Virgin Mobile/OTL group (in September). The FCA cleared both transactions. Following competitor complaints, the FCA carried out dawn raids at Numericable, SFR and Virgin Mobile/OTL's premises in order to determine whether there had been an early implementation of the transactions. Following an investigation and a statement of objections, the FCA fined Altice €80 million. While the fine is significant, the legal limit is in fact much higher (with the French Commercial Code (FCC) allowing penalties of up to 5% of Altice's French turnover for 2013). The lower fine reflects the fact that Altice did not challenge the statement of objections and in fact settled with the FCA.

Issues of Interest

First-ever "substantive" French gun-jumping fine

While companies have already been fined for failure to notify or non-compliance with commitments, this FCA decision is the first that fines companies for gun-jumping, *i.e.*, for implementing a merger before clearance.

The FCA's decision sends a strong message: as long as authorization has not been granted, merging parties must continue to behave like competitors and refrain from acting as a single entity. In this case, even though there was no transfer of ownership during the standstill period, the FCA found that Altice had

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"jumped the gun" by collaborating with the target businesses ahead of receiving the merger control clearance. Documents the FCA uncovered during its investigation showed that Altice had exercised a controlling influence over SFR and Virgin Mobile/OTL before Altice received regulatory permission to do so.

In the case of SFR, the FCA found that Altice participated directly in the operational management of the target by approving certain key strategic decisions such as the modalities of SFR's participation in a bid to develop fibre networks, the sharing of mobile networks between SFR and Bouygues Telecom, and SFR's pricing policies. Additionally, the FCA found that SFR and Numericable coordinated their commercial strategies, and that Altice and SFR exchanged general strategic and confidential information.

In the case of Virgin Mobile/OTL, the FCA found that Altice was involved in Virgin Mobile/OTL's operational decision-making process prior to merger clearance, including decisions concerning the hosting contracts of mobile customers concluded with network operators. Furthermore, Altice and Virgin Mobile/OTL shared commercially sensitive information that would have allowed Altice to closely monitor Virgin Mobile/OTL's economic performance. Finally, according to the FCA, Virgin Mobile/OTL's CEO started in his position as head of the SFR-Numericable group before merger clearance was granted.

Second French settlement procedure

This decision is the second settlement decision adopted under new Article L. 464-2, III° of the FCC (the first one being Decision No 16-D-15 of 6 July 2016 relating to practices implemented in the distribution of consumer goods overseas).

This new rule (which is part of the Macron Law that came into force last year), amended the French settlement procedures so as to allow companies to commit to change their future behavior in exchange for a reduced fine (*i.e.,* from a 10% reduction to a maximum 25% reduction — see our 26 August 2015 *Client Alert*, "The Macron Law Modifies French Competition Rules and Procedures").

Practical Implications

This decision shows the FCA's willingness to investigate instances of distortion of competition during the period between signing and completion. Moreover, this decision provides guidance on the new settlement procedure application.

As regards merger proceedings, the FCA's decision clarifies the rules undertakings must comply with in the period between signing and merger clearance. Gun-jumping includes, notably, exchanging strategic and confidential information, and the buyer exercising decisive influence over the target's business.

From a practical perspective, until the relevant antitrust authority approves the transaction, the buyer and the target should not:

- Share confidential and competitively sensitive information on each other's businesses (for example, prices, costs, suppliers, customers, sales and marketing plans or research and development plans)
- Engage in joint bidding, sales, marketing or purchasing
- Subject ordinary-course-of-business decisions by the target to the buyer's approval.

Where there is a need to exchange competitively sensitive information (for example during due diligence), "clean teams" (if need be involving third parties) should be created so that the confidentiality of the

information is preserved. In order to prepare the post-closing activity of the combined entity, forming "integration teams" is possible, but their activities should be limited to planning the future integration without coordinating conduct or exchanging sensitive information until closing.

Obtaining legal advice is highly recommended in order to ensure that any exchanges of information between a buyer and target are compliant with antitrust law.

Conclusion

The FCA's decision confirms that during the period prior to closing, both the buyer and the target should act independently from one another and continue competing. The decision also demonstrates that, pending clearance, implementing processes that prevent or reduce the risk of any unlawful coordination or information exchange is very important. As we see in this case, breaches of antitrust rules during the standstill period could lead to severe fines.

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