8 November 2016: Gun jumping/Acquisition of SFR and Virgin Mobile by Numericable

Published on November 22, 2016

The *Autorité de la concurrence* fines the Altice group 80 million euros for the premature completion of two mergers notified in 2014

The *Autorité de la concurrence* issued a decision today to fine jointly Altice Luxembourg and SFR Group 80 million euros, in application of Section II of Article L. 430-8 of the French Commercial Code (Code de commerce), for having prematurely completed two mergers, notified in 2014, in the electronic communications sector.

Altice and SFR Group have contested neither the reality of the concerned practices, nor their legal characterisation.

This decision is the first to be issued in Europe or anywhere else in the world in terms of the scale of practices sanctioned and the amount of fines handed out[1] .

It is also the first decision of this kind in France. While companies have already been sanctioned for failing to notify a merger or to fulfil their commitments, this case is the first in which the *Autorité* has had to adjudicate on the completion of a merger before the clearance decision has been issued, and specifically sanction this type of behaviour.

The *Autorité de la concurrence* has thus sent out a strong message to companies: they must not complete mergers prematurely, otherwise they could face heavy penalties.

BACKGROUND

In 2014, the Altice group, which then operated in France through its subsidiary Numericable, notified the *Autorité* of two mergers:

- Acquisition of the SFR group

This acquisition was notified on 5 June 2014 and cleared subject to commitments, following an in-depth examination, by the *Autorité*'s decision 14-DCC-160 of 30 October 2014 (see press release). SFR Numericable changed its name to SFR Group in April 2016.

- Acquisition of sole control of the OTL group (which, among other things, distributes telecoms services under the Virgin Mobile brand).

This acquisition was notified on 25 September 2014 and cleared without commitment by decision 14-DCC-179 of 27 November 2014 (see press release).

The *Autorité* found a number of clues - from competing operators in particular - which pointed to possible gun jumping in connection with both acquisitions. On 2 April 2015, it conducted dawn raids of Numericable, SFR and OTL premises to determine whether or not gun jumping practices had taken place.

GUN JUMPING

When it goes above certain thresholds, a merger must be notified to the *Autorité*, which must reach a decision on the effects of this joint purchasing agreement from the competitive point of view. Then the *Autorité* issues a clearance decision, subject, where necessary, to conditions (divestitures, commitments, etc.). The merger can only become effective after clearance by the *Autorité* ("suspensive" procedure).

Until this clearance is given, the parties to the merger must continue to behave as competitors and refrain from acting as a single entity (see note on mergers).

In this particular case, although the ownership of assets was not transferred during the suspensive period, the evidence shows that Altice's behaviour led it to exert a decisive influence on its targets and gave it access to a significant

quantity of strategic information, even before it was given the clearance by the *Autorité de la concurrence*.

THE ALTICE-SFR MERGER

Intervention by Altice in SFR's operational management

Altice intervened in the operational management of SFR on several occasions by validating a number of strategic decisions. The following examples illustrate this:

- From May to October 2014, the principle and procedures relating to the participation of SFR Collectivités in a bid for a development project for a fibre optics public initiative network in the département of Seine-et-Marne were submitted to the most senior executive of the Altice group for approval.

- In October 2014, the renegotiation of a major mobile network sharing agreement between SFR and Bouygues Telecom (known as the "Crozon" contract) was also approved at the highest level.

- As of June 2014, Altice directly intervened in SFR's sales policy, in particular in its pricing policy for its high-speed broadband Internet access offering. On 4 July, for example, two weeks after an intervention by Altice's President, SFR had to suspend a promotional offer on fibre, which was initially scheduled to last until 25 August.

- SFR and Altice coordinated during the takeover of the OTL group. In April and May 2014, when SFR was initially planning to take over OTL and had put in a takeover bid, the company's CEO informed Altice's President of the amount of the proposed bid. But finally, in June, Altice replaced SFR in making the takeover bid.

Stronger economic ties between SFR and Numericable

Altice and SFR took advantage of the suspensive period to implement an advance coordinated strategy for the two groups.

They went so far as to negotiate and operationally prepare the launch of a new range of very high-speed broadband Internet access offers under the SFR brand, using the set-up boxes, TV packages and the Numericable network (known as a "whitelabel" project). This project marked a major turning point in SFR's high-speed broadband strategy which, until then had concentrated on developing its own infrastructure.

It took several months of intense preparation on both sides (adapting the boxes, portals, interfaces and information systems, connecting SFR shops to the wire-line network, etc.) to launch the "Box TV Fibre" offer on 18 November 2014, just a few days after the Autorité de la concurrence had cleared the merger (30 October).

Generalised strategic information exchanges

Before the merger was cleared, Altice and SFR exchanged large quantities of strategic information in readiness for the integration of the two groups. This information was confidential and concerned individualised data, SFR's recent commercial performance and forecasts for the coming months. The exchanges involved the most senior executives of both groups.

THE ALTICE-OTL MERGER

Intervention by Altice in OTL's operational management

Before the merger was cleared, Altice had to make a number of strategic decisions on behalf of OTL, based on certain clauses in the memorandum of understanding signed to define the conditions of the merger. These decisions concerned, in particular, agreements to host OTL's mobile customers with network operators.

Strategic information exchanges

Altice set up a weekly information reporting mechanism allowing it to keep close track of OTL's economic performance. This monitoring, which is comparable to

that exercised by a controlling shareholder, provided Altice with access to commercially sensitive information concerning OTL.

Premature assignment of management duties

Lastly, the Autorité observed that OTL's Managing Director had begun to carry out his duties within the SFR-Numericable group before the merger had been cleared and, in particular, was involved in SFR's new commercial projects and received commercially sensitive information.

A 80 MILLION EUROS FINE

In view of the above behaviour, which characterises gun jumping, the Autorité de la concurrence has fined jointly Altice Luxembourg and SFR Group 80 million euros.

The fine, which is particularly heavy compared with those handed out by the Autorité in previous cases of failure to give notification and comply with commitments, takes into account:

- the scale of the transactions concerned by the breach, both in terms of the amount of the acquisitions and the impact on the telecoms sector;
- the extent and combination of the various types of behaviour that led to gun jumping in both mergers, some of which were directly connected to the competition risks precisely identified by the Autorité in its clearance decision;
- the scale of SFR's and Virgin Mobile's activities directly concerned by the behaviour;
- the duration of the behaviour, which began before the mergers were notified and continued throughout the merger control procedure;
- the observation of similar behaviour by Altice for the two mergers notified in 2014 and of the deliberate nature of the behaviour concerned.

The amount of the fine takes into account the fact that neither of the companies involved contested the reality of the practices concerned or their legal

characterisation.

[1]Noteworthy precedents in Europe and elsewhere in the world include the Gemstar case in the United States in 2003 (a 5 million euros fine), the Mars/Nutro case in Germany in 2008 (fines worth 4.5 million euros), the European Commission Electrabel case in 2009 (fines worth 20 million euros) and the Cisco Systems Inc/Technicolor case in Brazil in 2016 (fines worth some 8 million euros).

> See note on mergers in the press release

> Decision 16-D-24 regarding the situation of the Altice group with regard to Section II of Article L.430-8 will be published at a later date on the Autorité de la concurrence's website

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