

Merger control hot topics in France

LIDC WEBINAR - 23 NOVEMBRE 2017

Merger control hot topics in France

- The *Altice* case (n°16-D-24, 08/11/16) : content and limits of gun jumping
- Ongoing public consultation on the modernization of the French merger control

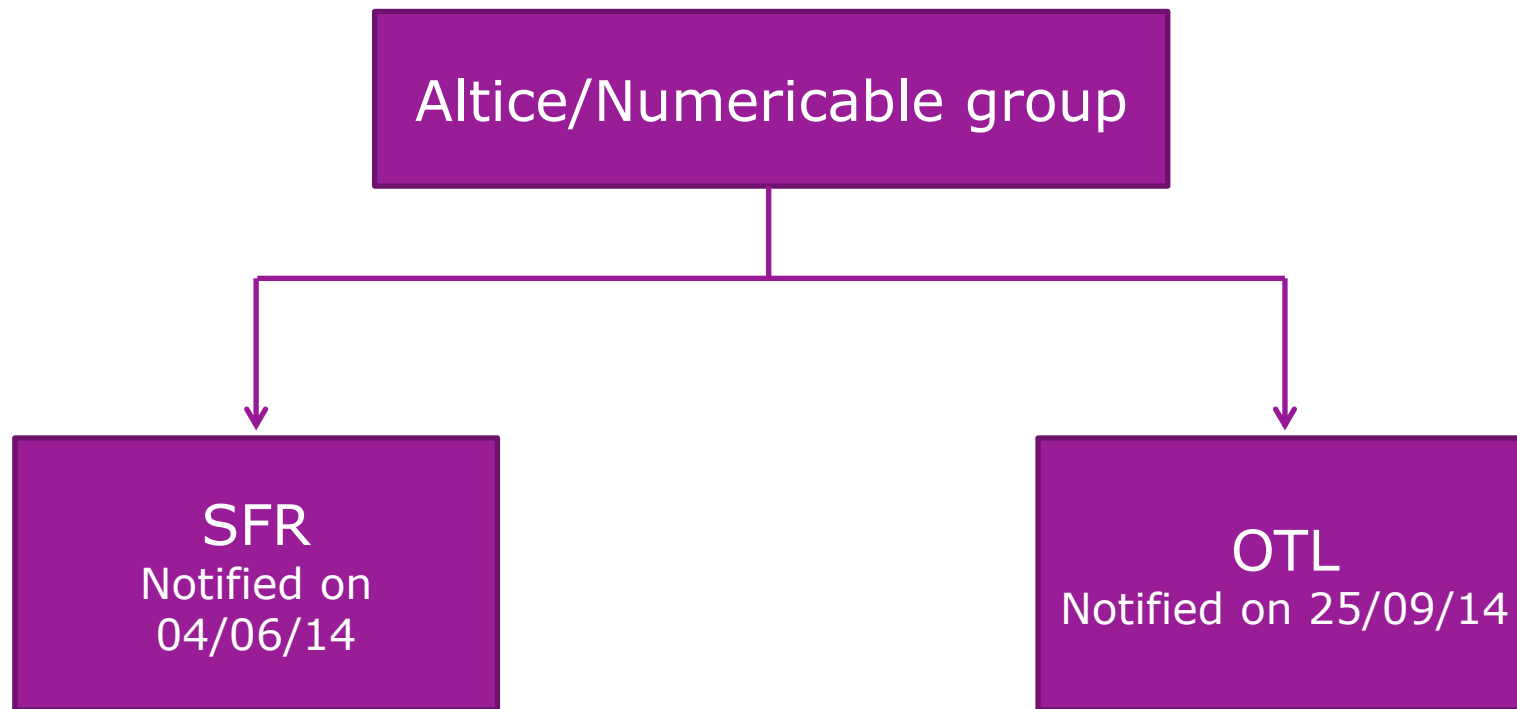
The *Altice* case – Content and limits of *gun jumping*

WHY IS IT AN IMPORTANT CASE ?

- First time French Competition Authority (« FCA ») conducts **dawn raids** in relation to a concentration
- First time FCA fines an undertaking for **breach of the standstill obligation** after notification (FCA had already fined undertakings which had implemented a concentration without having notified it)
- First fine of such a magnitude in the field of merger control (**EUR 80 million** - FCA entered into a *de facto* settlement with Altice)
- The decision raises a number of **practical issues** –not only relevant in French law - on the way to handle the acquirer and target's relationships during the suspension period

The *Altice* case – Content and limits of *gun jumping*

DECISION CONCERNS TWO CONCENTRATIONS NOTIFIED IN A FEW MONTH'S TIME BY ALTICE



The *Altice* case – Content and limits of gun jumping

LEGAL BASIS USED BY THE FCA

- Prohibition of gun jumping is provided for by **art. L. 430-8 II** of the French Commercial Code : FCA may impose a fine of up to **5%** of the notifying party's turnover if it implements a concentration which has been notified but not yet authorised.
 - Acquirer must not exercise any kind of **control** on the target's operations or strategy before clearance
 - According to the FCA, such a control is not limited to company's budget, BP, investments or appointment of managers ; extends to day-to-day operations if they impact the company's conduct on the market (§197)
- The Authority could also have used the prohibition of **anti-competitive agreements/concerted practices** ; however, that legal basis would not have caught all wrongful conducts in this case (collusion does not mean acquisition of control)

The *Altice* case – Content and limits of gun jumping

MAIN CONDUCTS HELD TO VIOLATE THE GUN JUMPING PROHIBITION

1. Control exercised on the targets through the covenants contained in the SPA (and their interpretation by the parties)
2. Commercial agreements entered into between the parties during the suspension period
3. Exchange of strategic information

The *Altice* case – Content and limits of gun jumping

1. EXERCISE OF A CONTROL THROUGH THE COVENANTS

- The OTL share purchase agreement (« SPA ») contained provisions protecting the purchaser against any variation of the target's value between signing and closing (*covenants*). These covenants **limited to a great extent the target's freedom** :
 - Interdiction to make (even small) investments
 - Interdiction to enter into/modify certain contracts (e.g. MVNO)
 - Interdiction to open new shops
 - Without prejudice to Altice's agreement
- According to the FCA, this gave Altice the opportunity to control OTL's strategy and operations during the suspension period (e.g. concluding a MVNO agreement was key for OTL to access the market ; the investment thresholds was too low and allowed Altice to control OTL's day-to-day business).

The *Altice* case – Content and limits of gun jumping

1. EXERCISE OF A CONTROL THROUGH THE COVENANTS

- The SFR SPA also contained a number of **more classical covenants** which according to the FCA were not problematic as such :
 - Price adjustment mechanisms
 - Seller's obligation to conduct the business with due care (« *en bon père de famille* »)
 - Interdiction to make off-budget investments above a certain value (if not paid before the closing)
 - Compensation for off-budget investments of a certain value if not possible for purchaser to cancel them without paying a fee

The *Altice* case – Content and limits of gun jumping

1. EXERCISE OF A CONTROL THROUGH THE COVENANTS

- However, the parties **construed these covenants extensively** and SFR did submit a number of strategic decisions to Altice's approval :
 - Consultation on SFR's submission to an important public bid
 - Mutualization of SFR's mobile network with the one of a competitor (Bouygues Telecom)
 - Investment in IT systems which SFR considered to be key
- According to the FCA, the consultation of Altice on these decisions violated the standstill obligation ; the FCA's findings raise two questions

The *Altice* case – Content and limits of gun jumping

1. EXERCISE OF A CONTROL THROUGH THE COVENANTS

- First question : does the FCA consider that **any form of concertation** is anti-competitive between signing and closing ?
 - This would be problematic as it would give incentive to operators to negotiate strict covenants limiting drastically the target's activity between signing and closing
- Second question : were the consultations at hand problematic **in relation to their content ?**
 - Query whether the projects had an actual impact on the target's value or exceeded (at least for some of them) the **ordinary course of business**
 - Query whether SFR could have **limited the information** given on these projects to what was necessary to inform on the impact on the target's value, if any (e.g. was SFR obliged to communicate their full offer in response to the public bid)?
- FCA could have better described the criteria used to reach its conclusion

The *Altice* case – Content and limits of gun jumping

2. COMMERCIAL AGREEMENTS BETWEEN ACQUIRER AND TARGET

- According to the FCA, the parties had to refrain from entering into any commercial arrangement which could have as an object or effect to **anticipate the completion** of the concentration (§218)
- Just after they entered into exclusive negotiations, Altice and SFR started to discuss a « white label » agreement whereby SFR would sell multi-play offers using Numericable (Altice)'s cable network
- According to the FCA, the agreement was « *decided, negotiated and prepared operationnally during the merger control assessment* » (§88).
- This entailed the exchange of confidential and strategic information between the parties (e.g. cost of Numericable's supplies)

The *Altice* case – Content and limits of gun jumping

2. COMMERCIAL AGREEMENTS BETWEEN ACQUIRER AND TARGET

- How did the FCA establish that this agreement was not « business as usual » ? -> use of a body of evidence :
 - The agreement was **new** : the decision to discuss it was taken just after the start of the deal's exclusive negotiations (a similar agreement had been discussed in 2012 but the 2014 agreement was not in the continuity of this initial agreement)
 - It characterises a **change** of SFR's prior strategy to become a major player of the fiber development in France as it gave incentive to SFR to use Numericable's cable network in dense areas, also where fiber is available
 - The purpose of the agreement **met the purpose of the concentration** which was to combine SFR's customer base and Numericable (Altice)'s under-used cable network
 - There was evidence that **the seller was not willing** initially to pursue the discussion of the agreement between signing and closing ; Altice obtained this by deferring the payment of the study costs after closing
- FCA's conclusion : the agreement allowed the parties to gain 6,5 months on the concentration's timeline and capture high speed broadband customers more quickly

The *Altice* case – Content and limits of gun jumping

3. EXCHANGE OF CONFIDENTIAL INFORMATION

- During pre-integration meetings the Altice and SFR used to exchange very **detailed and strategic information** e.g. on :
 - Commercial performances (churn, payback, revenue generating unit, etc.)
 - Net sales per offers / turnover per client, sometimes including information on margin
 - Sometimes on a monthly basis
 - Business forecasts and strategic orientations
 - Future prices and promotions
 - Ongoing submissions to public bids
- The parties also exchanged on SFR's **future box**
- Information communicated **directly to Altice's management**

The *Altice* case – Content and limits of gun jumping

3. EXCHANGE OF CONFIDENTIAL INFORMATION

- Difficult to contend that these exchanges were not problematic. However, the Decision contains a number of **general statements** that question the validity of standard *clean team* arrangements. According to the FCA :
 - During the suspension period the parties must refrain from exchanging **any strategic information** within the meaning of the Commission's guidelines on horizontal cooperation
 - In order to avoid competitive risks, this information can for instance be consulted by **external counsels** and then summarised in an aggregated and anonymised form
 - The exchange of strategic information having as an object or an effect to **prepare the implementation of the concentration** after the FCA's green light « *actually constitutes a circumvention of the suspensive character of the merger control procedure* » (§266)

The *Altice* case – Content and limits of gun jumping

3. EXCHANGE OF CONFIDENTIAL INFORMATION

- A more balanced approach taking into account the context of the information exchanges would seem relevant :
 - An absolute ban of strategic information exchange is not realistic : the exchange of certain types of strategic information should be allowed to the extent that it is strictly necessary to the assessment of the transaction
 - It is also legitimate for the parties to prepare the implementation of the deal before the clearance and to exchange information to that end (e.g. preparation of IT networks combination)
 - Purchasers' employees should not be systematically excluded from clean teams especially if they may not use the information for anti-competitive purposes (as per their position and the confidentiality commitments entered into by them)
 - Was it really impossible for the parties to discuss SFR's future box (at least the technical aspects) ?

The *Altice* case – Content and limits of gun jumping

CONCLUSION ON ALTICE

- The decision deals with a series of conducts which, taken alltogether, clearly amount to gun jumping
- However, certain conducts taken individually (e.g. exchange of certain confidential information) could have benefitted from a more balanced approach if they had been subject to a proper *clean team* process
- Certain *obiter dicta* contained in the decision deserve further explanations as they question the validity of certain *clean team* arrangements
- Undertakings need guidance on what they can or cannot do pending the FCA's clearance
- This is not just a French issue !

What are the hot topics in France ?

- The *Altice* case (n°16-D-24, 08/11/16) and the clarification of the rules on gun jumping

- Ongoing public consultation on the modernization of the French merger control
 - Should the notification thresholds be changed ?
 - How to better handle simplified cases ?
 - The role of trustees

Modernisation of the French merger control

SHOULD THE NOTIFICATION THRESHOLDS BE CHANGED ?

- The current French thresholds are defined in terms of the turnover achieved by the parties to the concentration (EUR 150 M aggregate / EUR 50 M individually + specific thresholds in the retail sector and for operations in the Overseas)
- Should this change ? No impact study was made by the FCA and **many options** are laid down in the consultation document :
 - A new market share thresholds
 - A Swedish-like « hybrid » model combining an *ex ante* notification and a possible *ex post* intervention of the authority in problematic cases
 - Application of the *Continental Can* case-law
 - Introducing a value of the transaction threshold (like the one that was recently adopted in Germany) -> is there really an enforcement gap to fill ?
- The bottom line is that FCA is overloaded with merger cases (esp. in the retail sector due to the low thresholds) but does not want to miss problematic cases ; it would need to better prioritise its work but to achieve this without impairing undertaking's legal certainty is squaring the circle

Modernisation of the French merger control

HOW TO BETTER HANDLE SIMPLIFIED CASES

- FCA is considering to **increase the number of simplified notifications** through an alignment of the criteria used to define simplified cases with the EU ones
- The **content** of the notification **could be simplified** (currently there is no distinct notification form for simplified concentrations)
- At the same time, FCA suggests to **reinforce the information requirements** bearing on the parties to simplified cases in order to make sure that the cases are really « simple » (e.g. mandatory pre-notification, additional information included in a dedicated « short form ») -> simplified cases should be simple for undertakings also !
- FCA is also considering (as the EU Commission did in its past consultations on EU merger control) to introduce a **declaration mechanism** whereby the parties to the simplest cases (no overlap) would only have to provide a light information to the FCA which could decide to intervene to ask questions, suspend the operation and/or obtain commitments or give injunctions

Modernisation of the French merger control

THE ROLE OF TRUSTEES

- A few evolutions are considered :
 - Obligation made to the parties to propose at least three trustees
 - Use of experts in addition to trustees in sectors where technical issues are at stake
 - Publish the name of the trustee appointed in each case
 - Establish a fund intended to pay the fees of the trustees (paid by undertakings who take commitments)

THANK YOU



Michael Cousin
Partner
+ 33 1 53 53 56 92
Michael.cousin@ashurst.com

These materials are for training purposes only and are not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Please take legal advice before applying anything contained in these materials to specific issues or transactions. For more information please contact the presenters or your usual contact.

LIDC webinar - Merger control hot topics in France

© Ashurst 2016

ashurst