

Kluwer Competition Law Blog

Highest fine ever for gun-jumping

Eric Paroche (Hogan Lovells) · Friday, November 11th, 2016

On 8 November 2016, the French Competition Authority (FCA) fined French-based Altice group and its telecommunications subsidiary SFR 80 million euros for the coordination of their commercial behaviour in the period between the acceptance of Altice's purchase offer of SFR and the FCA's merger clearance decision.

This is the highest fine ever imposed by a competition authority on companies for gun-jumping, namely the early implementation of a merger prior to its clearance in accordance with merger control rules.

What happened?

In March 2014, Altice and its cable operator subsidiary Numericable made an offer for the purchase of SFR. The offer was accepted in April 2014 and the share purchase agreement was executed in June 2014. The FCA cleared the transaction subject to commitments four months later in October 2014.

The FCA considered that Altice interfered in SFR's management and commercial policy, and that an excessive amount of strategic information was shared during the preparation of SFR and Numericable's integration between April and October 2014, at a time when the transaction had yet to be cleared.

In particular, the FCA focussed on the following interferences by Altice in SFR's management and commercial policy:

- Altice's involvement in the definition of SFR's pricing and promotional policy;
- Altice's prior approval of SFR's participation in a tender offer;
- The joint preparation of an SFR offer using Numericable's box, TV channel package and network;
- The approval by Altice's top management of the renegotiation of certain aspects of the mobile network sharing agreement with Bouygues Telecom.

The FCA also considered that Altice and SFR coordinated their behaviour in connection with the purchase of OTL, which supplies mobile phone services under the brand "Virgin Mobile". The acquisition of OTL was originally contemplated by SFR but was eventually carried out by Altice in

the weeks following the acceptance of Altice's purchase offer of SFR — upon disclosure to Altice's top management of the amount of SFR's initial bid for OTL. The FCA considered that there had been illegal coordination of behaviour despite the fact that the possible acquisition of OTL by SFR could have had a direct impact on SFR's valuation and thus on the final amount and definitive structure of Altice's acquisition of SFR.

More generally, the FCA considered that Numericable and SFR had shared an excessive amount of strategic information (in particular recent and forecasted commercial data) while preparing for the integration of both businesses.

The FCA also ruled that Altice had implemented OTL's acquisition prior to clearance, in particular through the premature participation of OTL's CEO in the SFR-Numericable group's decision-making and the monthly reporting to Altice of OTL's commercial performance.

The 80 million euro fine is the result of a settlement between the FCA, Altice and its subsidiary SFR.

This decision comes on the heels of the appointment of Isabelle de Silva as the new President of the FCA three weeks ago.

Impact

This fine forms part of the increasing trend for competition authorities worldwide to punish companies for gun-jumping. The US antitrust agencies have in the past been the most active enforcers of antitrust law with respect to gun-jumping, but authorities in Europe and elsewhere, as yesterday's fine evidences, are now taking a more aggressive approach.

In addition to fines, this can also include “dawn raids” of companies between signing and completion to check for gun-jumping. The FCA in this case, for example, conducted dawn raids on the premises of Numericable, SFR and OTL to gather evidence of gun jumping. The European Commission in 2007 during its in-depth inquiry of Ineos/Kerling conducted a dawn raid to check whether the merging parties were implementing the transaction early in breach of EU merger control rules (although it did not in the end find any evidence of violation).

It is widely accepted that early transitional planning and rapid implementation are the key to success for most mergers. However, this fine shows the importance for parties to rein in the understandable desire to start the process of integration at too early a stage.

Merging parties need to implement an effective strategy which balances the limitations imposed by antitrust law and the business imperatives of detailed due diligence and early integration planning. This strategy involves obtaining specialised local merger control input to interpret the relevant rules and risks, and the provision of pragmatic guidance for those involved in integration planning.

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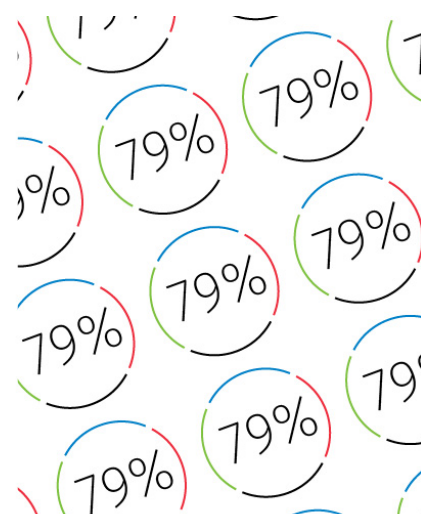
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