Gómez-Acebo & Pombo

April | 2018

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News

The Commission fines Altice EUR 124.5 million for gun jumping

Altice has been fined EUR 124.5 million for implementing its acquisition of the Portuguese telecommunications operator PT Portugal before notification or approval by the European Commission.

In accordance to EU merger rules, companies planning to merge are obliged to notify the proposed transactions, when these have Union dimension, to the European Commission for review. Such transactions cannot be implemented prior to obtaining the clearance from the Commission. This is the so-called “standstill” obligation, which is designed to prevent the potentially irreversible negative impact of transactions on the market while the merger investigation is on-going.

Implementing a transaction, which is subject to the notification obligation, prior to notifying and/or obtaining the approval from the Commission is a breach of the EU Merger Regulation, known as “gun jumping”.

In February 2015, Altice notified the Commission of its proposed acquisition of PT Portugal and received conditional clearance for the transaction, subject to the divestment of Altice’s businesses in Portugal at the time, Oni and Cabovisão, on 20 April 2015.

In May 2017, Altice received a Statement of Objections (“SoE”) from the Commission, in which the latter expressed its concerns that the transaction had been implemented before the Commission had given its approval and, partly, even before the notification had been filed.

The Commission investigation has shown that Altice had indeed infringed the EU Merger Regulation. On the one hand, the Commission has established that certain clauses of the purchase agreement allowed Altice to acquire the legal right to exercise decisive influence over PT Portugal. On the other hand, the Commission has concluded that Altice actually exercised decisive influence over aspects of PT Portugal’s business.

As a consequence, the Commission adopted a decision fining Altice EUR 124.5 million. This decision does not influence the Commission’s April 2015 decision whereby the transaction was conditionally approved. The assessment carried out for the adoption of the former decision was independent of the facts related to the gun jumping issue.

This fining decision follows another recent decision adopted against Facebook by the Commission, in which the social network was fined 110 million for providing incorrect or misleading information during the merger investigation of its proposed acquisition of WhatsApp.

There are currently three additional gun jumping investigations on-going. These concern Merck and Sigma-Aldrich, General Electric and Canon.

The Commission publishes New Deal for Consumers

On 11 April 2018, the Commission published the New Deal for Consumers. Its objectives are: (i) empowering entities to exercise representative actions on behalf of consumers; (ii) strengthening the sanctioning powers of national consumer authorities; (iii) extending consumer rights in the online context and (iv) tackling dual quality of consumer products.

The New Deal encompasses two proposals for Directives. The first proposal is intended to amend Directive 93/13/EEC on unfair terms in consumer contracts, Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices and Directive 2011/83/EU on consumer rights. This proposal will ensure better enforcement, update EU consumer protection rules and adjust them in light of the latest digital developments.

As for the second proposal for Directive, it concerns representative actions for the protection of the collective interests of consumers and will repeal the Injunctions Directive 2009/22/EC. Its aim is to improve the tools to fight illegal practices and to facilitate the collective redress mechanisms for consumers that are victims of the same infringement of their rights in a mass harm situation.

The proposals are accompanied by a Communication of the Commission which presents an action plan to work on coordinated enforcement actions among authorities and international cooperation with authorities from main trading partners.

In addition, the Commission has also published a study on transparency in online platforms. The study finds that increasing online transparency helps consumers take decisions and fuels their trust when purchasing online.

Plans to split the Spanish competition and regulatory authority

The new Spanish economy minister has announced the intention to take forward the plan to divide the Comisión Nacional de los Mercados y la Competencia (“CNMC”) into two distinct entities launched by its predecessor. The CNMC would be split into a competition authority and an authority in charge of supervising regulated markets.

The minister said that the proposal is at an advanced stage and that hopefully it will be passed prior to the end of the current parliamentary term.

The current CNMC was created in 2013 as a result of the merger between the former Spanish Competition Authority ("CNC") and the regulators of the following sectors: telecommunications, energy, audio-visual, postal, rail and airport services. This decision was part of an austerity measures package intended to reduce costs and has been subject to significant criticism. In particular, concerns refer to the efficiency of the CNMC and the appointment of its senior members.

The Court of Justice of the EU ruled on the legality of such consolidation in 2016 as a result of a preliminary ruling referred by the Spanish Supreme Court (Case C-424/15, *Xabier Ormaetxea Garai and Bernardo Lorenzo Almendros v Administración del Estado*). In its judgment, the Court of Justice of the EU upheld the decision to create a single authority but established that the dismissal of two of the members of the previous telecommunications regulator was unlawful.

Case-law & Analysis

The Court of Justice of the EU provides new guidance on how to determine that a customer was subject to a "competitive disadvantage" *(Judgment of the Court of Justice of the EU of 19 April 2018 in Case C-525/16, MEO — Serviços de Comunicações e Multimédia SA)*

The Court of Justice of the EU has clarified how to establish that a customer faced a "competitive disadvantage" in the context of antitrust investigations against dominant companies for discriminatory pricing.

EU Competition Law prevents dominant companies from abusing their position by applying dissimilar conditions to transactions that are equivalent to those concluded with other parties, "thereby placing them at a competitive disadvantage".

According to the Court of Justice of the EU, in order to establish the existence of such a competitive disadvantage, it is not necessary to prove actual, quantifiable deterioration in the customer's competitive situation. Instead, authorities must examine all the circumstances to determine if the conduct had an effect on competing customers' costs, profits and other relevant interest.

In this regard, the Court of Justice referred to the Intel judgment, where it was found that the General Court of the EU had failed to assess the economic arguments raised by Intel to contest the "as efficient competitor test" used by the Commission to conclude that the rebates granted by the US chips' manufacturer to PC makers harmed one of its competitors and was contrary to EU Competition Law.

The present judgment replies to a preliminary ruling referred by a Portuguese Tribunal asking under which circumstances a dominant firm's discriminatory pricing practices constitutes a competitive disadvantage and qualifies as abuse of dominant position within the meaning of EU rules.

Currently at GA_P

GA_P's Competition team recommended by Legal 500

GA_P's Competition team has been included in the 2018 edition of The Legal 500 Europe, Middle East and Africa as "recommended". The work of three of the members of our team has also been on the spotlight: our Competition partners Iñigo Igartua and Mario Marques Mendes have been included in the "Leading Lawyers" list and our lawyer Alexandra Dias Henriques has been mentioned as "recommended".

More information is available at: http://www.legal500.com/firms/10244/10270