
Competition Law

03.08.2018

Commission imposes record fine for “gun jumping”

8.3.2018

Altice, a multinational cable and telecommunications company, has been fined EUR 125 million for having implemented its acquisition of Portuguese telecoms operator PT Portugal before the transaction had been cleared by the Commission and, in some instances, even before notifying the Commission of the contemplated merger.

The Commission’s decision of 24 April 2018
By assistant attorney Adrian Kielberg

In December 2014, Altice, which is based in the Netherlands, signed an agreement with Brazilian telecoms operator Oi to acquire sole control of Oi’s Portuguese subsidiary, PT Portugal. Altice notified the Commission of the acquisition in February 2015, and the Commission cleared the merger in April 2015.

At the time of the notification, Altice had two Portuguese subsidiaries, Cabovisão and ONI, which were both competitors to PT Portugal on the telecommunications market in Portugal. The Commission made its clearance subject to Altice divesting these subsidiaries, finding that, in the absence of the divestment, the merged entity would not be exposed to effective competition from the remaining players on the market.

In May 2017, the Commission announced that it suspected Altice of having completed the acquisition of PT Portugal before clearance and, in some instances, even before notification of the merger. The Merger Control Regulation prohibits implementation of a notifiable merger before it has been notified to, and cleared by, the Commission. This is referred to as “*the standstill obligation*”. Implementation of a merger before notification is commonly referred to as “*gun jumping*” and is punishable by a fine of up to 10% of the merging entities’ annual turnover.

Decisive influence

The Commission has now established that Altice breached its standstill obligation.

The acquiring company is generally allowed to exercise certain rights which are necessary to preserve the value of the target until closing. As an example, the purchaser can normally veto decisions that do not affect the target’s day-to-day business. However, in exercising these rights, the purchaser may not gain formal or de facto control of the target before the merger has been cleared.

The Commission found in its decision that the share purchase agreement had conferred rights on Altice that enabled Altice to exercise decisive influence over PT Portugal and even more rights than was necessary to preserve the value of the target. The Commission also found that the agreement had granted Altice a veto right over a number of business decisions, including decisions to appoint management members, pricing decisions and contractual decisions above certain (low) thresholds, which are generally considered to be day-to-day business decisions. These rights were conferred on Altice upon signing.

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The Commission noted that it was not decisive if the rights had actually been exercised as long as it was possible for Altice to exercise decisive influence over PT Portugal. Nevertheless, the Commission held that Altice had been actively involved in PT Portugal's day-to-day operations even from the date of signing, and that PT Portugal, although not required to do so, had consulted Altice on a number of issues. By way of example, Altice had been directly involved in PT Portugal's marketing campaigns, the setting of its business targets, the renewal of its agreement with Porto Canal, and the negotiations for a supply contract with Cinemundo.

The Commission also concluded that Altice and PT Portugal had exchanged sensitive information on an ongoing basis, and that such exchange was not necessary in order to preserve the value of the target. Instead, the information exchanged had provided Altice with insight into PT Portugal's business, including its day-to-day operations and long-term strategic considerations. The exchange had primarily taken place on Altice's initiative, and the parties had failed to ensure that the information exchanged remained confidential, so that it could not be used by Altice in case the merger failed.

Fine

As a result of the breach of the standstill obligation, Altice was ordered to pay a fine of EUR 124,500,000 – the largest ever in a case involving gun jumping. The decision shows that gun jumping attracts increasing attention from both the EU and the national competition authorities.

Read more about the case in our previous news article:

[The European Commission accuses telecom multinational of "gun-jumping"](#)

[Read the European Commission's decision.](#)

Commission imposes heavy fine on Google

8.3.2018

The fine of DKK 32 billion was imposed following Google's abuse of its dominant position on the market for general internet search. The fine is the largest ever imposed by the Commission.

The Commission's decision of 18 April 2018

By senior intern Sebastian Willigenburg Andersen and assistant attorney Kristine Langgaard Stage

Google has been fined EUR 4.34 billion, equivalent to DKK 32 billion, for imposing illegal restrictions on Android device manufacturers and mobile network operators. The restrictions have ensured that consumers used Google Search, thus strengthening the dominant position of this search engine.

The Commission has identified three types of restrictions that amount to abuse in particular:

- Google has required manufacturers to pre-install Google Search and Google Chrome as a condition for using Google's app store (Play Store).
- Google has paid certain large manufacturers of Android phones for pre-installing the Google Search app as the only search app on their devices.
- Google has prevented manufacturers wishing to pre-install Google apps from selling mobile devices with alternative versions of Android that were not approved by Google.

Illegal tying of Google's app store and Google's search and browser apps

In its license agreements (on the Android operating system) with device manufacturers, Google had made it a condition for using Google's Play Store that the apps Google Search and Google Chrome were also pre-installed on all mobile devices.

The device manufacturers confirmed that Google's Play Store was a "must-have" app as consumers expect to find it pre-installed on their devices and because it is difficult to download apps without it. By tying Play Store, Google Search and Google Chrome, Google had abused its dominant position and ensured that its own search engine was preferred over those of its competitors.

While users are free to download another search engine, there is evidence showing that a pre-installed search app is consistently used more than a search app which users have to download themselves.

Illegal payments conditional on exclusive pre-installation of Google Search

Google had also granted significant financial incentives to the largest device manufacturers on condition that they pre-installed Google Search as the only search engine on their mobile devices.

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The Commission's investigation showed that a rival search engine would have been unable to compensate a device manufacturer for the loss which the manufacturer would suffer from not using Google's search engine. The reason is that if the manufacturer installed just one search engine from a Google competitor on a single device, the manufacturer would lose all the revenue from Google that it would otherwise have received. Consequently, the financial incentives were used as a means of restricting competition on the market.

Illegal obstruction of development and distribution of competing Android operating systems

Finally, Google had obstructed the development of alternative versions of Android that were not approved by Google (the so-called "Android forks"). In order to be able to pre-install Google Search and Google Play Store (which is a "must-have" app as noted above) on their devices, manufacturers had to commit not to develop or sell devices running on Android forks.

In imposing this requirement, Google had blocked an important channel for its competitors to introduce apps and services which could be pre-installed on Android forks.

Three-month time limit

Google has been ordered to bring its illegal conduct to an end within 90 days of the decision. If Google fails to do so, it may face fines of up to 5% of Alphabet's (Google's parent company) average daily worldwide turnover.

Google has announced that it intends to appeal the decision. In that case, Google may apply for suspension of the Commission's decision in which case Google will not be required to pay the fine until after hearing of the case, nor can Google be fined after expiry of the three-month time limit.

[Read the Commission's press release.](#)

Major electronics manufacturers fined for fixing online resale prices

8.3.2018

The Commission has imposed fines totalling EUR 111 million on ASUS, Philips, Denon & Marantz and Pioneer for sanctioning retailers selling their products at prices below their recommended resale prices. It is the first time in 15 years that the Commission imposes fines for retail price maintenance, but the Commission has recently focused increasingly on online sales and electronic price monitoring.

The Commission's decision of 24 July 2018
By assistant attorney Kristine Langgaard Stage

The Commission has, in four separate decisions, fined consumer electronics manufacturers for sanctioning their retailers' sale at prices below the recommended resale prices. Both ASUS, Philips, Denon & Marantz and Pioneer have used electronic tools to monitor their online retailers' resale prices. If a retailer sold a product at a lower price than recommended by the manufacturer, the manufacturer would ask the retailer to increase the price. If the retailer refused to do so, the manufacturer would stop deliveries. Thus, the four manufacturers have restricted competition among their retailers and kept up prices artificially.

The four manufacturers now face fines ranging between EUR 7 million and EUR 64 million. According to the Commission, each fine has been reduced by 40-50% as a result of the companies' cooperation with the Commission in connection with the investigations, in particular their admission of the offence at an early stage.

Focus on online sale and electronic price monitoring

Online sales account for an increasing share of all sales in Europe, causing both advantages and disadvantages to consumers. The Commission has therefore increased its focus on online sales, and Competition Commissioner Margrethe Vestager has pointed to the adverse effects of electronic price monitoring, emphasising that the area is in the Commission's spotlight.

In this case, the manufacturers had monitored the retailers' prices. Some retailers had also used automated price agents, adjusting their prices automatically according to their competitors' prices. This combination has probably increased the effect of the manufacturers' anti-competitive behaviour as an upward adjustment of the lowest prices on the market has made the other retailers follow suit. The practices at the retail level were not part of the Commission's investigations, but the Commission is expected to focus also on the anti-competitive effects of such pricing algorithms.

[Read the Commission's press release.](#)

Frankfurt Supreme Court rules in the Coty case

8.3.2018

On 12 July 2018, the Frankfurt Supreme Court delivered judgment in the dispute between Coty and Akzente. The case concerned a prohibition of sale of luxury goods on third-party online platforms. The decision is in line with the preliminary ruling of the European Court of Justice.

Judgment of 12 July 2018 by the Frankfurt Supreme Court – 11 U 96/14 (Kart)
By senior intern Sebastian Willigenburg Andersen

Following a preliminary reference to the European Court of Justice, the Frankfurt Supreme Court has now passed judgment in the Coty case. Thus, the Court agreed with the European Court of Justice, finding that Coty was allowed to prohibit the sale of its luxury goods on third-party online platforms such as Amazon and Ebay.

Akzente now has to decide whether to appeal the decision to the German Supreme Court.

[Read our previous mention of the preliminary ruling of the European Court of Justice.](#)