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British Group of the
Ligue Internationale du Droit de la Concurrence
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Speakers: Michael Cousin, Partner, Ashurst LLP (Paris)
Colin Raftery, Director of Mergers, Competition Markets Authority
Simon Genevaz, Case Handler, European Commission

Date: 23 November 2017 at 12 pm

Venue: Online Webinar

The purpose of the webinar was to learn about the recent *Altice* case on 'gun jumping' in France and the risks of not notifying under the CMA's voluntary regime. The speakers spoke in the order shown above, but as Michael Cousin and Simon Genevaz spoke on the same subject matter from different perspectives the summaries of their presentations are placed adjacent below.

Michael Cousin - Merger control hot topics in France

MC introduced the *Altice* case and highlighted that it was a Decision made in relation to two concentrations, the mergers with SFR and OTL. Altice was subject to an €80m fine for breach of the standstill obligation. MC set out the legal framework for the prohibition of gun jumping and explained the three separate conducts that were held to violate that prohibition:

- Control exercised on the target through covenants in the share purchase agreement;
- Commercial agreements entered into by the parties during the suspension period;
- Exchange of strategic information.

MC then explored each of these types of conduct in more detail. He thought that the Decision contained a number of general statements that were unhelpful to practitioners, particularly in relation to the suitability of clean teams. He was also concerned that in the Decision the French competition authority had moved away from a balanced, rule-of-reason approach. He concluded that some guidelines from the Commission on how to avoid violating the standstill provisions, particularly between competitors, would be extremely helpful.

Note: MC spoke from detailed slides which can be used for further analysis of his presentation.

Simon Genevaz - Risk of Failing to Notify a Transaction: Gun Jumping

SG opened the presentation with a general discussion of the applicable legislation at the French and European level and then highlighted some recent cases on failures to notify. Attention here was focused on the *Marine Harvest* case, the judgment of which had just been released by the General Court.

SG then moved onto gun jumping. He mentioned that there is an ongoing case at the Commission but that he was not at liberty to discuss this any further. He instead focused on the *Altice* case and the French authority's Decision, seeking to provide a response the issues raised in MC's presentation.

SG stressed that the Decision should be read as a whole, and that the individual statements in each section should not be considered in isolation. Therefore practitioners who were making arrangements that sought to stay on the right side of the law were most of the way there. In response to the individual issues:

- Veto rights: under the French *Altice* decision, acquirers are still fully able to protect their financial interests through provisions that give acquirers a say on major investments or divestments. However, the decision was concerned with veto rights so extensive that they amounted to decisive influence over day-to-day operations. This determination has to be done on a case-by-case assessment due the differing transaction structures, possible restrictions and activities of each business.
- Clean teams: The Authority made it clear that due diligence and integration planning are legitimate activities provided that no strategic information is disclosed. The *Altice* decision mentions that using external counsel to filter or aggregate sensitive information could be considered, but it should not be construed as requiring that companies should always use external counsel. Instead, the Authority focused on the content of the information exchanged and its decision should be interpreted as inviting companies to strike the right balance between the kind of safeguards they implement and the content of the information they wish to exchange. It also points to assessing whether the contemplated information exchange would infringe Article 101 or equivalent national rules.
- Discussing the merged entity's future products before clearance: the French *Altice* decision explains that exchanging strategic information in anticipation of the merger amounts to gun jumping <u>if</u> the exchange relates to <u>significant</u> aspects of the Parties' business activities. In that case, the Parties had exchanged information on a new set-top box and future pricing, i.e., very significant factors of differentiation and competition.

Colin Raftery – The risks of non-notification in a voluntary merger control regime: The UK experience

CR spoke about the UK merger regime: the background, the mechanics, and the use of initial enforcement orders (IEOs).

Background: CR explained the history of the UK merger regime and why the UK has kept it voluntary. This has been assessed on two occasions, in 2000/1 in anticipation of the Enterprise Act 2002 and in 2011/2 before the establishment of the CMA. Both of these assessed the pros and cons of a voluntary regime. The pros were flexibility and better use of resources – the CMA takes further action in 33% of its enquiries compared to the Commission's 7%. The cons were lack of certainty that the CMA would not intervene at a later date and the considerable costs of unwinding if they did.

Mechanics: CR explained the usual flow and timeline of merger notification, for which he presented a comprehensive flow chart. He then explained the workings of the Mergers Intelligence Team and Committee and presented some statistics on the number of cases they assess. Key to practitioners in this section was that companies choosing not to refer can alert a merger to the CMA with a briefing paper on why they were not referring. This should be shorter than five pages. If it took longer to explain why there were no competition concerns then the case is probably better suited to the standard merger investigation.

IEOs: CR explained the how and why of IEOs. He explained that prior to 2014 there would be negotiated undertakings. However, these were often unsatisfactory as they would be limited in scope and time-consuming to achieve. IEOs therefore present a good balance

between a mandatory and a voluntary regime. They are used in almost all completed cases. Derogations can, and frequently are given, where the parties give specified, reasoned and evidenced support. These include the provision of back office support to maintain the viability of assets in an asset sale or for different parts of the business where there are no overlaps.

Finally CR discussed enforcement. The IEO regime has thus far been successful with good levels of compliance – indeed, the ability to fine a party up to 5% of turnover for failing to comply with an IEO had not yet been invoked.