



## **Final Report of the Hearing Officer<sup>1</sup>**

### **Case M. 7993 - Altice/ PT Portugal (Article 14(2) Procedure)**

#### **INTRODUCTION**

1. On 9 December 2014, Altice S.A. and Altice Portugal S.A signed an agreement for the purchase of PT Portugal<sup>2</sup> from Oi<sup>3</sup> (the "Transaction Agreement"). On 18 December 2014, Altice S.A. commenced pre-notification discussions with the European Commission (the "Commission") in order to obtain merger control clearance for this acquisition. On 25 February 2015 Altice S.A.<sup>4</sup> formally notified the transaction to the Commission, together with an offer for remedies under Article 6(2) of the Merger Regulation.<sup>5</sup> The Commission raised serious doubts as to the compatibility of the merger with the internal market, finding concerns in a number of horizontally affected markets.
2. On 20 April 2015, the Commission conditionally cleared the transaction following a revised remedy offer by Altice (the "clearance decision"). Altice announced that it had closed the transaction on 2 June 2015.
3. On 13 April 2015, the Commission sent a request for information ("RFI") to Altice asking for details on the purpose and content of visits by Altice executives to PT Portugal, prior to the adoption of the clearance decision, that the Portuguese press had reported upon. Altice replied to this RFI on 17 April 2015.
4. The Commission sent a further RFI on 12 May 2015 (focussing on documents relating to the Altice and PT Portugal meetings), to which Altice replied on 12 June 2015, but only providing Altice (and not PT Portugal) documents.
5. On 8 July 2015, the Commission adopted a decision under Article 11(3) Merger Regulation requiring Altice to provide responsive PT Portugal documents. Altice

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<sup>1</sup> Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 ("Decision 2011/695/EU").

<sup>2</sup> PT Portugal SGPS S.A., a telecommunications and multimedia operator in Portugal.

<sup>3</sup> Oi S.A., the Brazilian telecommunications operator.

<sup>4</sup> Although Altice S.A. was the Notifying Party in the transaction (M.7499), on 9 August 2015 Altice S.A merged with Altice N.V. - the new holding company of Altice Group - in result of which Altice SA ceased to exist. Altice N.V., as legal successor of Altice S.A., is the addressee of the draft Decision. Altice S.A. and Altice N.V. are referred to as "Altice" in this report.

<sup>5</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation").

responded on 30 July 2015. The Commission sent another RFI on 4 December 2015 and Altice responded on 18 December 2015.

6. On 15 March 2016, the Commission adopted a decision under Article 11(3) Merger Regulation requiring Altice to provide (inter alia) employee electronic mailboxes, confidentiality agreements and documents specifically relating to certain interactions between Altice and PT Portugal prior to 20 April 2015. Altice submitted the requested documents on 6 April 2016.
7. Finally, the Commission sent Altice RFIs on 20 July 2016, 24 August 2016, 27 September 2016 and 21 December 2016 to which Altice responded.

#### **STATEMENT OF OBJECTIONS**

8. On 18 May 2017, the Commission notified a Statement of Objections ("SO") to Altice. In the SO, the Commission took the preliminary view that Altice had implemented a concentration with a Union dimension in breach of Articles 4(1) and 7(1) of the Merger Regulation. More specifically, the Commission's preliminary view in the SO was that the Transaction Agreement already granted Altice the legal right to exercise decisive influence over PT Portugal. In addition, the Commission's provisional assessment was that Altice actually exercised decisive influence over PT Portugal before the clearance decision and, in certain instances, before notification to the Commission by (a) being involved in certain PT Portugal commercial decisions and (b) by systematically receiving commercially sensitive information from PT Portugal.
9. The deadline for the reply to the SO was initially 26 June 2017, but was subsequently extended to 18 August 2017.
10. Altice received access to the file on 29 May 2017. No issues concerning access to the file have been brought to my attention.

#### **ORAL HEARING**

11. In its SO response of 18 August 2017, Altice requested the opportunity to develop its arguments at a formal oral hearing which was held on 21 September 2017. On 19 October 2017, Altice provided an addendum to its presentation at the oral hearing in response to observations and questions made by the Commission during the hearing concerning Altice's involvement in certain matters of PT Portugal's business.<sup>6</sup>

#### **LETTER OF FACTS**

12. In its response to the SO and during the oral hearing, Altice argued that the Commission should have contacted Oi, since Oi's interpretation of the Transaction Agreement and its decisions as to whether or not to consult Altice during the pre-closing period played a significant role in the implementation of the Transaction Agreement pre-closing covenants.

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<sup>6</sup> This addendum was distributed to all participants at the oral hearing. On 18 January 2018 Altice provided an updated version of the presentation to take account of its response to the Letter of Facts (see paragraph 26 below).

13. In light of these observations, the Commission sent an RFI to Oi on 6 October 2017. Oi provided its response on 20 October 2017.
14. On 16 November 2017, the Commission sent a Letter of Facts to Altice pointing to factual elements not mentioned in the SO that supported the preliminary conclusions set out in the SO. The Letter of Facts referred both to factual elements that were on the file, but also additional factual elements identified after the SO (more specifically, Oi's 20 October 2017 RFI response).
15. Altice was given until 30 November 2017 to submit its written observations to the Letter of Facts. It requested an extension of the deadline by eight weeks until 26 January 2018. An extension was granted until 15 December 2017 and on that date Altice provided its response to the Letter of Facts.
16. On 28 December 2017, Altice sent a letter to the Hearing Officer complaining about certain procedural points that are further discussed below.

### **PROCEDURAL ISSUES RAISED BY ALTICE IN RELATION TO RIGHTS OF DEFENCE**

#### *Oi's involvement in the investigation*

17. As mentioned above, in its response to the SO and during the oral hearing, Altice argued that the Commission should have contacted Oi during its investigation. According to Altice, by refusing to consult Oi, the Commission failed to take into account elements that are relevant for assessing the case, thereby infringing Altice's rights of defence, especially its right to be heard and its right to good administration.
18. I consider that Altice's claim is not sustainable. First, the EU Courts have confirmed that the Commission has a reasonable margin of discretion to decide how expedient it may be to hear persons whose evidence may be relevant to the inquiry.<sup>7</sup> Furthermore, the guarantee of the rights of defence does not require the Commission to carry out further investigations where it considers that the preliminary investigation of the case has been sufficient.<sup>8</sup> In any case, as mentioned above, following the oral hearing, the Commission did send an RFI to Oi to seek Oi's views on the interpretation and implementation in practice of the Transaction Agreement. In its reply to the Letter of Facts (where Altice was given the opportunity to comment on Oi's response to the Commission's RFI) and in its letter to the Hearing Officer on 28 December 2017, Altice further claimed that the Commission did not sufficiently investigate Oi's role and viewpoint. On this point, however, I should note that whether or not the investigation file contains sufficient evidence to support an infringement finding is ultimately a question of substance.
19. Altice also argued that the involvement of Oi in the investigation was extremely important from a procedural viewpoint and that, as such, Oi's responses should have been presented in a supplementary statement of objections rather than a Letter of Facts. I do not agree with Altice's assessment in this respect: Oi's responses to the RFI are

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<sup>7</sup> See, for example, T-9/99 *HFB and Others v. Commission*, EU:T:2002:70, paragraph 383; T-655/11 *FSL v. Commission*, EU:T:2015/383, paragraph 406.

<sup>8</sup> See, for example, T-141/94, *Thyssen Stahl v. Commission*, EU:T:1999:48, paragraph 110; T-758/14 *Infineon Technologies v. Commission* EU:T:2016:737, paragraph 110.

factual elements relevant to the Commission's existing objections in the SO. This type of evidence is presented in a letter of facts and not in a supplementary statement of objections.

*Necessity and proportionality of Commission's RFIs sent during the investigation*

20. In its response to the SO, Altice argued that the Commission's RFIs sent to Altice during the investigation were disproportionate to the needs of the investigation because of the volume of information requested and in view of the time-limits fixed by the Commission to respond to these RFIs.
21. For the purposes of this report it suffices to note that Altice did not exercise its full procedural rights in this respect. Even though the Terms of Reference do not specifically give powers to the Hearing Officer to extend deadlines in the case of procedural infringements of merger control rules,<sup>9</sup> Altice could have requested a further extension of time from the Commission or appealed the Commission decisions of 8 July 2015 and 15 March 2016 to the General Court.

*Altice's procedural criticisms on the Letter of Facts*

22. In its response to the Letter of Facts and subsequently in its letter to the Hearing Officer of 28 December 2017, Altice complained about the following procedural issues relating to the Letter of Facts:
  - According to Altice, the Commission already had knowledge of the consultations referred to in the Letter of Facts at the time of the SO and deliberately chose not to mention these elements in the SO. According to Altice, the fact that the Commission did not include these elements in the SO did not allow these elements to be debated between Altice and the Commission throughout the entire proceedings, including at the oral hearing.
  - In addition, Altice argued that the Letter of Facts listed 19 matters on which Altice was consulted without explaining the reason for which it considers that these matters would corroborate the preliminary findings set out in the SO. According to Altice, the Commission did not provide any legal characterisation to the new elements of the infringement introduced in the Letter of Facts and the status of the issues mentioned in footnote 4 of the Letter of Facts was unclear.
23. I would note the following in this respect: first, the Commission presented additional existing information from its file in the Letter of Facts because the Commission considered that this evidence contradicted certain claims made by Altice in its response to the SO. The Commission did not, as Altice claims, deliberately choose not to mention these elements in the SO. Second, as the draft decision explains, the Commission (a) investigated Altice's claim that there were several decisions taken by PT Portugal between signing and clearance where Altice was not consulted, (b) verified the instances in which Altice's consent was requested through formal Oi letters, and (c) found instances (in addition to those mentioned in the SO) where Altice's consent was requested on which Altice had claimed that it had not been consulted or even informed

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<sup>9</sup> See Article 4(2)(c) which only relates to extensions of time limits in decisions requesting information pursuant to Article 18(3) Regulation 1/2003.

thereof. These items do not form new objections against Altice and are not used against Altice in the draft decision as instances where the exercise of decisive influence is shown, but are merely used to respond to Altice's claim that it was not consulted on or informed of many decisions taken by PT Portugal between signing and clearance.

*Request for a second oral hearing*

24. In its letter of 28 December 2017, Altice also requested that a new oral hearing be organised.
25. Article 14(3) Regulation 802/2004 (read in conjunction with Article 13 Regulation 802/2004) only provides for the right to request a formal oral hearing in the written comments to the SO, not in observations to a letter of facts. This is also confirmed by Article 6(1) of Decision 2011/695/EU. Since the 16 November 2017 Letter of Facts did not contain any new objections against Altice that had not been set out in the SO, a right to a second formal oral hearing was not triggered.

*Additional information for participants at the oral hearing*

26. In its letter of 28 December 2017, Altice also indicated that, in view of the elements put forward by the Commission in its Letter of Facts, Altice would provide a new version of the slide deck which had been presented at the oral hearing. Altice provided such updated version of the presentation on 18 January 2018. This version was sent to all the participants of the oral hearing.

**DRAFT DECISION**

27. In the draft decision the Commission comes to the conclusion that Altice has, at least negligently, implemented a concentration in breach of Articles 4(1) and 7(1) of the Merger Regulation.
28. I have reviewed the draft decision pursuant to Article 16(1) of Decision 2011/695/EU and I conclude that it deals only with objections in respect of which the Parties have been afforded the opportunity of making known their views.

**CONCLUSION**

29. Overall, I consider that the effective exercise of procedural rights has been respected in this case.

Brussels, 23 April 2018

Joos STRAGIER