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QUICK LINKS

Altice loses appeal against European Commission gun-jumping fine

Background

In 2014, Altice entered into a share purchase agreement to acquire sole control of PT Portugal from Brazilian telecommunications operator Oi. Altice notified the European Commission of its plans in February 2015 and in April 2015 the Commission cleared the acquisition subject to Altice selling its Portuguese subsidiaries.

However, in April 2018, the Commission fined Altice €124.5 million for gun-jumping in the context of the acquisition. It found 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 from implementing concentrations before they have been notified to the Commission and cleared (Article 7(1) of the Merger Regulation). Specifically, it found that certain provisions of the parties' SPA had given Altice the possibility of exercising decisive influence over PT Portugal. It found, further, that on certain matters Altice had actually exercised this influence – both 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 appealed and in September 2021 the European General Court (GC) largely upheld the Commission's decision, but reduced the original fine by €6.22m in recognition of the fact that Altice had taken steps to inform the Commission about the acquisition both prior to and immediately after signing. Further detail of the GC's judgment is contained in a previous edition of this newsletter. Altice ultimately appealed the GC's decision to the European Court of Justice (CJ).

CJ's findings

On 9 November 2023, the CJ handed down its judgment, confirming that the Commission was right to fine Altice for gun-jumping, but nevertheless reducing the amount of that fine.

Autonomous objectives

Altice had argued that the GC was wrong to find that Article 4(1) and Article 7(1) pursue "autonomous" objectives. It had further argued that the GC was therefore wrong to find that the imposition of two fines for the same conduct, by the same authority in a single decision, did not infringe the general principle of proportionality or the principle prohibiting double punishment.

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The CJ rejected these arguments on the basis that the two provisions of the Merger Regulation pursue separate and independent objectives. It noted that Article 4(1) confers a positive obligation to act on the merging parties, with a failure to do so amounting to an instantaneous infringement; conversely, Article 7(1) lays down an obligation not to act, and any infringement is continuous for as long as the parties pursue the concentration. It observed that the Court has previously rejected the idea that, if a merger is implemented before notification, it can only be penalised under Article 7(1). Such an interpretation 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. The CJ considered that the GC was therefore correct to find that Article 4(1) and Article 7(1) pursue autonomous objectives and lay down separate obligations. In turn, the CJ rejected Altice's arguments that the GC had breached the principle of proportionality and the principle prohibiting double punishment.

Concept of "implementation" of a concentration

Altice further argued that the GC had incorrectly assessed the pre-closing covenants contained in its SPA with Oi as "implementation" of the concentration.

The CJ dismissed this ground of appeal. It noted that the Court has already, in Case C-633/16 *Ernst & Young* (covered in a previous briefing), held that implementation of a concentration arises as soon as the parties to that concentration implement operations contributing to a lasting change in the control of the target; in this respect, "control" is constituted by the possibility of exercising decisive influence over the target undertaking. The CJ agreed with the GC that the pre-closing covenants, which required Oi to seek Altice's prior written consent for certain decisions (and to indemnify Altice for any losses in the event it failed to do so) and went beyond what was necessary to protect the value of PT Portugal, had given Altice the possibility of exercising decisive influence.

The fines

Altice also disputed the GC's assessment of the fines imposed.

The CJ dismissed Altice's argument that it had not acted negligently, recalling that this condition is satisfied where an undertaking cannot be unaware of the anti-competitive nature of its conduct (whether or not it is aware that it is infringing EU competition law). In this respect, the CJ noted that Altice should have consulted the Commission if it was unsure of the legality of its conduct; further, the GC has already found that Altice was aware that its conduct may be incompatible with EU competition law.

Altice also argued that the GC was wrong to find the Commission had provided sufficient reasons for imposing two distinct fines of €62,250,000 for the infringements of Article 4(1) and Article 7(1) respectively. Whilst the Commission had considered that the two infringements were identical in nature and gravity, it had, crucially, observed that they were different in duration: the infringement of Article 4(1) being instantaneous, the infringement of Article 7(1) being continuous for as long as the parties pursued the relevant merger.

Consequently, whilst the CJ rejected Altice's arguments challenging the theoretical possibility for the Commission to impose two fines of the same amount for infringements of the Articles 4(1) and 7(1), it nevertheless decided that, with regards to the circumstances of the case, the fine for breach of Article 4(1) should be lowered to €52,912,500, to reflect the instantaneous nature of that infringement. This amount, it concluded, was *"proportionate in light of the nature, gravity and duration of the infringement, while remaining sufficiently dissuasive"*.

Conclusion

The CJ has largely confirmed the Commission's approach to gun-jumping in *Altice*. However, the next high-profile test of the EU's gun-jumping rules is likely to be Illumina's pending appeal of the €432 million fine imposed by the Commission for closing its acquisition of cancer-testing company Grail while the Commission's review was ongoing.

OTHER DEVELOPMENTS

ANTITRUST

Competition Appeal Tribunal dismisses CMA request to raid individual

On 6 November 2023, UK Competition Appeal Tribunal (CAT) handed down a judgment ruling that it would make public an order granting warrants sought by the UK Competition and Markets Authority (CMA) to enter and search business and domestic premises as part of a dawn raid. The CAT granted orders for the issue of three such warrants to three unnamed companies, but denied the issue of a fourth warrant in relation to an individual referred to in the judgment as "*Mr. X*". In its ruling, the CAT noted that the dawn raid regime "*constitute[s] considerable intrusions into private life*" and that "*the exercise of these powers must, in all cases, be closely justified*". The CAT also commented that the burden of the "*intense process of application*" and the "*obligation… of full and frank disclosure*" fall upon the CMA because of the degree of intrusion entailed by dawn raids. The judgment also concerns the issue of whether the "closed" judgment by which the warrant was denied should be published.

In dismissing the CMA's application to preserve the status of the warrant's judgment as confidential, the CAT also rejected the CMA's argument that publication of the judgment would make it more difficult in future for the CMA to obtain warrants to conduct raids on domestic premises. The CAT remarked that "*to the extent that submission is suggesting the reasons of the court… should not be published because a party does not like or accept the outcome, then we reject that as a reason for keeping any judgment closed*". The publication of the judgment in due course is likely to include the CAT's reasoning for rejecting the warrant to raid the individual's domestic premises, as well as to provide clarification on its approach to the issue of warrants for domestic premises raids in future applications, an area of increasing relevance as the shift towards remote working continues.

Hong Kong Competition Commission takes estate agencies cartel case to the Competition Tribunal

On 14 November 2023, the Hong Kong Competition Commission (HKCC) commenced proceedings in the Competition Tribunal against real estate agencies Midland Realty International Limited and Hong Kong Property Services (Agency) Limited, their parent company Midland Holdings Limited (collectively, Midland), and five individuals who are members of the senior management within Midland.

The HKCC's case is that Midland Realty, HK Property and their competitors, Centaline Property Agency Limited and its wholly-owned subsidiary Ricacorp Properties Limited (collectively, Centaline), agreed to fix the minimum net commission rate for the sale of first-hand residential properties in Hong Kong at 2% unless a director's approval is obtained, which effectively fixes or restricts the maximum level of rebate their frontline agents could offer to home purchasers (the NCR Agreement).

The HKCC alleged that, following the 25th anniversary ceremony of the Hong Kong Estate Agents Authority, members of Midland and Centaline's senior management attended five physical meetings from October to December 2022, culminating in a meeting on 15 December 2022 at which Midland and Centaline reached the NCR

Agreement. It is worth noting that only one of the individual respondents attended all five of the meetings. Whilst the other four individual respondents attended three meetings or fewer, the HKCC's case against them mostly relies on discussions relating to the NCR Agreement and actions taken to implement it.

Centaline has entered into a leniency agreement with the HKCC in exchange for the HKCC not commencing legal proceedings against Centaline and their officers or employees. In its press conference, the HKCC highlighted the significance and benefits of the leniency policy for both companies and individuals. The lack of proceedings against Centaline in this case underscores the clear advantages of leniency applications.

These proceedings come less than 12 months after the HKCC initially announced that it was looking into the matter in January 2023, making it one of the quickest investigations to date. It demonstrates the HKCC's ability, with the help of a leniency applicant, to conduct and conclude an investigation very quickly. The HKCC also reiterated that, in line with its stated enforcement priorities, it will focus on enforcement against anti-competitive conduct that affects people's livelihood, particularly in sectors such as the property market.

GENERAL COMPETITION

UK Government publishes call for evidence to inform changes to National Security and Investment Act

On 13 November 2023, the UK Government's Cabinet Office published a Call for Evidence on the UK National Security and Investment Act 2021 (NSIA). The NSIA came into force on 4 January 2022 and introduced a national security screening regime in the UK enabling the UK Government to scrutinise certain transactions on national security grounds and to impose remedies on, or even block, such transactions. For further details on the regime, see our previous publications here, here, here, and here.

While the UK Government considers that the regime has "*functioned well*" (noting that 93% of notifications cleared in the financial year 2022-23 had "*clear, legally binding answers within 30 working days*"), the Call for Evidence seeks views from stakeholders to inform "*whether more detailed consultation on specific measures or legislative changes are necessary*". The UK Government anticipates in particular that the evidence collected will help it to:

- Inform the post-implementation review of the NSIA and the review of the regulations which prescribe the 17 sensitive areas of the economy;
- Hone the scope of the regime's mandatory notification requirements to prevent notification of transactions which pose no national security risk;
- Improve the processes for notification and assessment to minimise the burden on businesses as far as possible; and
- Develop the UK Government's public communications in relation to how the NSIA works and where risks are viewed as arising.

Oliver Dowden, the Secretary of State in the Cabinet Office, outlined an approach that seeks "*to be as pro-business and pro-investment as possible*" and "*to safeguard… the UK against the small number of deals that could be harmful… whilst leaving the majority of transactions unaffected*". The Call for Evidence therefore specifically seeks comments on the experience of businesses and investors interacting with the process and whether they consider the regime's requirements to be "*proportionate and effective*".

The Call for Evidence contains (among others) sections relating specifically to areas where stakeholders have previously raised concerns, including in respect of mandatory notification requirements relating to internal reorganisations and transactions involving the appointment of liquidators, official receivers, and special administrators. Comments are also sought on the scope of 8 of the 17 sensitive sectors which require mandatory notification, and the Call for Evidence contemplates in addition the creation of additional sensitive sectors relating to semiconductors and critical minerals. The Call for evidence is open until 14 January 2024.

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