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QUICK LINKS

General Court upholds record fine for gun-jumping

The European General Court (GC) has confirmed that the European Commission was correct to fine French telecom company Altice for gun-jumping in the context of its acquisition of PT Portugal. Although the GC reduced the fine to €118.3 million, it remains the Commission's largest-ever sanction for gun-jumping.

BACKGROUND AND DECISION

In December 2014 Altice agreed to acquire sole control of PT Portugal from Oi, a Brazilian telecommunications operator. Altice notified the Commission of its plans in February 2015 and in April 2015 the Commission cleared the €7.4 billion acquisition, subject to Altice selling its Portuguese subsidiaries.

However, in May 2017 the Commission issued a statement of objections provisionally finding that Altice had infringed European merger control rules which require concentrations to be notified to the Commission before they are implemented (Article 4(1) of the Merger Regulation) and prohibit parties implementing concentrations before they have been notified and cleared (Article 7(1) of the Merger Regulation).

In its final decision in April 2018 the Commission confirmed its preliminary view that certain provisions of the parties' SPA had given Altice the possibility of exercising decisive influence over PT Portugal - and that on certain matters Altice had actually done so - prior to clearance and, in some instances, prior to notification (further detail of the Commission's decision is contained in a previous edition of this newsletter). Altice was ordered to pay two fines amounting to a record-breaking €124.5 million. Altice appealed the decision to the GC.

GC'S FINDINGS

On 22 September 2021 the GC largely upheld the Commission's findings, although reduced the fine by €6.22 million in recognition of the fact that Altice had taken steps to inform the Commission about the acquisition both prior to and immediately after signing.

No double punishment

In support of its appeal, Altice had argued that Articles 4(1) and 14(2)(a) of the Merger Regulation (which require merging parties to notify a concentration to the Commission and enable the Commission to impose a fine for failure to do so) are redundant in light of Articles 7(1) and 14(2)(b) (which prohibit implementation before notification and clearance and enable the Commission to impose a fine for breach).

Further, Altice contended that a party should not as a result of these provisions be liable for two fines in respect of the same facts.

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The GC rejected Altice's arguments on the basis that the provisions pursue different and independent objectives. Notifying the Commission of a possible concentration confers on the merging parties a positive obligation to act, with failure to do so amounting to an instantaneous infringement. By contrast, not implementing a concentration before clearance is a negative obligation not to act, and any infringement of that requirement is continuous for as long as the parties pursue the relevant merger. Moreover, the GC considered that if it declared the provisions unlawful it would deprive the Commission of the ability to distinguish, by means of the fines which it imposes, between a situation in which the merging parties comply with the notification obligation but infringe the non-implementation obligation and a situation in which the merging parties flout both obligations.

Too great a level of control

Altice further argued that the provisions contained in the SPA which governed how PT Portugal was to be managed prior to completion did not confer on it the power to exercise decisive influence over PT Portugal's business. Rather, these provisions were preparatory or ancillary to the deal.

Again, the GC rejected Altice's arguments on the grounds that the company had failed to provide any evidence that its powers under the SPA were necessary to ensure that the value of PT Portugal's business was preserved or that its commercial integrity was protected. Among the specific provisions referred to by the GC in its decision were clauses allowing Altice to appoint, dismiss and amend the contracts of senior management, to block decisions on PT Portugal's pricing policies and to veto the entry into, termination and amendment of material contracts irrespective of their economic value.

In the GC's view Altice could have foreseen that such clauses were likely to infringe the EU's gun-jumping rules and, had there been any doubt, it should have consulted the Commission.

A jumping of the gun in fact

Altice also sought to assert that it did not in fact exercise any decisive influence over PT Portugal, given it was only consulted on a small number of issues and PT Portugal remained under the sole control of its prior owner until the closing of the transaction.

In this regard, the GC reiterated that the relevant criteria for assessing whether merging parties have jumped the gun is not sole control, but rather whether there has been a change of control on a lasting basis, control being constituted by the possibility of exercising decisive influence. The GC found that such a change of control had indeed occurred given Altice had been afforded the possibility of exercising decisive influence, had actually intervened in the day-to-day running of PT Portugal on several occasions and had exchanged sensitive information prior to the transaction's completion.

OUTLOOK

The decision of the GC is likely to shore up the Commission's approach to gun-jumping cases. The Commission is currently investigating US life sciences company Illumina for closing its acquisition of cancer detection test-maker GRAIL before the transaction was cleared, which is likely to be the next high profile test of these rules.

OTHER DEVELOPMENTS

GENERAL COMPETITION

UK LAUNCHES OFFICE FOR THE INTERNAL MARKET

On 21 September 2021 the UK officially launched the Office for the Internal Market (OIM), which within the framework of the UK Internal Market Act 2020 has been set up within the UK's Competition Markets Authority (CMA). Coinciding with its launch, the OIM has published (i) guidance setting out general advice and information about its role; as well as (ii) a policy statement providing details on how it will exercise and enforce its information gathering powers under the Internal Market Act.

The OIM will use its economic and technical expertise to provide independent, non-binding advice to Governments across the UK on regulations or regulatory proposals that may impact the effective operation of the UK internal market. According to the guidance, "effective operation" includes minimised barriers to trade, investment and movement of labour between all parts of the UK, ensuring business or consumers in one part of the UK are not favoured over others, and effective management of regulatory divergence. It will also monitor and report on the health of the internal market over time, including trends and developments across sectors and regions. In doing so, the OIM will be making use of its information-gathering powers in support of the exercise of its functions.

In order to help fulfil its role, the OIM has created a new digital reporting service. The service enables businesses to report on any issues that they have faced when trading between different parts of the UK, or where they have experienced difficulty in using a professional qualification awarded in one part of the UK to work in a different part of the UK. The information provided through the service will contribute to the first State of the UK Internal Market report, which is planned for Spring 2022, and will help to inform any discretionary reviews that the OIM may elect to perform.

The Chief Executive of the CMA Andrea Coscelli stated that the OIM will "*shine a light on how effectively companies are able to sell their products and services to people across the four nations, post-Brexit*", and that it would "*listen to concerns and report to all Governments on the barriers faced by businesses*".

The UK Internal Market Act however, does not provide for the CMA to generate any binding recommendations on the back of its reporting, advice and monitoring, nor does it address the consequences of what will happen if the CMA does identify distortive or discriminatory actions.

CMA PUBLISHES FINAL GUIDANCE ON CONSUMER LAW OBLIGATIONS FOR BUSINESSES MAKING ENVIRONMENTAL CLAIMS

On 20 September 2021 the CMA published its final guidance for businesses making environmental claims in the UK. The Green Claims Code aims to help businesses to understand and comply with their obligations under consumer protection law when communicating their green credentials while reducing the risk of misleading shoppers. The Code - which focusses on six principles – emphasises that firms making green claims "*must not omit or hide important information*" and "*must consider the full life cycle of the product*". It follows a CMA co-ordinated 2020 global review of websites, in which the CMA found that 40 per cent of environmental claims made online could be misleading consumers.

In its press release, the CMA has urged businesses to make sure that their environmental claims comply with the law by the New Year, and informed them that it will be performing a full review of misleading claims, both on and offline (e.g. to capture claims made in store or on labelling) in early 2022. The CMA further warned that it stands ready to take action against offending firms and, where there is clear evidence of breaches of consumer law, may even take action before the formal review has begun.

CHINA DEMANDS RECTIFICATION OF URL BLOCK AS PART OF MIIT CAMPAIGN

On 9 September 2021 the Chinese Ministry of Industry and Information Technology (MIIT) held an administrative guidance meeting with internet companies, including Alibaba, Tencent, ByteDance, Xiaomi and NetEase. The meeting discussed the blocking of links to competitors' websites, and media reports state that MIIT requested that internet companies remove such blocks by 17 September 2021 and ensure uniform display and access methods for links shared

by users to similar products or services. It also requested that they display website links shared by instant message directly as a page within the messenger application and refrain from imposing any additional steps in accessing links to specific products or services (such as a requirement to manually copy and paste website links, which was previously common practice).

At a press conference held on 13 September 2021, a MIIT spokesperson said the administrative guidance meeting was part of MIIT's six-month reform campaign in the internet sector, which was launched in July 2021. The campaign will last until January 2022 and is expected to turn to tackle other issues such as deceptive and misleading pop-ups and poor data management.

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