General Court of the European Union
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Press and Information

Judgment in Case T-425/18
Altice Europe v Commission

The General Court dismisses Altice Europe's action against the Commission decision imposing two fines totalling €124.5 million in connection with the acquisition of PT Portugal

However, it orders the amount of the fine relating to the breach of the obligation to notify the concentration to the Commission be reduced by €6.22 million

Altice Europe NV ('Altice') is a multinational cable and telecommunications company. PT Portugal SGPS SA ('PT Portugal') is a telecommunications and multimedia operator with activities extending across the entire telecommunications sector in Portugal.

On 9 December 2014 Altice concluded a share purchase agreement ('SPA') with a view to obtaining sole control of PT Portugal through its subsidiary Altice Portugal SA. Since that acquisition required authorisation by the Commission under the regulation on the control of concentrations [1], the SPA laid down a set of rules concerning how PT Portugal's business was to be managed in the period between the signing of that agreement and the closing of the transaction following authorisation by the Commission ('the preparatory clauses').

By decision of 20 April 2015, the Commission declared the acquisition compatible with the internal market subject to compliance with certain commitments.

In March 2016, after becoming aware of information in the press, la Commission launched an investigation to determine whether Altice had infringed the provisions of the Merger Regulation which require that concentrations be notified to the Commission before they are implemented [2] and prohibit their implementation before they are notified and declared compatible with the internal market [3].

Based on the results of its investigation, the Commission concluded that Altice had had the possibility of exercising decisive influence or had exercised control over PT Portugal prior to the adoption of its clearance decision and, in some instances, even prior to notification of the concentration. In that regard, the Commission observed, in the first place, that some of the preparatory clauses gave Altice a right to veto the appointment of senior management of PT Portugal, its pricing policy, commercial terms agreed with clients and a veto over it entering into, terminating or amending a wide range of contracts. In the second place, the Commission found that those clauses had been implemented on a number of occasions, which involved Altice intervening in the day-to-day running of PT Portugal. In the third place, the Commission noted that sensitive information concerning PT Portugal had been exchanged as from the date of signing the SPA.

Accordingly, **by decision of 24 April 2018, the Commission imposed on Altice a fine of €62 250 000 for having infringed the obligation to notify the concentration and a fine of**

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1, 'the Merger Regulation').
[2] Article 4(1) of the Merger Regulation.
[3] Article 7(1) of the Merger Regulation.

€62 250 000 for failing to comply with the prohibition on implementing the concentration prior to its notification to and its clearance by the Commission [4].

Altice brought an action seeking annulment of that decision, **which the General Court has dismissed in part.** In its judgment, the General Court provides clarifications regarding the interpretation and the application of the notification obligation and the standstill obligation for concentrations with a European dimension laid down in the Merger Regulation.

The General Court's findings

First of all, the General Court dismisses the plea of illegality raised by Altice, according to which the obligation to notify the concentration (laid down in Article 4(1) of the Merger Regulation) **and the fine applicable in cases of non-compliance with that obligation** (laid down in Article 14(2)(a) of the regulation) **are redundant in the light of the obligation not to implement the concentration before it has been notified and cleared** (laid down in Article 7(1) of the regulation) **and the fine applicable in cases of infringement of that obligation** (laid down in Article 14(2)(b) of the regulation). In that context, Altice also alleged an infringement of the principles of proportionality and the prohibition of double punishment, in so far as the provisions mentioned above permitted the Commission to impose a second fine on the same person in respect of the same facts.

In that regard, the General Court observes, in the first place, that **Article 4(1) and Article 7(1) of the Merger Regulation pursue autonomous objectives**. Article 4(1) seeks to require undertakings to notify a concentration before it is implemented whilst the aim of Article 7(1) is to prevent those undertakings from implementing a concentration before the Commission has declared it compatible with the internal market. In addition, Article 4(1) lays down a **positive obligation to act**, whereas Article 7(1) lays down a **negative obligation not to act**. Furthermore, while an infringement of Article 4(1) is an **instantaneous infringement**, an infringement of Article 7(1) is a **continuous infringement**.

In the light of those considerations, the General Court concludes that Article 4(1) and Article 14(2)(a) of the Merger Regulation **are not redundant** in the light of Article 7(1) and Article 14(2)(b) and **do not infringe the principle of proportionality or the prohibition of double punishment. Furthermore, to declare such provisions unlawful would conflict not only with the objective of the regulation, which is to ensure effective control of concentrations, but would also deprive the Commission of the possibility of establishing a distinction, by means of the fines which it imposes, between a situation in which the undertaking complies with the notification obligation but infringes the standstill obligation, and a situation in which the undertaking infringes both obligations.**

Next as regards Altice's argument that the **preparatory clauses of the SPA** did not confer upon it the power to block the adoption of strategic decisions and cannot therefore be considered to be veto rights granting it control of PT Portugal, the General Court first of all addresses the preparatory clause enabling Altice to appoint and to terminate the employment of the senior management of PT Portugal, or to amend their contracts. The General Court observes, in that regard, that the power to co-determine the structure of the senior management usually confers on the holder the power to exercise decisive influence on the commercial policy of an undertaking.

In addition, the preparatory clause enabling Altice to intervene in PT Portugal's pricing policy required PT Portugal to obtain written consent from Altice to any change in prices and to any amendments to its standard terms and conditions.

In so far as the preparatory clauses also enabled Altice to enter into, terminate or amend a wide range of PT Portugal's contracts, the **General Court observes that those clauses, which carried a right to compensation in the event they were infringed, obliged PT Portugal to**

[4] Decision C(2018) 2418 final imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) on the Merger Regulation (Case M.7993 – Altice/PT Portugal).

request Altice's prior consent to all material contracts, whether or not they were in the ordinary course of business and irrespective of their economic value.

In that regard, Altice had not proved that the preparatory clauses concerned were necessary to ensure the value of the undertaking transferred was preserved or to avoid its commercial integrity being compromised.

In the light of the foregoing, the **General Court concludes that those preparatory clauses gave Altice the possibility of exercising control over PT Portugal, by conferring on it the possibility of exercising decisive influence over the business of PT Portugal.** According to the General Court, it is apparent, **in addition,** from various items in the file that, on a number of occasions, **Altice did in fact intervene in the day-to-today running of PT Portugal and that sensitive information was exchanged between Altice and PT Portugal.**

Finally, given that the entry into force of the preparatory clauses of the SPA, certain interventions and certain exchanges of sensitive information had occurred before the transaction was notified, **the General Court confirms that Altice exercised decisive influence over PT Portugal, contrary to both the notification obligation under Article 4(1) of the Merger Regulation and the standstill obligation under Article 7(1) of that regulation.**

However, in the exercise of its unlimited jurisdiction**, the General Court considers that it is appropriate to reduce by 10% the amount of the fine applied in relation to the infringement of the notification obligation laid down in Article 4(1) of the Merger Regulation, in order to take account of the fact that, before the SPA was signed, Altice had informed the Commission of the transaction it was to undertake and that, immediately after that signing, it sent to the Commission a case team allocation request relating to its file.**

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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