



EUROPEAN COMMISSION  
DG Competition

***CASE M.7993 - ALTICE / PT  
PORTUGAL***

(Only the English text is authentic)

**MERGER PROCEDURE  
REGULATION (EC) 139/2004**

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Article 14(2) Regulation (EC) 139/2004

Date: 24/04/2018

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EUROPEAN  
COMMISSION

Brussels, 24.4.2018  
C(2018) 2418 final

*PUBLIC VERSION*

**COMMISSION DECISION**

**of 24.4.2018**

**addressed to:**

**Altice N.V.**

**imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Council Regulation (EC) No. 139/2004 (Case M.7993 – Altice / PT Portugal, Article 14(2) procedure)**

(Only the English text is authentic)

## TABLE OF CONTENTS

1.	Factual Background .....	6
1.1.	The Undertakings Concerned and the Concentration .....	6
1.2.	Background to the current proceedings.....	8
2.	Legal Framework .....	11
3.	Application to the present case .....	13
4.	Breach of Article 7(1) of the Merger Regulation.....	15
4.1.	The Transaction Agreement.....	15
4.1.1.	The relevant provisions of the Transaction Agreement .....	15
4.1.2.	The Commission's Assessment of the Transaction Agreement .....	17
4.1.2.1.	The possibility for Altice to influence the appointment of the Target's senior management staff .....	19
4.1.2.2.	The possibility for Altice to influence the Target's pricing policies .....	20
4.1.2.3.	The possibility for Altice to influence the Target entering into, terminating or modifying contracts.....	21
(a)	Relevant provisions and definitions .....	21
(b)	Summary of the Commission's assessment.....	21
(c)	A very broad range of commercial actions was covered .....	22
(d)	The value thresholds were low in the context of the PT Portugal business.....	23
(e)	Contracts within the ordinary course of business were covered .....	24
(f)	In practice, the number of contracts covered by the relevant clauses was high and often related to ordinary course of PT Portugal's business .....	25
(g)	Conclusion on the possibility for Altice to influence the Target entering into, terminating or modifying contracts.....	26
4.1.3.	Altice's views on the Transaction Agreement.....	26
4.1.3.1.	The relevant clauses of the Transaction Agreement were strictly necessary for the preservation of the value of PT Portugal between the Signing Date and the Closing Date .....	26
4.1.3.2.	The Transaction Agreement did not provide Altice with the possibility to exercise decisive influence over PT Portugal .....	28
a)	The veto right over PT Portugal personnel .....	31
b)	Veto right over PT Portugal's pricing policy .....	32
c)	The veto right over PT Portugal's contracts .....	34
4.1.3.3.	Altice did not interpret the Transaction Agreement as giving it a veto right over PT Portugal's decisions .....	36
4.1.3.4.	Conclusion on the Commission's assessment of the relevant provisions of the Transaction Agreement .....	37
4.2.	Altice's influence over the Target .....	37

4.2.1.	Altice's role in PT Portugal's commercial decisions .....	38
4.2.1.1.	Post-paid mobile campaign .....	38
(a)	Facts .....	38
(b)	The Commission's findings .....	42
(c)	Altice's views .....	43
(d)	The Commission's assessment of Altice's views .....	44
4.2.1.2.	Porto Canal .....	46
(a)	Facts .....	46
(b)	The Commission's findings .....	49
(c)	Altice's views .....	50
(d)	The Commission's assessment of Altice's views .....	51
4.2.1.3.	Selection of RAN supplier .....	53
(a)	Facts .....	53
(b)	The Commission's findings .....	55
(c)	Altice's views .....	56
(d)	The Commission's assessment of Altice's views .....	57
4.2.1.4.	Video on demand / Electronic sell-through contract .....	58
(a)	Facts .....	58
(b)	The Commission's findings .....	60
(c)	Altice's views .....	61
(d)	The Commission's assessment of Altice's views .....	62
4.2.1.5.	DOG TV .....	63
(a)	Facts .....	63
(b)	The Commission's findings .....	64
(c)	Altice's views .....	66
(d)	The Commission's assessment of Altice's views .....	66
4.2.1.6.	SIRESP Shares .....	67
(a)	Facts .....	67
(b)	The Commission's findings .....	68
(c)	Altice's views .....	69
(d)	The Commission's assessment of Altice's views .....	69
4.2.1.7.	[...] Contract .....	70
(a)	Facts .....	70
(b)	The Commission's findings .....	71
(c)	Altice's views .....	71
(d)	The Commission's assessment of Altice's views .....	72

4.2.1.8.	Considerations on the relevance of decisions on which Altice's consent was not requested .....	73
(a)	Altice's views .....	73
(b)	The Commission's assessment .....	74
4.2.2.	Exchanges of commercially sensitive information between Altice and PT Portugal	75
4.2.2.1.	Ad-hoc meetings between Altice management and PT Portugal.....	76
(a)	Facts .....	76
(i)	Meeting of 3 February 2015.....	76
(ii)	Meeting of 20 March 2015.....	78
(iii)	Meeting of 25 – 27 March 2016.....	80
(b)	The Commission's findings .....	84
(c)	Altice's arguments .....	86
(d)	Commission's assessment of Altice's arguments .....	88
4.2.2.2.	Other bilateral communications .....	90
(a)	3P / 4P Pricing.....	90
(b)	Provision of information on key performance indicators .....	91
(c)	Commission's findings .....	94
(d)	Altice's views .....	95
(e)	Commission's assessment of Altice's arguments .....	96
4.3.	Conclusion on breach of Article 7(1) of the Merger Regulation .....	96
5.	Breach of Article 4(1) of the Merger Regulation.....	98
6.	Procedure.....	99
6.1.	Altice's arguments .....	99
6.2.	The Commission's assessment .....	101
6.2.1.	Oi's role in the implementation of the pre-closing covenants and Altice's liability for early implementation of the Transaction.....	101
6.2.1.1.	Altice's claim that a failure to take into account of Oi's view amounts to a violation of Altice's right to be heard and its right to a good administration .....	101
(a)	The infringement by Altice is based on Altice's conduct.....	101
(b)	Altice had an active role in the drafting and implementation of the Transaction Agreement .....	102
(c)	The Commission has sought Oi's views on the Transaction Agreement and its implementation.....	103
6.2.1.2.	Altice's claim that imputing the alleged infringement to Altice constitutes a breach of the fundamental principle of personal liability .....	104
6.2.2.	The Commission's requests for information .....	105
6.2.2.1.	The RFI of 8 July 2015 .....	105
6.2.2.2.	The RFI of 5 August 2015 .....	108

6.2.2.3.	The RFI of 11 March 2016.....	109
6.2.2.4.	The RFI of 20 July 2016 .....	110
6.2.2.5.	The RFI of 21 December 2016.....	112
7.	Fines .....	112
7.1.	The nature of the infringement.....	113
7.2.	The gravity of the infringement .....	115
7.2.1.	Altice's infringement was committed at the very least negligently .....	115
7.2.2.	Altice's acquisition of PT Portugal raised serious doubts as to its compatibility with the internal market.....	116
7.3.	The duration of the infringement .....	118
7.4.	Mitigating and aggravating circumstances.....	118
7.4.1.	Mitigating circumstances .....	119
7.4.2.	Aggravating circumstances .....	122
7.5.	Conclusion.....	122
8.	Amount of the fines.....	122

# COMMISSION DECISION

of 24.4.2018

addressed to:

Altice N.V.

**imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Council Regulation (EC) No. 139/2004 (Case M.7993 – Altice / PT Portugal, Article 14(2) procedure)**

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings<sup>1</sup>, and in particular Articles 4(1), 7(1) and 14(2) thereof,

Having provided Altice N.V. the opportunity to make known its views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations<sup>2</sup>,

Having regard to the final report of the Hearing Officer in this case<sup>3</sup>,

Whereas:

## 1. FACTUAL BACKGROUND

### 1.1. The Undertakings Concerned and the Concentration

- (1) Altice N.V.<sup>4</sup> ("Altice" or the "Notifying Party") is a multinational cable and telecommunications company based in the Netherlands.
- (2) PT Portugal SGPS S.A. ("PT Portugal" or the "Target") is a telecommunications and multimedia operator with activities extending across all telecommunications segments in Portugal. PT Portugal offers residential customers fixed and mobile voice services, data services, broadband internet access services, and pay TV

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

<sup>2</sup> OJ C .....200. , p....

<sup>3</sup> OJ C .....200. , p....

<sup>4</sup> Altice S.A., a company incorporated in Luxembourg, was the notifying party in the case M.7499 – *Altice/PT Portugal*. On 6 August 2015, Altice S.A., the former holding company of Altice Group transferred substantially all assets and liabilities to its wholly owned subsidiary Altice Luxembourg S.A. On 9 August 2015, Altice S.A. merged with Altice N.V., the new holding company of Altice Group. As a result of the merger, Altice S.A. ceased to exist.

services, which are sold either on a stand-alone basis or as multiple play packages. PT Portugal offers corporate customers fixed and mobile voice services, data services and IT services, comprising data centre solutions, virtualisation services, cloud, business outsourcing process and other additional value-added services.

- (3) On 9 December 2014 (the "Signing Date"), Altice S.A.<sup>5</sup> and Altice Portugal S.A.<sup>6</sup> entered into a share purchase agreement (the "Transaction Agreement") with the Brazilian telecom operator Oi S.A. ("Oi" or the "Seller"; Oi and Altice are together referred to as the "Parties") whereby Altice S.A., through its subsidiary, Altice Portugal S.A., would acquire sole control of PT Portugal within the meaning of Article 3(1)(b) of the Merger Regulation by way of purchase of shares (the "Transaction")<sup>7</sup>.
- (4) PT Portugal's turnover in 2014 was EUR 2 533 million. The purchase price was EUR 7 400 million at the time of the Transaction.
- (5) As set out in Article 4.7 of the Transaction Agreement, the due diligence process in relation to the Transaction was carried out between 16 October 2014 and 27 November 2014. No non-disclosure agreement was signed or clean team arrangement effected as part of that due diligence process<sup>8</sup>.
- (6) At the time of notification to the Commission of the Transaction, Altice operated in Portugal via two subsidiaries, Cabovisão – Televisão por Cabo S.A. ("Cabovisão") and ONI Telecom – Infocomunicações S.A. ("ONI"). Cabovisão provided pay TV services, broadband internet access and fixed telephony services to residential customers, both on a standalone basis and as multiple play packages. ONI provided business-to-business ("B2B") telecommunication services and IT services, including cloud and information and communication technology services to business customers. Its offers included network and fixed telecommunication services including voice, data and fixed internet access services. Neither Cabovisão nor ONI provided mobile services.

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<sup>5</sup> Altice S.A. is the former holding company of Altice Group. See footnote 4.

<sup>6</sup> Altice Portugal S.A. was a wholly-owned subsidiary of Altice S.A. In the Transaction Agreement, Altice Portugal S.A. is identified as the "buyer" and Altice S.A. is identified as the guarantor for the Transaction.

<sup>7</sup> The Transaction had a Union dimension within the meaning of Article 1(2) of the Merger Regulation.

<sup>8</sup> The only non-disclosure agreement that was entered into in relation to the Transaction was an agreement between Altice's counsel and Oi on 17 December 2014 with respect to exchanges of information for the preparation of the merger control notification of the Transaction to the European Commission. According to Altice, no other non-disclosure agreement or clean team arrangement was put in place in connection with the Transaction, except a clean team arrangement entered into between PT Portugal and [...] relating to [...] solutions project (for the avoidance of doubt, the [...] project does not form part of the current proceedings). It appears from the documents provided by Altice that on 17 April 2015 Altice requested that [...] employees involved in the [...] project sign a letter recalling the obligations of confidentiality with respect to information obtained either from Altice / [...] or PT Portugal during the project. A "*Framework note on information exchanges and preventing the risk of gun jumping*" (the "Framework Note") dated April 2015 was attached to the declaration. See Altice's response to Commission's decision of 15 March 2016, Memorandum to the Commission of 6 April 2016, pages 11-12. See also Altice's response of 18 December 2015 to Commission's RFI of 4 December 2015, pages 3-4. The Framework Note was provided as part of Document 30 of the Third Set of Documents, Volume 4 ID[130].

- (7) On 25 February 2015, the Commission received notification of the Transaction submitted pursuant to Article 4 of the Merger Regulation<sup>9</sup>. Pre-notification contacts with the Commission had started on 18 December 2014.
- (8) On the basis of the results of the market investigation, the Commission found that the Transaction raised serious doubts as to its compatibility with the internal market in a number of horizontally affected markets in Portugal, in particular: (i) retail supply of fixed voice services; (ii) retail supply of internet access services; (iii) the retail supply of pay TV services; (iv) the possible market for the retail supply of multiple play services, in particular double and triple play; and (v) the provision of B2B telecommunications and possible sub-markets. In each of the markets, the Commission found that PT Portugal and Altice's subsidiaries in Portugal (Cabovisão and ONI) had high combined market shares, were close competitors and that there were high barriers to entry that would prevent potential entrants from placing a competitive constraint on the merged entity.
- (9) The Notifying Party formally submitted commitments on 25 February 2015 under Article 6(2) of the Merger Regulation and, following the feedback received from the market test, a revised set of commitments on 31 March 2015, which included the divestiture of Cabovisão and ONI.
- (10) On 20 April 2015, the Commission adopted a decision under Article 6(1)(b) of the Merger Regulation in conjunction with Article 6(2) of the Merger Regulation, declaring the Transaction compatible with the internal market, subject to full compliance by Altice with the obligations and conditions annexed to that decision (the "Clearance Decision").
- (11) On 2 June 2015, Altice publicly announced that it had closed the Transaction namely that ownership of the shares in PT Portugal has been transferred to Altice (the "Closing Date").

## **1.2. Background to the current proceedings**

- (12) On 13 April 2015, following reports in the press regarding visits by Altice executives to PT Portugal<sup>10</sup> prior to the adoption by the Commission of the Clearance Decision, the Commission sent Altice, as the Notifying Party, a request for information ("RFI") under Article 11(2) of the Merger Regulation<sup>11</sup>. The Commission thereby requested that Altice describe and explain the purpose and content of exchanges between Altice and PT Portugal during those meetings. In particular, the Commission requested that Altice elaborate on any information exchanged between Altice and PT Portugal on those occasions.
- (13) On 17 April 2015, Altice submitted its reply to the Commission RFI of 13 April 2015<sup>12</sup>. In that reply, Altice explained that its top management made three visits to PT Portugal, on: (i) 3 February 2015; (ii) 20 March 2015; and (iii) 25 to 27 March 2015.
- (14) On 12 May 2015, the Commission addressed a second RFI to Altice under Article 11(2) of the Merger Regulation, seeking further information regarding the type of

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<sup>9</sup> Notification in case M.7499 Altice/PT Portugal, ID[455].

<sup>10</sup> Article in *Diário Económico* of 26 February 2015: [http://economico.sapo.pt/noticias/altice-ja-esta-na-pt-portugal-para-assumir-controlo-da-empresa\\_212789.html](http://economico.sapo.pt/noticias/altice-ja-esta-na-pt-portugal-para-assumir-controlo-da-empresa_212789.html). ID[153]

<sup>11</sup> ID[123].

<sup>12</sup> ID[109]-ID[112].

information exchanged by Altice and PT Portugal during those meetings<sup>13</sup>. In particular, the Commission requested documents relating to the meetings described in recital (12) between Altice and PT Portugal.

- (15) Altice replied to the Commission's second RFI on 12 June 2015<sup>14</sup>. Altice provided documents which had been requested by the Commission, however it did not submit responsive PT Portugal documents. On 8 July 2015, the Commission adopted a decision pursuant to Article 11(3) of the Merger Regulation requiring Altice to provide the requested PT Portugal documents<sup>15</sup>. Altice submitted the requested documents on 30 July 2015<sup>16</sup>. A third Commission RFI under Article 11(2) of the Merger Regulation was addressed to Altice on 4 December 2015 which was limited to a number of missing documents pertaining to its RFI of 12 May 2015<sup>17</sup>. Altice provided the relevant documents on 18 December 2015<sup>18</sup>.
- (16) By letter dated 11 March 2016<sup>19</sup>, the Commission informed Altice that following the examination of the documents submitted by Altice in reply to the Commission's RFIs, an investigation was being carried out into a possible infringement by Altice of the stand-still obligation laid down in Article 7(1) of the Merger Regulation and the notification requirement laid down in Article 4(1) of the Merger Regulation.
- (17) On 15 March 2016, the Commission adopted a decision pursuant to Article 11(3) of the Merger Regulation requiring Altice to provide information relevant to the Commission's investigation, including: (i) the complete electronic mailboxes of a number of employees of Altice and PT Portugal; (ii) all documents relating to any confidentiality arrangements that were put in place with regard to the Transaction; (iii) all documents regarding a "post-paid mobile market campaign" by PT Portugal; and (iv) all documents related to the negotiations on the renewal of the distribution contract of Porto Channel by PT Portugal<sup>20</sup>.
- (18) Altice submitted the requested documents described in recital 17 on 6 April 2016<sup>21</sup>.
- (19) On 20 July 2016, the Commission sent Altice a fourth RFI under Article 11(2) of the Merger Regulation asking for clarifications regarding some of the documents

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<sup>13</sup> ID[113]-ID[114].

<sup>14</sup> ID[107]-ID[108].

<sup>15</sup> Commission Decision no. C(2015)4648 of 8 July 2015 [ID 610].

<sup>16</sup> ID[97]-ID[106].

<sup>17</sup> ID[93]-ID[94].

<sup>18</sup> ID[65]-ID[92].

<sup>19</sup> ID[15].

<sup>20</sup> Commission Decision No. C(2016)1660 of 15 March 2016. ID [18]. The decision was addressed to Altice N.V. It is noted that on 11 March 2016, the Commission had adopted a decision addressed to Altice SA, the former holding company of the Altice group, requiring Altice to provide the same information as requested in the decision of 15 March 2016. However, since Altice N.V. had announced the completion of a merger with Altice SA, as a result of which Altice SA ceased to exist, the Commission addressed on 15 March 2016 the decision to Altice N.V.

<sup>21</sup> ID[34]-ID[37] and ID[40]-ID[52]. In Altice's Response dated 6 April 2016 Altice provided its 2014 turnover figures and informed the Commission that Altice's 2015 turnover figure was not available at that time and that Altice would provide it once it became available. On 17 January 2017, the Commission requested Altice by RFI pursuant to Article 11(2) of the Merger Regulation to provide its turnover for 2015 and, if available, 2016 (ID[577]). On 31 January 2017 Altice informed the Commission that Altice N.V.'s consolidated turnover for 2015 amounted to EUR 14 550.3 million (ID[582] and ID[584]). On 11 April 2017, Altice informed the Commission Altice NV's consolidated turnover for 2016 amounted to EUR 20 755.7 million ID[587].

submitted by Altice on 6 April 2016<sup>22</sup>. Altice replied to the Commission's RFI on 23 August 2016<sup>23</sup>. A fifth RFI under Article 11(2) of the Merger Regulation requesting clarifications was sent by the Commission to Altice on 24 August 2016<sup>24</sup>. Altice submitted its response on 15 September 2016<sup>25</sup>.

- (20) Further, on 27 September 2016, the Commission sent Altice an RFI under Article 11(2) of the Merger Regulation asking for clarifications regarding: (i) the reorganisation of the Altice Group; and (ii) Altice's response to Commission's RFI of 8 July 2016<sup>26</sup>. Altice's response was received on 11 October 2016<sup>27</sup>.
- (21) On 21 December 2016, the Commission sent Altice an RFI under Article 11(2) of the Merger Regulation asking for clarifications regarding: (i) the Transaction Agreement; (ii) PT Portugal's commercial contracts; (iii) the due diligence process in relation to the Transaction; (iv) the telecommunications market in Portugal; (v) PT Portugal's revenues; (vi) PT Portugal's debt; and (vii) the number of PT Portugal employees<sup>28</sup>. Altice submitted part of its response on 13 January 2017<sup>29</sup> and part on 31 January 2017<sup>30</sup>.
- (22) On 12 May 2017, a state of play meeting was held between the Commission's services and Altice.
- (23) On 17 May 2017, the Commission issued a statement of objections (the "SO") addressed to Altice pursuant to Article 18 of the Merger Regulation. In the SO, the Commission reached the preliminary conclusion that Altice had intentionally or at least negligently breached Article 4(1) and Article 7(1) of the Merger Regulation, and therefore the Commission was considering imposing fines on Altice in accordance with Article 14(2)(a) and (b) of the Merger Regulation.
- (24) On 23 May 2017, Altice asked for and obtained from the Commission an extension of the deadline to respond to the SO. On 18 August 2017, Altice submitted its response to the SO (the "SO Response").
- (25) On 21 September 2017, Altice presented the arguments contained in the SO Response in the course of an oral hearing (the "Hearing").
- (26) On 6 October 2017, the Commission addressed an RFI to Oi under Article 11(2) of the Merger Regulation. Oi responded on 20 October 2017 ("Oi's Reply").
- (27) On 19 October 2017, Altice submitted an addendum to the presentation provided at the Hearing (the "Addendum").
- (28) On 16 November 2017, the Commission addressed a letter to Altice in which it highlighted additional evidence in the Commission's file in support of the preliminary findings of the SO (the "Letter of Facts"). Oi's Reply was shared with Altice in the Commission's Letter of Facts.

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<sup>22</sup> ID[124]-ID[125].

<sup>23</sup> ID[129]-ID[133].

<sup>24</sup> ID[135].

<sup>25</sup> ID[142]-ID[145].

<sup>26</sup> ID[149]-ID[150].

<sup>27</sup> ID[156]-ID[179].

<sup>28</sup> ID[567]-ID[568].

<sup>29</sup> ID[572]-ID[575].

<sup>30</sup> ID[583]-ID[586].

- (29) On 15 December 2017, Altice submitted written comments on the Letter of Facts (the "Reply to the Letter of Facts").
- (30) On 18 January 2018, Altice submitted a revised version of the presentation provided at the Hearing.
- (31) On 11 April 2018 and on 23 April 2018, Advisory Committee meetings were held.

## 2. LEGAL FRAMEWORK

- (32) Article 3(1) of the Merger Regulation states that:

*"A concentration shall be deemed to arise where a change of control on a lasting basis results from [...]*

*(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of **direct or indirect control** of the whole or parts of one or more other undertakings."*

- (33) Article 3(2) of the Merger Regulation further states that:

*"Control shall be constituted by **rights, contracts or any other means** which, either separately or in combination and having regard to the considerations of fact or law involved, confer the **possibility of exercising decisive influence** on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking."*

- (34) The General Court of the European Union (the "General Court") has confirmed that: *"according to Article 3(2) of Regulation 139/2004, control is to be constituted, inter alia, by rights which confer the 'possibility' of exercising decisive influence on an undertaking. The decisive influence is therefore the acquisition of that control in the formal sense, and not the actual exercise of such control"*<sup>31</sup>.

- (35) Article 4(1), first paragraph, of the Merger Regulation states that: *"Concentrations with a [Union]<sup>32</sup> dimension defined in this Regulation shall be notified to the Commission **prior to their implementation** and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest"*.

- (36) Article 7(1) of the Merger Regulation states that: *"A concentration with a [Union] dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), **shall not be implemented either before its notification or until it has been declared compatible with the common market** pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6)."*

- (37) As stated by the General Court in its judgment in *Electrabel v. Commission*<sup>33</sup>, the system for the control of concentrations which the Merger Regulation established is designed to: *"allow the Commission to exercise effective control of all concentrations*

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<sup>31</sup> Marine Harvest, paragraph 58.

<sup>32</sup> Concentrations with a Union dimension are those meeting the thresholds defined in Article 1 of the Merger Regulation.

<sup>33</sup> Judgment of the General Court of 12 December 2012, *Electrabel v. Commission*, (the "Electrabel Judgment"), recitals 245-246.

*from the point of view of their effect on the structure of competition (seventh recital) and that the effectiveness of that system is ensured by the introduction of ex ante control of the effects of concentrations with a [Union] dimension."* The General Court considered that it follows from Article 4(1) and Article 7(1) of the Merger Regulation that the effectiveness of that control rests on a duty for undertakings to notify such concentrations in advance and to suspend their implementation until the Commission has adopted a decision declaring them compatible with the internal market. Furthermore, the limitations on the possibility of granting a derogation from the obligation to suspend the concentration laid down in Article 7 of the Merger Regulation (and the severity of the penalties provided for in Article 14 of the Merger Regulation in the event of a breach of that obligation) confirm the fundamental importance which the legislature placed on the obligation to suspend the concentration in the context of the control of concentrations, an approach which is justified in so far as the implementation of a concentration affects the structure of the market and may render more difficult the decisions whereby the Commission seeks, where necessary, to restore effective competition.

- (38) Indeed, the provisions of Article 4(1) and Article 7(1) of the Merger Regulation lie at the heart of the Union merger review system as they form the fundamental pillars on which the Union system of *ex ante* review of concentrations is based. The critical nature of Articles 4(1) and 7(1) of the Merger Regulation is set out in Recital 34 of the Merger Regulation, which provides that the obligation to notify a concentration and suspend its implementation pending clearance is essential "*to ensure effective control*" by the Commission.
- (39) While both Articles 4(1) and 7(1) of the Merger Regulation are fundamental to the *ex ante* Union merger control system structure, they enshrine distinct legal principles and thereby play distinct and complementary roles within the context of the control of concentrations exercised by the Commission.
- (40) On the one hand, Article 4(1) of the Merger Regulation relates to the act of bringing the existence of a proposed transaction with a Union dimension to the Commission's attention by way of a formal notification before such transactions are implemented. It constitutes a positive obligation to notify the Commission of a concentration before its implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest (as the case may be). By providing for the mandatory notification of concentrations, Article 4(1) of the Merger Regulation safeguards the Commission's ability to detect and investigate concentrations.
- (41) On the other hand, the standstill obligation enshrined in Article 7(1) of the Merger Regulation establishes that a concentration falling within the remit of the Merger Regulation shall not be implemented prior to its notification or prior to its clearance, thereby preventing the potential detrimental impact of those transactions on the competitive structure of the market pending the outcome of the Commission investigation. Article 7(1) of the Merger Regulation therefore constitutes a negative obligation not to implement a concentration until it has been notified and cleared. Article 7(1) of the Merger Regulation therefore goes beyond Article 4(1) of the Merger Regulation by safeguarding against the risk of the proposed concentration impeding effective competition in the internal market pending the conclusion of the Commission's review. Such safeguards cannot be achieved by notification alone.
- (42) Implementation of a concentration prior to notification and/or clearance can take different forms. Among them, early implementation of a concentration with a Union dimension in breach of Article 4(1) and/or Article 7(1) of the Merger Regulation

could result from: (i) the acquisition, prior to notification and/or clearance by the Commission, of the ability to exercise decisive influence; or (ii) the actual exercise, prior to notification and/or clearance by the Commission, of decisive influence; or both<sup>34</sup>.

- (43) Within this framework, control – that is, the possibility to exercise decisive influence and/or the actual exercise of decisive influence by the acquiring company over the target – can be acquired on a *de jure* and/or *de facto* basis; control can be explicitly conferred by way of the existence of a legal right, for example by rights included in the transaction documentation, or can be determined on the basis of the actual practice of exercising control.
- (44) Finally, Article 14(2)(a) and (b) of the Merger Regulation states that: “*The Commission may by decision impose fines not exceeding 10% of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)(b) or the undertakings concerned where, either intentionally or negligently, they:*
- (a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3).*
- (b) implement a concentration in breach of Article 7”.*
- (45) In summary, the key objectives of the system of sanctions laid down Article 14(2)(a) and (b) of the Merger Regulation are to ensure notification of concentrations with a Union dimension and to provide sufficient deterrence against implementation of those concentrations prior to notification and/or clearance.

### 3. APPLICATION TO THE PRESENT CASE

- (46) In October 2014, Altice entered into negotiations with Oi to purchase PT Portugal and signed the Transaction Agreement on 9 December 2014.
- (47) The Transaction Agreement sets out the principles by which Altice and Oi had agreed how the Target should conduct its operations between the Signing Date and the Closing Date. The relevant provisions included both a positive obligation to carry out PT Portugal's activities in the ordinary course of business and in accordance with past practice unless approved by Altice; and a negative obligation not to undertake a broad range of corporate, competitive, and commercial actions without Altice's prior consent.
- (48) As mandated by the Transaction Agreement, Oi was to send formal notices to Altice requesting its consent prior to taking certain actions, depending on the subject matter and the monetary value of such actions. Between the Signing Date and adoption of the Clearance Decision, Oi sent nine such formal notices to Altice, requesting formal approval for actions that it considered fell within the remit of the relevant provisions of the Transaction Agreement.

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<sup>34</sup> For purposes of clarity, early implementation of a concentration in breach of Article 4(1) and/or Article 7(1) of the Merger Regulation can take different forms and the acquisition of the possibility to exercise decisive influence and/or the actual exercise of decisive influence by the acquiring company over the target prior to notification and/or clearance of the transaction is only one of those potential forms of early implementation.

- (49) The communications between Oi and Altice foreseen by the Transaction Agreement were supplemented by frequent and direct contact between Altice and PT Portugal via telephone calls, emails and meetings. PT Portugal sought consent from Altice on a wide range of issues; reported on the progress of various on-going matters as well as providing detailed and granular financial information. In addition, Oi sought Altice's input and consent on matters that were not within the remit of the Transaction Agreement.
- (50) The Commission recognises that clauses determining the conduct of a target between signing a transaction agreement and closing the transaction in order to preserve its value are both common and appropriate in commercial transactions. However, as detailed in the present decision, the contacts between Altice and PT Portugal extended beyond what was necessary for the purposes of preserving the value of the target and resulted in Altice's being involved across all major areas of PT Portugal's activities, including the most commercially sensitive areas of the business such as pricing. In order to facilitate Altice's ability to make these decisions with regard to the PT Portugal business, PT Portugal provided detailed, confidential and up to date information on the relevant issues.
- (51) The Commission has found no evidence that Altice sought at any time to distance itself from Oi's (or PT Portugal's) request for consent or guidance, regardless of whether the request was being made pursuant to the Transaction Agreement or was made outside the framework provided for in the Transaction Agreement.
- (52) The information flow from PT Portugal to Altice was not limited to instances for which Altice's consent was required under the Transaction Agreement. PT Portugal shared confidential information with Altice regarding many facets of its business during meetings in February and March 2015 and also provided Altice with detailed financial and weekly key performance indicator ("KPI") data. This information, which Altice accepted, was granular, non-historic and by its nature, individualised.
- (53) The exchange of information took place between various PT Portugal and Altice executives without any safeguards - such as confidentiality agreements, non-disclosure agreements, or so-called clean team arrangements<sup>35</sup> - being put in place. The extended management of Altice (including: [Mr. A] (CEO); [Mr. B] (CFO); [Mr. C] (CTO); [Mr. D] (head of strategy and business development); [Mr. E] (general secretary, head of corporate and business development); [Mr. F] (COO); [Mr. G] (director of corporate affairs and M&A); [Mr. H] (director finance); and [Mr. I] (director, acquisitions); were involved in the discussions or received information to varying degrees, depending on the topic, with no limitations on how they then used, or disseminated, that confidential information.
- (54) Furthermore, much of this conduct by Altice, Oi and PT Portugal took place against the backdrop of pre-notification discussions and the Commission's Phase I investigation of the Transaction following which the Commission concluded that the Transaction raised serious doubts as to its compatibility with the single market. Altice, through its subsidiaries Cabovisão and ONI, was a direct competitor of PT Portugal. During its Phase I investigation, the Commission found that in a number of

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<sup>35</sup> The term clean team generally refers to a restricted group of individuals from the business that are not involved in the day-to-day commercial operation of the business who receive confidential information from the counter party to the transaction and are bound by strict confidentiality protocols with regard to that information.

markets, PT Portugal, Cabovisão and ONI, had high combined market shares and were close competitors. In order to remedy the Commission's concerns regarding this merger between competitors, Altice ultimately committed to divest Cabovisão and ONI, which essentially constituted the whole of Altice's businesses in Portugal.

- (55) The Commission concludes that as a result of the foregoing, Altice had the possibility to exercise decisive influence and/or resulted in the actual exercise of control over PT Portugal prior, to the adoption of the Clearance Decision and in some instances prior to notification, in breach of both Article 4(1) and Article 7(1) of the Merger Regulation.
- (56) Section 4 details why the Commission concludes that Altice implemented the Transaction prior to adoption of the Commission's clearance of the concentration, in breach of Article 7(1) of the Merger Regulation. In particular: Section 4.1 sets out the provisions of the Transaction Agreement which gave Altice the legal right to veto decisions regarding the commercial policy of PT Portugal; Section 4.2 describes incidents of Altice being involved in the day-by-day running of PT Portugal which allowed Altice to exercise decisive influence over PT Portugal; Section 4.3 sets out the Commission's conclusions as to why the terms of the Transaction Agreement as described in Section 4.1 and the Parties' conduct as described in Section 4.2 constitute implementation of the Transaction prior to the Commission having declared the Transaction compatible with the internal market.
- (57) Section 5 details why the Commission concludes that Altice implemented the Transaction prior to notification of the concentration, in breach of Article 4(1) of the Merger Regulation.

#### **4. BREACH OF ARTICLE 7(1) OF THE MERGER REGULATION**

##### **4.1. The Transaction Agreement**

- (58) The Transaction Agreement was entered into on 9 December 2014 between Altice S.A. and Altice Portugal S.A.<sup>36</sup> on the one hand, and Oi, the parent company of PT Portugal, on the other.

##### *4.1.1. The relevant provisions of the Transaction Agreement*

- (59) The Transaction Agreement includes a number of covenants given by the Seller to Altice on a range of issues including the management of the business between the Signing Date and the Closing Date; steps necessary to secure financing; ensuring that a carve out of certain assets is completed; and the change of control provisions in material contracts.
- (60) With regard to the restrictive covenant which governed the management of the PT Portugal business between the Signing Date and the Closing Date, the Transaction Agreement requires that Oi ensure that PT Portugal continues its activities solely within the normal and ordinary course of business and consistent with past practice (Article 6.1(a) of the Transaction Agreement), and that Oi refrain from undertaking certain actions without prior authorisation from Altice (Article 6.1(b) of the Transaction Agreement).

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<sup>36</sup> Altice Portugal S.A. was identified as the "buyer" in the Transaction Agreement; Altice S.A. is identified as the guarantor for the Transaction. See footnote 6.

- (61) The negative obligation detailed in Article 6.1(b) of the Transaction Agreement limited the actions that Oi could take vis-à-vis the Target across a wide range of issues relating to a variety of corporate and commercial matters, including certain business activities necessarily relating to the competitive behaviour of the Target, unless Oi procured Altice's prior written consent:

*"6.1 - Management between the date hereof and the Closing date*

*(b) ...until closing, the Seller shall procure that, except with the written consent of the Buyer (not to be unreasonably withheld or delayed and it being agreed and understood that in the event that the Buyer does not reply to any written consent request by the Seller sent in accordance with Section 9.7 below within 8 (eight) Business Days as of the receipt of such request or, with reference to any urgent matter reasonably evidenced as such by the Seller, within any reasonable term indicated by the Seller in its written request, Buyer's consent shall be deemed as silently given to the Seller), no Group Company<sup>37</sup> shall [...] take any of the actions below [...]:[...]*

*ii. enter into any transaction or commitment or assume or incur any liability (including any contingent liability) the value of which exceeds [...] Euros in the aggregate; or*

*iii. take any commitment in excess of [...] Euros and exceeding three months or which may not be terminated with a notice period of three months or less; or [...]*

*vii. enter into, terminate or modify any agreement qualifying as a Material Contract; or [...]*

*ix. except as provided in the Budget, acquire or agree to acquire any assets the aggregate value of which exceed [...] Euros; or [...]*

*xviii. recruit any new director or officer; or [...]*

*xx. terminate or amend the terms of any contract with any director or officer except if there is a just cause for such termination; or [...]*

*xxvi. modify its pricing policies or standard offer prices as applicable to its products and services to its customers (other than as reflected in the Budget) or amend any existing standard terms and conditions with customers, excluding any day to day action with specific customers aimed at preventing churn; or*

*xxvii. enter into, amend or terminate any Material Contracts other than for cause or in the ordinary cause of business; [...]."*

- (62) The term "Material Contracts" used in Articles 6.1(b)(vii) and (xxvii) of the Transaction Agreement was defined in Article 1 of the Transaction Agreement as: "...agreements to which any of the Group Companies is a party which involve, contractually or de facto, payment or other obligations to or from third parties of more than €[...] per year or more than €[...] for the entire duration of the agreement concerned in each individual case; or [...] (c) are Communication Agreements."

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<sup>37</sup> Defined in the Transaction Agreement as: "The Company together with those legal entities which the Company controls amongst the legal entities which are referred to in Exhibit A as "Companies within the Transaction Perimeter" as may be adjusted in accordance with the terms of Section 6.3(b) below"; where the Company was defined as PT Portugal SGPS S.A."

- (63) In turn, "*Communication Agreements*" was defined in Article 5.15 of the Transaction Agreement in a manner which covered various aspects of the Target's core telecommunications operations: "*A list of the material agreements relating to the ownership or operation of the Network or the sale or promotion of electronic communication services by the Company with an amount higher than [...] Euros per year (the "Communication Agreements") is set out in Schedule 5.15(a). The term Communication Agreements shall include the following, if any, to the extent they are material: (i) interconnection agreements, roaming agreements, backhaul agreements, infeasible rights of use or other agreements in respect of capacity; (ii) agency and distribution agreements under which third parties are authorised to sign up new subscribers to any Group Company's services; (iii) service provider, reseller, mobile virtual network operator or other wholesale agreements under which third parties are authorised by any of the Group Companies to resell such Group Company's electronic communication under brands other than such Group Company's brands; (iv) co-location, site-sharing, access and maintenance agreements for Network sites; (v) support, implementation, development, maintenance, outsourcing, disaster recovery or escrow agreements relating to the Network; (vi) procurement agreements for handsets, SIM cards and network equipment; (vii) Network roll-out agreements; (viii) agreements entered into with MNOs; (ix) contracts with television program (content) providers; (x) satellite capacity leasing agreements; (xi) tower sharing agreements; (xii) the consortium agreements and ancillary documentation (including the corresponding backhaul services agreements) relating to the entities of which any of the Group Company is a member and which operate submarine cables; and (xiii) basic telecommunications network purchase agreements.*"
- (64) Schedule 5.15(a) to the Transaction Agreement provided a list of contracts deemed to be 'material' Communication Agreements which had a value in excess of EUR [...] per year. These contracts were divided into several categories including: (i) PT Portugal's wholesale contracts; (ii) PT Portugal's providers (electricity, insurance, bank and financing contracts, other facilities); (iii) contracts with TV channel suppliers; and (iv) network infrastructure and smartphone distribution contracts.
- (65) Certain of the monetary thresholds noted above in recital (61) were subject to an automatic and significant reduction upon one month from signing. In this respect, Article 6.1(b) of the Transaction Agreement also provided: "*...it being agreed that, upon the expiry of a one month period after the Execution Date, the monetary thresholds referred to below shall be automatically modified so that: (i) any reference to a €[...] threshold shall be replaced by a €[...] threshold, and (ii) any reference to a €[...] threshold shall be replaced by a €[...] threshold*".
- (66) Finally, as regards the process for requesting Altice's written consent, Article 6.1(b) of the Transaction Agreement referred to the process detailed in Article 9.7 of the Transaction Agreement which provided that communications to Altice in connection with the Transaction Agreement were to be made in writing to Altice's CEO [Mr. A] and in-house counsel [Mr. E], with their legal counsel in copy.

#### 4.1.2. *The Commission's Assessment of the Transaction Agreement*

- (67) The Commission concludes that upon the Transaction Agreement coming into effect on the Signing Date, multiple provisions of Article 6 of Transaction Agreement granted Altice the possibility to exercise decisive influence over PT Portugal prior to the Commission having completed its review under the Merger Regulation.

- (68) As described in recital (33), the Merger Regulation states that control can be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence. In this regard, when establishing whether one undertaking controls another, it is clear from the Consolidated Jurisdictional Notice<sup>38</sup> that control can be either positive or negative (the power to block actions). For example, when considering whether a minority shareholder has a controlling interest, the Commission reviews the types of decisions over which it has a veto right<sup>39</sup>.
- (69) The Commission concludes that the Transaction Agreement, as a contract between Oi and Altice, constituted an agreement by Oi to not take certain actions regarding the PT Portugal business without Altice's prior consent. The Transaction Agreement therefore conferred upon Altice the ability to determine PT Portugal's actions with regard to the items listed in the Transaction Agreement.
- (70) The Commission recognises that it is both common and appropriate for clauses aimed at protecting the value of an acquired business between the signing of a purchase agreement and closing to be included in sale and purchase agreements. Consequently, as noted by Altice, the Ancillary Restraints Notice<sup>40</sup> envisages that agreements to abstain from material changes to a target's business until closing can be considered directly related and necessary to the implementation of a concentration. Indeed, such clauses restricting the seller from acting in a manner inconsistent with the outcome of the merger or from making major changes to the business can be reasonably justified to ensure the value of the business acquired is preserved, in general and as compared to the agreed purchase price. Such clauses can take a variety of different forms including prohibitions on certain actions, with or without a veto right, or a positive obligation to continue to run the target business in a certain manner.
- (71) However, such an agreement between the seller and the buyer which grants the buyer the possibility to exercise decisive influence over a target prior to clearance is only justified if strictly limited to that which is necessary to ensure that the value of the target is maintained. It follows that an agreement that afford the purchaser the possibility to exercise decisive influence over a target on matters that are not necessary for the preservation of the value of the target, for example because they pertain to the ordinary course of the target's business operations or the target's commercial policy, is not justified.
- (72) As a result of the commercial matters covered by the provisions of the Transaction Agreement and the low level of the monetary thresholds set in those provisions, the Transaction Agreement gave Altice a legal right to intervene in the Target's business beyond that which was necessary to guarantee maintenance of the value of the Target between the Signing Date and the Closing Date, and gave Altice the possibility to exercise decisive influence over the Target.

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<sup>38</sup> Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ C 95, 16.04.2008, p. 1 - 48

<sup>39</sup> For example, Consolidated Jurisdictional Notice, paragraph 68

<sup>40</sup> Commission Notice on restrictions directly related and necessary to concentrations, OJ C 56, 5.3.2005, p. 24–31.

- (73) In this respect, and for the reasons set out below, the Commission concludes that having the right to determine the conduct of PT Portugal's with regard to the following matters, individually and collectively, went beyond what was necessary to preserve the value of the Target's business pending the closing of the Transaction and gave Altice the possibility to exercise decisive influence over PT Portugal: (i) the appointment of the PT Portugal's senior management staff (see Section 4.1.2.1); (ii) PT Portugal's pricing policy and commercial terms and conditions with customers (see Section 4.1.2.2); and (iii) the ability to enter, terminate or modify a wide range of PT Portugal's contracts (see Section 4.1.2.3).
- 4.1.2.1. The possibility for Altice to influence the appointment of the Target's senior management staff
- (74) Article 6.1(b) of the Transaction Agreement contains a number of restrictions on Oi's decisions with regard to the personnel of the Target. Altice's prior consent was required before any of the following actions were taken by PT Portugal: (i) under Article 6.1(b)(xviii) PT Portugal could not: "*appoint any new director or officer*"; and (ii) under Article 6.1(b)(xx) PT Portugal could not: "*terminate or amend the terms of any contract with any officer or director, except if there is a just cause for such termination*".
- (75) The Commission considers that having a degree of oversight regarding the personnel of a target may be justified in order to preserve the value of the business between signing and closing, in respect of, for example, the retention of certain key employees who are integral to the value of the business, or in order to prevent material changes to the cost base of the business.
- (76) However, having a veto right over the appointment, dismissal and changes to the terms of employment of any officer or director goes beyond what is necessary for the purposes of value preservation and enables the acquirer to influence the commercial policy of the target. First, the veto right is extremely broad and covers such an undefined class of personnel not all of whom are likely to be relevant to the value of the business. Second, it affords Altice the possibility to co-determine the structure of the senior management of the Target, such as the appointment of the members of the board. By analogy, when considering the whether a minority shareholder has decisive influence over a company, paragraph 67 of the Commission's Consolidated Jurisdictional Notice, considers that: "*Veto rights which confer joint control typically include decisions on issues such as [...] the appointment of senior management*", therefore finding that such a right goes beyond what would be required to protect their financial interest in the company, and amounts to a strong indicia of control. Indeed, paragraph 69 of the Consolidated Jurisdictional Notice further develops this point: "*The power to co-determine the structure of the senior management, such as members of the board, usually confers upon the holder the power to exercise decisive influence on the commercial policy of an undertaking.*"
- (77) As such, the Commission considers that the veto rights contained in Article 6.1(b)(xviii) and Article 6.1(b)(xx) of the Transaction Agreement on the appointment of any new officer or director and the termination or amendment of the terms of any contract with any officer or director - irrespective of whether retention of that director or officer was integral to the value of the business - independently and together with the other veto rights discussed in this decision, conferred upon Altice the power to exercise decisive influence over the Target's senior management and therefore, its commercial policy. Such a provision therefore goes beyond simply protecting the value of the Target and gave Altice the possibility to exercise decisive influence over the Target.

#### 4.1.2.2. The possibility for Altice to influence the Target's pricing policies

- (78) Article 6.1(b)(xxvi) of the Transaction Agreement relates to PT Portugal's terms of business regarding its customers, stating that without Altice's consent, Oi could not *"modify [the Target's] pricing policies or standard offer prices as applicable to its products and services to its customers (other than as reflected in the Budget)"*. Moreover, this provision required Altice's consent in relation to the amendment of: *"any existing standard terms and conditions with customers excluding any day to day action with specific customers aimed at preventing churn"*.
- (79) The Commission considers that decisions on pricing form a fundamental part of a company's commercial policy and the unfettered ability to set prices is essential for any company to compete independently and effectively in the market.
- (80) The requirement to obtain Altice's consent prior to modifying its pricing policies and standard offer prices inherently reduced the Target's discretion and ability to act independently on the market. The Commission therefore concludes that Altice's veto right over the Target's commercial decisions goes beyond what was necessary to guard against material changes to the Target's business for the purposes of preserving its value.
- (81) Moreover, the Commission notes that Article 6.1(b)(xxvi) of the Transaction Agreement was extremely broad and gave Altice a veto right over a large proportion of PT Portugal's pricing decisions and terms of business with its customers.
- (82) First, given that no specific definition of "standard offer prices" was included in the Transaction Agreement, Altice's veto right over PT Portugal's "pricing policy and standard offer prices" essentially gave Altice the possibility to veto any and all changes to the Target's prices between the Signing Date and the Closing Date. Furthermore, while modifications to the pricing policies or standard offer prices reflected in the budget were excluded, the budget annexed to the Transaction Agreement referred to did not contain any details of pricing policies or standard offer prices thereby rendering the limitation meaningless.
- (83) Second, Altice's veto right over amendments to PT Portugal's existing standard terms and conditions with customers gave Altice the possibility to veto all changes to the contracts with PT Portugal's customers, in addition to the prices that PT Portugal charged. The Commission considers that the exclusion of day-to-day actions with specific customers aimed at preventing churn is likely to cover only a limited number of changes in a limited number of circumstances for "specific" customers and would therefore only have a limited impact in practice as compared to the vast majority of changes to PT Portugal's standard terms and conditions remaining subject to Altice's oversight.
- (84) In conclusion, the Commission considers that the veto rights contained in Article 6.1(b)(xxvi) of the Transaction Agreement regarding PT Portugal's pricing policy, standard offer prices and standard terms and conditions with its customers, independently and together with the other veto rights discussed in this decision, conferred upon Altice the power to determine the Target's commercial policy. Such a provision therefore goes beyond simply protecting the value of the Target, and gave Altice the possibility to exercise decisive influence over the Target.

4.1.2.3. The possibility for Altice to influence the Target entering into, terminating or modifying contracts

(a) Relevant provisions and definitions

(85) Article 6.1(b) of the Transaction Agreement contains a number of restrictions on Oi's decisions with regard to the types of contracts that PT Portugal could enter into. Altice's prior consent was required before any of the following actions were taken by PT Portugal: (i) under Article 6.1(b)(ii) PT Portugal could not: "*enter into any transaction or commitment or assume or incur any liability (including any contingent liability) the value of which exceeds [...] Euros in the aggregate*"; (ii) under Article 6.1(b)(iii) PT Portugal could not: "*take any commitment in excess of [...] Euros and exceeding three months or which may not be terminated with a notice period of three months or less*"; (iii) under Article 6.1(b)(ix) PT Portugal could not: "*except as provided in the Budget, acquire or agree to acquire any assets the aggregate value of which exceed [...] Euro*"; (iv) under Article 6.1(b)(vii) PT Portugal could not: "*enter into, terminate or modify any agreement qualifying as a Material Contract*"; and (v) under Article 6.1(b)(xxvii) could not: "*enter into, amend or terminate any Material Contracts other than for cause or in the ordinary course of business*".

(86) Pursuant to Article 6.1(b) of the Transaction Agreement, the thresholds in Article 6.1(b)(ii), (iii) and (ix) automatically reduced to [...] of the original amount as of one month from the date of execution of the Transaction Agreement. Accordingly, as of 10 January 2015, Altice's consent was required in relation to all transactions and commitments in excess of EUR [...].

(87) As can be seen from the extract in recital (61), the actions for which PT Portugal needed Altice's prior approval were defined in two different ways, (i) with monetary thresholds above which transactions, commitments, liabilities and acquisitions were caught (generally EUR [...] which was reduced after one month to EUR [...]), and (ii) for contracts falling within the contractual definition of "Material Contracts". The definition of "Material Contract" was, in summary: (i) any contract with a value of more than EUR [...] per year or EUR [...] for the contract's duration<sup>41</sup>; (ii) contracts which included non-compete or restraint of trade provisions; (iii) contracts which granted exclusive rights; and (iv) contracts defined as Communication Agreements.

(88) "Communication Agreement" is defined in Article 5.15(a) of the Transaction Agreement which lists all the categories of agreements that, if material, should be considered Communication Agreements. Article 5.15(a) states that Schedule 5.15(a) to the Transaction Agreement lists the material agreements with a value over EUR [...]. A definition of "material" in this context is not provided. Altice submits that only the contracts listed in Schedule 5.15(a) constitute Communication Agreements.

(b) Summary of the Commission's assessment

(89) The Commission considers that having a degree of oversight over contracts which a target can enter into, and the commitments it can make, between signing and closing

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<sup>41</sup> In response to Question 1(c) of the Commission's response to its RFI to Oi of 6 October (Doc ID [693], Oi explains that it considers that the thresholds were in fact lower than this as they were subject to a reduction after 1 month similarly to the thresholds as described in recital (96). Altice disputes this interpretation of the Transaction Agreement. The Commission does not consider it necessary to reach a final determination on this matter as its conclusions remain the same either way: contracts not relevant to preservation of the value of the Target business were caught by the definition of Communication Agreement and the thresholds in Articles 6.1(b)(ii), (iii) and (ix) of the Transaction Agreement.

may be justified in order to preserve the value of a target, for example, to preserve the perimeter of the business or to guard against commitments of such magnitude that the value of the business could be affected. However, the Commission considers that having a veto right over almost all commercial action with a low monetary threshold in the context of the target's business goes beyond what would be necessary to guard against material changes to a target's business for the purposes of preserving its value. In particular, the Commission considers that issues falling within a target's ordinary course of business are unlikely to be relevant to preserving the value of the target's business.

- (90) The Commission concludes that the range of contracts and action over which Altice had a veto right was so broad that it gave Altice the possibility to exercise decisive influence over PT Portugal. This is based on an assessment of the monetary thresholds set in Articles 6.1(b)(ii), (iii) and (ix) of the transaction Agreement, from the definition of "Material Contracts" applicable for Article 6.1(b)(vii)/(xxvii) and the definition of a subset of the "Material Contracts", the "Communication Agreements". In particular, the Commission concludes that the monetary thresholds were set at a level that brought contracts that were not relevant to preserving the value of the Target's business under Altice's oversight. The Commission therefore concludes for the reasons detailed in recitals (91) - (108) that Altice had the possibility to exercise decisive influence over PT Portugal pursuant to the Transaction Agreement.
- (c) A very broad range of commercial actions was covered
- (91) The Commission considers that the breadth of actions covered by the definition of Material Contract relevant for Articles 6.1(b)(vii)/(xxvii) combined with the generic nature of Articles 6.1(b)(ii), (iii) or (ix) which cover all transactions, commitments, liabilities and acquisitions was extensive. Together, the provisions cover essentially all commercial arrangements for both variable costs and fixed costs with respect to commercial, financial and administrative matters. The Commission considers that this resulted in a large number of issues that affect the competitiveness, commercial policy and day-to-day running of the Target. Accordingly, Altice would have had oversight over matters that cannot be justified in order to preserve the value of PT Portugal.
- (92) While the definition of Communication Agreements (within the definition of Material Contracts and therefore covered by Articles 6.1(b)(vii) and (xxvii) of the Transaction Agreement) appears more limited, nevertheless granted Altice oversight of contracts which went to the heart of PT Portugal's commercial operations. The definition of "Communication Agreement" in the Transaction Agreement covered all contracts that were: (i) material which was not defined; and (ii) fell within a comprehensive list of types of agreements that telecommunications companies generally have<sup>42</sup>. This means that there was no clear limit on Altice's veto right regarding the contracts, either in terms of subject matter or impact on the business.

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Namely: Interconnection agreements, roaming agreements, backhaul agreements, indefeasible rights of use or other agreements in respect to capacity; agency and distribution agreements under which third parties are authorised to sign up new subscribers to any Group Company's services; service provider, reseller, mobile virtual network operator or other wholesale agreements under which third parties are authorized by any of the Group Companies to resell such Group Company's electronic communication services under brands other than such Group Company's brands; co-location, site-sharing, access and maintenance agreements for Network sites; support, implementation, development, maintenance,

- (93) This is supported by Oi's response to the Commission's RFI of 6 October 2017 in which it confirms that under the Transaction Agreement, Altice had a consent right over all Communication Agreements, including any Communication Agreement that could be considered by either Party as "material" (not defined in the Transaction Agreement), and not limited to the list in Schedule 5.15(a) of the Transaction Agreement<sup>43</sup>.
- (d) The value thresholds were low in the context of the PT Portugal business
- (94) The Commission considers that the monetary thresholds in Articles 6.1(b)(ii), (iii) and (ix) of the Transaction Agreement and definition of Material Contracts were set at a level that included contracts of a value that would not have a material impact on the value of the PT Portugal business. Accordingly, Altice had oversight over matters that cannot be justified in order to preserve the value of PT Portugal.
- (95) First, the Commission looked into how Altice and Oi came to an agreement as regards the level of these materiality thresholds. Based on the information provided by Altice<sup>44</sup>, the materiality thresholds in the Transaction Agreement were subject to a negotiation process between Altice and Oi, and not based on objective criteria such as the size and scope of the Target's activities (PT Portugal was valued at EUR 7 400 million and achieved revenues of EUR 2 597 million in 2013<sup>45</sup>) or the value of PT Portugal's contracts that were examined as part of the due diligence process.
- (96) The correspondence between Altice and Oi shows that, starting on 2 November 2014, Altice and Oi executives exchanged several drafts of the Transaction Agreement during the negotiations, with Altice insisting during the negotiations on establishing a materiality threshold of EUR [...] regarding Article 6.1(b)(ii) of the Transaction Agreement: "*any transaction or commitment or assume or incur any liability the value of which exceeds [...] euros in the aggregate*", and Oi considering that a much higher EUR [...] threshold would be more appropriate, "*in accordance with the Company's governance practice*"<sup>46</sup>. As Altice submits in the SO Response, Oi considered the lower thresholds of EUR [...] and EUR [...] that Altice was pushing for to be: "*very burdensome for them*"<sup>47</sup>. In its response to the Commission's RFI of 6 October 2017, Oi confirmed that those thresholds were more stringent than those pre-existing within PT Portugal<sup>48</sup> and states that it would have been nearly impossible to change the approval processes of PT Portugal in a way that the thresholds of EUR [...] and EUR [...] would be properly observed just after the execution date. Altice and Oi agreed on the final materiality thresholds during a negotiation meeting on 18 November 2014<sup>49</sup>, with the higher thresholds being in

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outsourcing, disaster recovery or escrow agreements relating to the Network; procurement agreements for handsets, SIM cards and network equipment; Network roll-out agreements; agreements entered into with MNOs; contracts with television program (content) providers; satellite capacity leasing agreements; tower sharing agreements; the consortium agreements and ancillary documentation (including the corresponding backhaul services agreements) relating to the entities of which any of the Group Company is a member and which operate submarine cables; and basic telecommunications network purchase agreements.

<sup>43</sup> Doc ID [693], response to Question 3

<sup>44</sup> Altice's response to Commission's RFI of 21 December 2016, Annex 1.41, 1.4.2, 1.5, 1.61 and 1.6.2 [ID 586].

<sup>45</sup> Form CO, points 2.2.2, 3.3 and Annex 4.6.a.

<sup>46</sup> Altice's response to Commission's RFI of 21 December 2016, Annex 1.7.2, [ID 586].

<sup>47</sup> SO Response, paragraph 232.

<sup>48</sup> Doc ID [693], response to Question 1(b).

<sup>49</sup> Altice's response to Commission's RFI of 21 December 2016, page 3 [ID 573-574].

place for the first month to give PT Portugal a transition period in which to adjust its internal reporting processes. In summary, the monetary thresholds included in the Transaction Agreement gave Altice greater powers of scrutiny over the operations of PT Portugal compared to those that were in place in PT Portugal's ordinary course of business.

- (97) Second, the Commission analysed the list of contracts disclosed in the data room for the purpose of the due diligence, and their value (where provided)<sup>50</sup>. The process of due diligence, based wholly or in part on the contents of the data room, is fundamental in an acquirer's decision to proceed with an acquisition and establishing the terms on which it is willing to do so. The documents that the seller places in a data room, and the acquirer requests be included, therefore give a good indication of the contracts that are likely to affect the value of the business.
- (98) This analysis showed that contracts relating to the development of the network, contracts for the maintenance and support of the network, or content provision contracts had a value of [...] (for example, contracts with television providers for EUR [...] or EUR [...]; or a contract for network maintenance and services contracts for over EUR [...]) and that certain supply agreements potentially falling under the Article 5.15 of the Transaction Agreement (the so-called "Communication Agreements") had an aggregate value of [...] euros (for instance, [...] construction and maintenance agreement amounted to over EUR [...] for a period of [...] years).
- (e) Contracts within the ordinary course of business were covered
- (99) The Commission considers that whether a contract falls within the ordinary course of a target's business is a good indication (although not decisive) of whether it is likely to have a material impact on the value of the target. A contract falling within the ordinary course of business is unlikely to have a material impact on the value of the target, such as to justify a right of oversight for the acquirer pending the receipt of approval under Article 7(1) of the Merger Regulation. On the other hand, it may be the case that an issue falls outside the ordinary course of business but is still not relevant to maintain the value of a target. Careful analysis is therefore required depending on the context of the target business.
- (100) In the present case, the Transaction Agreement contained two apparently duplicative and inconsistent clauses: Article 6.1(b)(vii) and Article 6.1(b)(xxvii) of the Transaction Agreement with no indication as to which was the prevailing provision. The coexistence of both sub-clauses gave rise to ambiguity as to whether Altice's consent was required with respect to all Material Contracts, irrespective of whether they were concluded/modified or terminated in the ordinary course of business.
- (101) The Commission considers that, in practice, contracts concluded in the ordinary course of business were not excluded from the remit of this provision. No general limit was included in Article 6.1(b) of the Transaction Agreement that only decisions outside the ordinary course of business were to be under Altice's purview. For a number of specific items under Article 6.1(b) of the Transaction Agreement, matters falling in the ordinary course of business were explicitly excluded, but not for others. It cannot therefore be interpreted that all decisions falling outside the ordinary course of business were excluded in accordance with the general spirit of Article 6.1.

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<sup>50</sup> Altice's response to Commission's RFI of 21 December 2016, Annex 3 [ID 586].

- (102) In its response to the Commission's RFI of 6 October 2017, Oi confirmed that it interprets the Transaction Agreement as meaning that it was obliged to seek Altice's consent on all Material Contracts, regardless of whether they fell within the Target's ordinary course of business<sup>51</sup>. That is to say that in practice Oi considered Article 6.1(b)(vii) to be the prevailing clause and that Altice had a veto right over all matters which met the low monetary thresholds regardless of whether they were in the ordinary course of business. As such, Oi's interpretation is consistent with the Commission's that Altice had a veto right over matters within the ordinary course of business that went beyond what was necessary to preserve the value of the Target pending clearance.
- (f) In practice, the number of contracts covered by the relevant clauses was high and often related to ordinary course of PT Portugal's business
- (103) The Commission examined how many contracts concluded by PT Portugal between the Signing Date and the Closing Date would actually be caught by the provisions and would thus need Altice's consent under the Transaction Agreement using the subset of Communication Agreements as a proxy. The Commission examined the list of items (including contracts concluded or extended by PT Portugal/MEO with third parties) that were discussed during the board meetings of PT Portugal and MEO board meetings between 1 December 2014, until mid-May 2015<sup>52</sup>.
- (104) The number of contracts that could qualify as Communication Agreements within the meaning of Article 5.15 of the Transaction Agreement is high. Between 1 December 2014 and 31 May 2015, PT Portugal's board and MEO's board of directors discussed [...] Communication Agreements ([...] for PT Portugal and [...] for MEO). For MEO board meetings, the figure represents more than a quarter of all issues discussed at board meetings (which also included many other items which were not contracts or had no monetary value).
- (105) The Commission also observes that by their nature, these [...] contracts discussed at the board meetings were important for the day-by-day functioning of the PT Portugal business, including contracts for procuring network equipment, roaming agreements, procurement contracts for SIM cards and handsets or contracts with television content providers.
- (106) Further, while these [...] contracts fell into the definition of Communication Agreements, in most cases, these contracts were of a low value (e.g. only a few had a value in excess of EUR [...]) and therefore were unlikely to have an impact on the value of the Target, which Altice had agreed to acquire for EUR 7 400 million. Nevertheless, such contracts, which had a low monetary value (for example procurement contracts for various network equipment or for maintenance all with a monetary value far below EUR [...]), fell into the category of contracts for which Altice's consent was required by the Transaction Agreement.
- (107) The Commission notes, based on the notices sent by Oi to Altice pursuant to Article 9.7 of the Transaction Agreement, that only a small proportion of these Communication Agreements were formally submitted to Altice for approval (although for some Communication Agreements that did not reach the materiality thresholds, PT Portugal sought Altice's consent through less formal ways than those laid down in the Transaction Agreement, including via e-mail). However, as

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<sup>51</sup> Doc ID [693], response to Question 2.

<sup>52</sup> MEO is the Mobile business of PT Portugal.

explained in recital (173), the relevant legal test is whether Altice had the possibility to exercise decisive influence, not whether it actually exercised its veto right in a particular circumstance.

- (g) Conclusion on the possibility for Altice to influence the Target entering into, terminating or modifying contracts
- (108) The Commission concludes that the veto rights contained in Article 6.1(b)(ii), 6.1(b)(iii), 6.1(b)(ix), 6.1(b)(vii) and 6.1(b)(xxvii) of the Transaction Agreement regarding PT Portugal's ability to enter into, terminate or modify a wide range of contracts, independently and together with the other veto rights discussed in this decision, conferred upon Altice the power to determine the Target's commercial policy. Such a provision therefore goes beyond simply protecting the value of the Target and gave Altice the possibility to exercise decisive influence over the Target.

#### 4.1.3. *Altice's views on the Transaction Agreement*

- (109) Altice disputes that the Transaction Agreement granted it the possibility to exercise decisive influence over PT Portugal because: (i) the relevant clauses of the Transaction Agreement were strictly necessary for the preservation of the value of PT Portugal between the Signing Date and the Closing Date; (ii) the Transaction Agreement did not provide it with the possibility to exercise decisive influence over PT Portugal; and (iii) Altice did not interpret the Transaction Agreement as giving it a veto right over PT Portugal's decisions. These arguments are addressed in turn below.

##### 4.1.3.1. The relevant clauses of the Transaction Agreement were strictly necessary for the preservation of the value of PT Portugal between the Signing Date and the Closing Date

- (110) Altice submits that the relevant clauses of the Transaction Agreement were strictly necessary for the preservation of the value of PT Portugal between the Signing Date and the Closing Date given that: (i) such pre-closing covenants are standard in merger transactions and have been accepted in the Commission's decisional practice; (ii) the covenants were strictly limited to ensuring the transfer to Altice of the full value of PT Portugal's business; and (iii) preserving the value of PT Portugal's business was all the more necessary given the context of the Transaction. The Commission assesses each of these arguments in turn below.
- (111) First, Altice argues that in principle the inclusion of clauses governing the behaviour of a target between signing and closing is standard commercial practice. It argues that it is critical for the purchaser to make sure that, as a result of strategic decisions which will be taken by the acquired business between signing and closing, the value of the acquired business is not downgraded and will still effectively correspond to the price paid by the purchaser. In this vein, Altice argues that equivalent clauses were explicitly approved by the Commission as ancillary restraints under the old Merger Regulation<sup>53</sup>. Its second argument, a corollary to the first, is that in practice the clauses in question were strictly limited to ensuring the transfer of the full value of the PT Portugal business by maintaining the value, perimeter and long term performance of the business. It argues that the clauses in the Transaction Agreement i.e. a positive obligation to operate the business in the ordinary course of business

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<sup>53</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentration between undertakings, OJ L 395, 30.12.1989, pages 1 – 12.

and a list of key decisions that require the purchaser's prior consent, were therefore standard commercial practice.

- (112) The Commission concurs with Altice's first argument; the Commission recognises that it is both common and appropriate for clauses aimed at protecting the value of an acquired business between the signing of a purchase agreement and closing to be included in sale and purchase agreements. Such an agreement between the seller and the buyer determining the conduct of a target however can only be reasonably justified if strictly limited to that which is necessary to ensure that the value of the target is maintained and does not afford the purchaser the possibility to exercise decisive influence over the target, for example by affecting the ordinary course of the target's business operations or the target's commercial policy. With regard the second argument, for the reasons set out in this Section 4.1, the Commission considers that a number of the provisions included in Article 6.1(b) of the Transaction Agreement were not strictly limited to ensuring that the value of the Target was maintained, and afforded Altice the possibility to exercise decisive influence over PT Portugal. These provisions are therefore not of the same type as those envisaged by the Ancillary Restraints Notice, or as considered in the Commission's decisional practice.
- (113) Third, Altice submits that specific circumstances surrounding the purchase made it "all the more necessary" to ensure the preservation of the value of PT Portugal. In particular, it submits that Altice had reasons to believe that the value of PT Portugal might deteriorate prior to the Closing Date considering: (i) specific financial and judicial issues affecting PT Portugal and Oi related to the Rio Forte scandal; (ii) a long standing pattern of value leakage from PT Portugal to related parties; and (iii) the concerns that Oi could financially and operationally prioritise its Brazilian operations to the detriment of PT Portugal. Altice also submits that it was provided with limited information during the due diligence process, had to enter a Transaction Agreement providing for reduced liability of the seller, and it was unclear whether the Oi would be able to honour any obligations including indemnification in favour of Altice. Given these factors and the specific risks facing the PT Portugal business, the pre-closing covenants were critical to protect Altice's financial interests.
- (114) The Commission rejects these arguments. The Transaction Agreement includes specific provisions to address each of the risks facing the PT Portugal business identified by Altice; in addition to the requirement Article 6.1(a) of the Transaction Agreement to continue to run the business consistently with past practice, including: (i) Clause 6.1(b)(xii) of the Transaction Agreement which relates to contracts, trading or financial arrangements with the Seller and its affiliates; (ii) Clause 6.1(b)(xiii) of the Transaction Agreement which relates to the payment of dividends, capital contributions, reserves, premiums or other distributions; and (iii) Clause 6.1(b)(xxi) of the Transaction Agreement which relates to settling litigation where the amount exceeds EUR [...].
- (115) The Commission has not taken issue with these provisions in the present decision, as they relate directly to the particular circumstances to which Altice refers and because they do not relate to PT Portugal's commercial policy. Conversely, Altice has not provided sufficient justifications as to why clauses governing the appointment of the Target's senior management staff, PT Portugal's pricing policy and commercial terms and conditions with customers and the ability to enter, terminate or modify a wide range of PT Portugal's contracts would be relevant to minimising these risks.
- (116) Furthermore, the Commission also recalls that if Altice needed to take specific measures in order to address the risks Altice submits were facing PT Portugal, pursuant to Article 7(3) of the Merger Regulation, undertakings can request that the

Commission grant them derogation from the standstill obligation imposed in Article 7(1) of the Merger Regulation so as to enable the concentration to be implemented prior to receipt of clearance, subject to specific safeguards. Altice did not submit a request, either formally or informally, for derogation from the standstill obligation to allow Altice to take actions to guard against these allegedly serious risks.

- (117) In conclusion, the Commission acknowledges that pre-closing covenants dictating how a target business operates between signing and closing can be justified in order to prevent material changes to, and preserve the value of, the target. For the reasons set out above, however, the Commission concludes that certain of the rights granted to Altice in Article 6.1(b) of the Transaction Agreement were not limited to preventing material changes to, and preserving the value of, PT Portugal.
- 4.1.3.2. The Transaction Agreement did not provide Altice with the possibility to exercise decisive influence over PT Portugal
- (118) Altice submits that the Transaction Agreement did not provide it with the possibility to exercise decisive influence over PT Portugal for the following reasons: (i) Altice's rights derived from the Transaction Agreement were merely consultation rights and should not be confused with the rights of a minority shareholder; and (ii) Altice had no veto right regarding PT Portugal's management staff, pricing strategy or contracts. The Commission addresses each of these arguments below.
- (119) First, Altice argues that its rights under the Transaction Agreement should not be confused with the veto right of a minority shareholder: (i) because its consent could not be unreasonably withheld; (ii) there are important legal distinctions between a controlling minority shareholder and Altice's "consultation" right.
- (120) The Commission rejects Altice's argument that the Transaction Agreement afforded it a mere consultation right. A consultation right suggests that Oi would have been contractually permitted to take the actions listed, provided that it had informed Altice and considered its views. On the contrary, the Transaction Agreement clearly states in Article 6.1(a) of the Transaction Agreement that PT Portugal's business must be carried on in the ordinary course of business, other than when accepted in writing by Altice, and Article 6.1(b) of the Transaction Agreement clearly states that decisions that cannot be taken, unless Altice has provided its prior consent. The Commission considers that this leaves no room for doubt; Oi was contractually bound not to take the specified actions without Altice's written consent.
- (121) The contemporaneous evidence in the Commission's file shows that Altice considered that the rights granted under Article 6 of the Transaction Agreement afforded it a consent right. The evidence shows that Altice consistently referred to a consent right for which it had to give specific approvals; see for example: (i) recital (309) where Altice stated: "*we are requested to approve*" in response to a request from Oi; (ii): "*Pursuant to Clause 6(1) of the SPA the Buyer hereby authorizes the Seller to contract the [...] described in the Letter*"<sup>54</sup>; (iii) "*following the call we just add I confirm our approval for the [...] office lease contract*"<sup>55</sup>; and (iv) in multiple instances: "*We hereby confirm that we do grant our consent for the performance of the necessary actions to implement and/or carry out the items as presented in the*

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<sup>54</sup> Letter from Altice to Oi dated 24 February 2015, provided as Annex 3.2.2 to Altice's response of 15 September 2016 to Commission RFI of 30 August 2016

<sup>55</sup> Email from Altice to Oi dated 30 April 2015, provided as Annex 5.7 to Altice's response of 15 September 2016 to Commission RFI of 30 August 2016

*Notice, except for the following items for which our consent is denied at this stage*<sup>56</sup>. At paragraph 160 of the SO Response, Altice refers to 6.1(b) of the Transaction Agreement as a list of key decisions that require the purchaser's prior consent.

- (122) Moreover, the fact that Altice actually denied its consent under the relevant provisions of the Transaction Agreement as described by Altice in the SO Response<sup>57</sup>, and in Section 4.2 of this decision, concretely demonstrates that it could effectively exercise its veto right under the Transaction Agreement.
- (123) This conclusion is supported by Oi's response to the Commission's RFI of 6 October 2017. Oi confirms that the Transaction Agreement affording Altice a consent right which allowed it to block certain actions being taken from the Signing Date until the Closing Date. Oi states in its response that it considered that the actions listed in Article 6.1(b) of the Transaction Agreement required Altice's approval, and that it submitted matters under Article 6.1(b) for Altice's consent<sup>58</sup>.
- (124) Contrary to Altice's submission, the Commission does not consider the fact that the contractual term requiring its consent was not to be unreasonably withheld meant the provision amounted to a mere consultation right over each of the items specified. The caveat that consent is "not to be unreasonably withheld" is a common limiter used in commercial contracts and widely understood to represent a threshold that is easily distinguishable from a consultation right, or a right to be informed. Indeed, it is wholly possible that Altice could reach a different commercial decision from Oi without acting unreasonably.
- (125) In a number of instances<sup>59</sup>, Altice argues that the obligation in Article 6.1(a) of the Transaction Agreement on Oi that it must ensure that the Target continues to operate in accordance with its ordinary course of business and consistently with past practice, implies that matters which were in the ordinary course of business and consistent with past practice did not require Altice's consent under Article 6.1(b) of the Transaction Agreement (which foresees that Altice's consent must be sought prior to PT Portugal taking numerous, specific actions). The Commission rejects this argument. Articles 6.1(a) and 6.1(b) clearly set out two separate obligations, with no indication that Article 6.1(a) supersedes Article 6.1(b). This interpretation is consistent with Oi's interpretation: see for example regarding whether Material Contracts in the ordinary course of business were subject to Altice's veto right (see recital (102)). Moreover, and as explained in recital (101), there was no general limitation in the body of Article 6.1(b) that only decisions outside the ordinary course of business were to be under Altice's purview. Rather, Article 6.1(b) explicitly lists those matters falling in the ordinary course of business that should not be subject to Altice's consent right – thereby indicating that all other actions falling within the scope of Article 6(1)(b) were subject to Altice's purview, regardless of whether they fell within the scope of PT Portugal's ordinary course of business.
- (126) With regard to whether it had equivalent rights to a controlling minority shareholder, Altice submits that a controlling minority shareholder has: (i) the right to participate

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<sup>56</sup> Letter from Altice to Oi dated 13 March 2015, provided as Annex 4.4.2 to Altice's response of 15 September 2016 to Commission RFI of 30 August 2016; Letter from Altice to Oi dated 2 April 2015, provided as Annex 5.2.2 to Altice's response of 15 September 2016 to Commission RFI of 30 August 2016

<sup>57</sup> Paragraphs 248 – 253 of the SO Response

<sup>58</sup> Doc ID [693], see for example the responses to Question 4(a), 4(b) and 4(c).

<sup>59</sup> For example paragraphs 205 and 211 of the SO Response.

in the annual general meeting; (ii) an entitlement to minimum information rights; and (iii) the ability to initiate judicial actions. It submits in comparison that: (i) Altice did not appoint any members of PT Portugal's board of directors or management team; (ii) the rights granted to Altice were for a short duration; (iii) Altice could not require the PT Portugal management team to report on the PT Portugal's financial situation; and (iv) Altice's available recourse in the event on a breach of covenant was relatively limited. Given this disparity, it argues that it did not have the possibility to exercise decisive influence over PT Portugal.

- (127) The Commission rejects Altice's argument that it is necessary to have the rights equivalent to that of a controlling minority shareholder in order to be able to exercise decisive influence. As noted in Section 4.1.2, the Commission concludes that the Transaction Agreement, as a contract between Oi and Altice, constituted an agreement by Oi to not take certain actions regarding the PT Portugal business without Altice's prior consent and therefore conferred upon Altice the ability to determine PT Portugal's actions with regard to the items listed in the Transaction Agreement. It follows therefore that: (i) it is not necessary to be a shareholder of a company to have the possibility to exercise decisive influence; and in turn: (ii) it is not necessary to have the rights equivalent to a shareholder to have the possibility to exercise decisive influence. Indeed, the possibility of exercising decisive influence on an undertaking can exist on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved.
- (128) Regardless of rights which may be afforded to a controlling minority shareholder under Portuguese national law, which Altice considers would have been necessary for it to be able to exercise decisive influence, the Consolidated Jurisdictional Notice is clear that the concept of control under the Merger Regulation is not related to national legislation. The rights afforded to minority controlling shareholders under Portuguese national law is therefore not relevant to whether Altice had the possibility to exercise decisive influence under the Merger Regulation. Neither is it relevant that Altice's rights under the Transaction Agreement were limited in time to the period from the Signing Date to the Closing Date.
- (129) Moreover, the Commission notes that Altice in fact did have rights under the Transaction Agreement pertaining to those which it considers are necessary for a minority shareholder to be able to exercise control as set out in the proceeding recitals.
- (130) With regard to participation in shareholder meetings, under Article 6.1(b)(xxiii) of the Transaction Agreement, Oi had to seek Altice's consent in order to pass any resolutions of the shareholders whether in general meeting or otherwise. Therefore, while Altice may not have had a right of physical attendance or participation in shareholders' meetings, the consent right contained in Article 6.1(b)(xxiii) of the Transaction Agreement grants Altice a contractual right equivalent to that of a controlling shareholder.
- (131) With regard to information reporting, under Article 6.9 of the Transaction Agreement Oi was required to provide Altice with: *"any information regarding the business affairs of the Group Companies, the properties, books, records, contracts, agreements, and any other document of or pertaining to the Group companies as the Buyer may reasonably request"* which goes far beyond the minimum information requirements Altice refers to in the SO Response. In practice PT Portugal was providing confidential commercial information to Altice, as further described in Section 4.2.2.

- (132) With regard to the right to initial judicial proceedings, Altice had a number of potential avenues of recourse. As noted by Altice in the SO Response<sup>60</sup>, pursuant to Article 8.1(a)(v) of the Transaction Agreement, it could refuse to close in case of a breach of a covenant in the event that damages reached a certain threshold. In addition, under Article 7, Oi undertook to repay Altice a portion of, or adjustment to, the purchase price for any loss arising in connection with a breach the covenants in Article 6 of the Transaction Agreement. These rights were underpinned by the obligation in Article 6.11 of the Transaction Agreement which placed Oi under a continual obligation to update the disclosure schedules and report any breaches of the pre-closing covenants to Altice.
- (133) With regard to the appointment of PT Portugal's board of directors or management team, as discussed in recitals (74) - (77), Altice had a veto right over the appointment, termination or change of employment conditions of all PT Portugal's directors and officers.
- (134) Second, for the reasons explained below, Altice does not consider that the veto rights granted over PT Portugal staff, PT Portugal's pricing policy of PT Portugal's contracts resulted in it having the possibility to exercise decisive influence over PT Portugal.
- a) The veto right over PT Portugal personnel
- (135) Altice argues that Article 6.1(b)(xviii) and 6.1(b)(xx) of the Transaction Agreement did not provide it with the power to co-determine the structure of the senior management as per paragraph 69 of the Consolidated Jurisdictional Notice for the following reasons: (i) its consent was not to be unreasonably withheld and therefore the clause amounted to a mere consultation right; (ii) it did not have the ability to choose or appoint a specific number of directors and/or managers of PT Portugal; (iii) it could only veto the termination or amendment of the terms of a contract if there was no just cause, where in any event directors and officers could only be terminated with just cause; (iv) the Transaction Agreement did not grant it any rights regarding the ability to promote or downgrade managers which left Oi/PT Portugal with a very wide margin of manoeuvre; and (v) it did not interfere in any manner with the termination of any officer or director or with the modification of any employment contract. These arguments are discussed in turn below. In addition, as explained in recital (76), the Commission considers that Altice's veto right with regard to PT Portugal's employees was not justified both because of the undefined class of personnel it covered, and also because it afforded Altice the possibility to co-determine the structure of the senior management. Altice's arguments relate solely to this second objection.
- (136) **First**, the Commission rejects Altice's argument that its consent was not to be unreasonably withheld, for the reasons explained in recital (124).
- (137) **Second**, Altice argues that in contrast to the rights that would be required in order for a minority shareholder to have control, it did not have the ability to choose or appoint a specific number of managers and/or directors.
- (138) While having the power to determine a specific portion of the senior managers may be relevant to establishing whether there is equality in the appointment of members to the decision-making bodies of a joint venture (Consolidated Jurisdictional Notice,

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<sup>60</sup> See paragraph 190 of the SO Response

paragraph 64), paragraph 69 of the Consolidated Jurisdictional Notice to which Altice refers makes no reference to the number of senior managers over which the right must exist in order to confer control. It follows therefore that there is no minimum number or proportion of senior managers over which a company has a veto right for the right to be considered as an indicia of control.

(139) **Third**, Altice argues that its ability to block the dismissal of directors and officers without just cause was meaningless as under the long term contracts of these directors and officers they could only ever be dismissed with just cause.

(140) The Commission rejects this argument. PT Portugal was entitled to fire directors without due cause, although doing so may have given rise to claim for compensation by the director. Any such claim, however, could have been provisioned for in completion accounts to proportionately adjust the purchase price. As such, there is no justification for Altice to have a prior consent right for the removal of directors and any such right would go beyond what was necessary to preserve the value of a target business.

(141) **Fourth**, Altice argues that Oi/PT Portugal retained a large amount of discretion as it remained free to promote or downgrade managers and employees without seeking Altice's consent.

(142) The Commission notes that this did not alter the fact that Altice did have the ability to exercise decisive influence over the senior management of PT Portugal. Moreover, neither the term director nor officer is defined in the Transaction Agreement which potentially allows for a degree of discretion as to which employees this clause relates meaning it had the potential to include staff whose employment was no material to the value of the PT Portugal business.

(143) **Fifth**, the Commission rejects Altice's argument regarding the extent to which Altice actually exercised its veto right. As discussed in recital (173), the relevant legal test is whether Altice had the possibility to exercise control. It is therefore irrelevant whether this veto right was actually exercised during the relevant time period.

b) Veto right over PT Portugal's pricing policy

(144) Altice argues that its veto right over PT Portugal's pricing policy did not provide it with the possibility to exercise decisive influence over PT Portugal because: (i) its consent was not to be unreasonably withheld and therefore the clause amounted to a mere consultation right; (ii) the scope of the right was limited such that PT Portugal could implement any pricing policies, promotion campaigns etc without seeking Altice's prior approval provided that they were in the ordinary course of business consistent with past practice; (iii) that the reference to the budget annexed to the Transaction Agreement reduced the scope of Altice's potential intervention; (iv) that the purpose of the clause was to prevent Oi from making changes to PT Portugal's pricing policy which would have artificially inflated the working capital of the business to Oi's benefit under the price adjustment clause in the Transaction Agreement but would have been detrimental to business in the long term; and (v) Altice did not interfere with PT Portugal's pricing policy, except in one example. These arguments are discussed in turn below.

(145) **First**, the Commission rejects Altice's argument that its consent was not to be unreasonably withheld, for the reasons explained in recital (124).

(146) **Second**, Altice argues that the scope of the right was limited such that PT Portugal could implement any pricing policies and promotion campaigns, among other things

without seeking Altice's prior approval, provided that they were in the normal and ordinary course of business, and consistent with past practice.

- (147) The Commission does not interpret Article 6.1(b)(xxvi) of the Transaction Agreement to be limited to pricing decisions that were outside PT Portugal's ordinary course of business or limited to past practice. As explained above in recital (83), the Commission considers that the exclusion of day-to-day changes to the standard terms and conditions with the specific aim of preventing churn would only apply to a small number of potential actions. Despite this caveat, Altice had the ability to influence almost all pricing decisions as well as a large proportion of potential actions regarding changes to standard terms and conditions.
- (148) Altice argues that in the general spirit of Article 6.1 of the Transaction Agreement, Altice's veto right did not cover any matters falling within the ordinary course of PT Portugal's business and that were consistent with its past practice. The Commission rejects this argument. In a number of provisions, matters falling in the ordinary course of business were explicitly excluded (see for example Article 6.1(b)(x), Article 6.1(b)(xi) and Article 6.1(b)(xix) of the Transaction Agreement). Accordingly, it cannot be assumed that matters falling in the ordinary course of business or consistent with past practice were excluded from the provisions where this is not explicitly stated due to a "general spirit" of the clause.
- (149) Regardless, the Commission does not consider that having the power to determine a target's pricing policies is either a valid or a justifiable manner in which to preserve the value of a target business between signing and closing, regardless of whether the clause purportedly excludes pricing matters that fall within the ordinary course of business.
- (150) **Third**, Altice argues that the reference to the budget annexed to the Transaction Agreement reduced the scope of Altice's potential intervention to the extent that it did not have the ability to exercise decisive influence.
- (151) As explained in recital (82), the Commission does not consider that the exemption of pricing decisions referred to in the budget limited Altice's scope for intervention. The Target's 2015 budget to which Article 6.1(b)(xxvi) of the Transaction Agreement refers is Exhibit D to the Transaction Agreement. This document is of a general nature and does not refer to any specific pricing decisions or types of pricing decision. As no pricing policies or standard offer prices are referenced in the this budget<sup>61</sup>, the scope of the pricing policies and standard offer prices to which Article 6.1(b)(xxvi) relates is unclear and leaves considerable scope for intervention by Altice.
- (152) **Fourth**, with regard to Altice's argument that the clause could be justified to prevent Oi from making changes to PT Portugal's pricing policy which would have artificially inflated the working capital of the business to Oi's benefit, the Commission does not consider that Altice's broad veto right over PT Portugal's pricing policy in this case can be considered necessary to preserve the value of PT Portugal, especially given the other safeguards in place such as the obligation to run

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<sup>61</sup> The budget for 2015 which is incorporated into the Transaction Agreement as Exhibit D, was divided in broad blocks (residential, personal, corporate and PME, wholesale and other) that did not allow the ability to draw any conclusions as to whether any changes to pricing strategies were actually reflected in the said budget.

the business in the ordinary course of business and free negotiation of a pricing mechanism.

- (153) **Fifth**, the Commission rejects Altice's argument regarding the extent to which Altice actually exercised its veto right. As discussed in recital (173), the relevant legal test is whether Altice had the possibility to exercise control. It is therefore irrelevant whether this veto right was actually exercised during the relevant time period.
- c) The veto right over PT Portugal's contracts
- (154) With regard to its veto rights over the modification and termination of PT Portugal's contracts, and the entry into transactions, commitments, liabilities and acquisitions, Altice argues that: (i) in the general scheme of Article 6.1 of the Transaction Agreement, the clause amounted to a mere consultation right regarding matters outside the ordinary course of business and inconsistent with past practice; (ii) the contracts over which Altice had a veto right were justifiable to preserve the value of the PT Portugal business; (iii) the monetary thresholds which determined which actions were caught were legitimate to protect the value of the business and there is no guidance as to what would be acceptable thresholds; and (iv) with regard to both the interpretation of the Transaction Agreement and its implementation, Altice argues that it had no control over what Oi considered as being covered, and therefore submitted to it for review. These arguments are discussed in turn below.
- (155) **First**, the Commission rejects Altice's argument that its consent was not to be unreasonably withheld for the reasons explained in recital (124).
- (156) **Second**, with regard to its veto right over Material Contracts, Altice argues that its veto right was limited to contracts that fell within a narrow definition set by the Transaction Agreement and were therefore justifiable to preserve the value of the PT Portugal business. Altice submits that its consultation was required for proposed decisions and courses of action that were: (i) outside the ordinary course of business or inconsistent with past practice; or (ii) fell within one of the categories listed in Article 6.1(b)<sup>62</sup>. The Commission agrees with this interpretation of the Transaction Agreement but rejects Altice's submission that it only had oversight of Material Contracts outside the ordinary course of business.
- (157) With regard to the Material Contracts over which Altice had oversight, as detailed in recitals (100) - (102), the Commission concludes that Article 6.1(b)(vii) of the Transaction Agreement prevails and therefore contracts in the ordinary course of business fell within Altice's purview.
- (158) Altice submits that this discrepancy results from a drafting oversight and that the intent was that only events outside of the ordinary course of business, including in relation to Material Contracts, should be captured. It argues that there was a general sense of Article 6(1)(b) of the Transaction Agreement that decisions outside the ordinary course of business were to be excluded and that given the multiplicity of thresholds provided for in the Transaction Agreement and consequently the difficult practical application of the Transaction Agreement, Oi interpreted the Transaction Agreement as requiring it to seek Altice consent exclusively on contracts that fell outside the ordinary course of business, regardless of their value.
- (159) For the reasons explained in recital (125), the Commission reject's Altice's arguments regarding the "general spirit" of Article 6.1 of the Transaction Agreement.

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<sup>62</sup> SO Response, paragraph 222.

- (160) In its reply to the Letter of Facts, Altice further submits that Oi's actual implementation of the clause did not reflect its interpretation of the Transaction Agreement that it was obliged to submit all Material Contracts, even if they fell within the ordinary course of business, as explained in its response to the Commission's RFI of 6 October 2017. Altice observes that 22 contracts which met the monetary thresholds to be considered Material Contracts were not submitted to Altice for its consent, meaning that Oi must have been excluding contracts that fell within its ordinary course of business.
- (161) The Commission again notes that the relevant legal test is whether Altice had the possibility to exercise decisive influence over a target, not which matters it actually presided over in practice. Indeed, with regard to Altice's claims regarding the relevance of Oi's role in submitting matters to it for its consent, Oi confirms that: (i) the thresholds and criteria set down in Article 6.1 of the Transaction Agreement which determined the matters for which Altice's consent was required were negotiated and agreed between it and Altice<sup>63</sup>; (ii) that the Transaction Agreement clearly determined the issues for which Oi had to seek Altice's consent before proceeding; and (iii) that the matters it submitted to Altice for its consent were based exclusively on Article 6.1 of the Transaction Agreement<sup>64</sup> and this was based on Oi's literal and conservative interpretation of the Transaction Agreement<sup>65</sup>.
- (162) Moreover, as demonstrated in Section 4.2, in practice, other matters were submitted to Altice for its consent that clearly fell within the scope of PT Portugal's ordinary course of business.
- (163) **Third**, with regard to the monetary thresholds which determined the issues over which Altice had a veto right, Altice makes a number of arguments which are addressed below.
- (164) Altice submits that the monetary thresholds which determined the issues over which Altice had a veto right were legitimate because they caught critical decisions which would affect PT Portugal's long term viability and are common practice in merger transactions. While the Commission acknowledges that provisions which provide a buyer with oversight over issues which would have a material effect on the value of the Target can be justified, for the reasons explained above in recitals (94) - (98), the Commission considers that in the context of the PT Portugal business, the level of the monetary thresholds gave Altice a veto right over matters which would not have had a material impact on the value of the PT Portugal business.
- (165) Altice submits that the fact that there were contracts of a large value in the data room is irrelevant to assessing whether the thresholds were set at an appropriate level and observes that the data room also contained contracts with a value lower than the monetary thresholds in the Transaction Agreement.
- (166) As noted above, the Commission considers that the contents of a data room can give a good indication of contracts that are relevant for assessing the value of the business, and therefore can be a benchmark against which to assess whether thresholds in the Transaction Agreement go beyond what is necessary to guard against material changes to the value of the Target. The Commission acknowledges that, depending on their specific content and the relevant context, contracts of a

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<sup>63</sup> Doc ID [693], response to Question 1(a)

<sup>64</sup> Doc ID [693], response to Question 4(a).

<sup>65</sup> Doc ID [693], response to Questions 2 and 3.

lower value may be capable of affecting the value a target's business. The simple inclusion of contracts of low value in the data room does not however undermine the Commission's use of the data room as a general indicator in its analysis.

- (167) Altice argues that there is no guidance as to what would be considered acceptable thresholds, and that it had no control over what Oi considered as being covered, and therefore submitted to it for review. This argument is dealt with in recitals (583) and (584) regarding fines.
- (168) Altice argues in response to the Letter of Facts, that Oi could have walked away from the negotiations if it considered the thresholds to be too low. The Commission does not consider this relevant to the observation that the thresholds in the Transaction Agreement were far more stringent and extensive than those used in the PT Portugal business in the ordinary course of business.
- (169) Altice also argues in response to the Letter of Facts that the Commission did not take into account the thresholds proposed in the transaction documentation of competing bidders. The Commission however does not consider this to be a relevant factor to its analysis; the thresholds set are determined during commercial negotiations and competing bidders therefore may, for example, have accepted to forgo any pre-closing covenants in exchange for another contractual term. A meaningful comparison would therefore not be possible or relevant.
- (170) **Fourth**, based on its review of the contracts that Oi submitted to it for approval, Altice argues that Oi interpreted the Transaction Agreement as not requiring it to seek Altice's consent on matters falling within the ordinary course of PT Portugal's business. As explained in recital (173), the Commission notes that the relevant legal test is whether Altice had the possibility to exercise decisive influence over the Target, not an assessment of the matters for which Oi actually requested consent. In addition, Altice's argument is directly contradicted by the interpretation of the Transaction Agreement given to the Commission by Oi in response to its RFI (see recital (102)) and the fact that Oi consulted Altice on matters that fell within the ordinary course of business and were not necessary to preserve the value of the Target.
- 4.1.3.3. Altice did not interpret the Transaction Agreement as giving it a veto right over PT Portugal's decisions
- (171) Altice submits that as the consultation rights it had over PT Portugal which are at issue stem from the Transaction Agreement, it is necessary to consider the interpretation given to the Transaction Agreement. Altice submits that in the majority of instances that Oi consulted it, Altice simply requested extra information in order to be able to understand the matter, and only in very few instances did it actually deny its consent. In the three instances where it did deny its consent, these denials were only temporary and justified by Altice's lack of information on the relevant matters. From this it can be inferred that Altice understood that it only had a consultation right under the transaction Agreement.
- (172) The Commission rejects this submission in its entirety for the following reasons.
- (173) First, the relevant test under the Merger Regulation is whether one undertaking has the possibility to exercise decisive influence over the other. While the possibility to exercise decisive influence must be effective, it is not necessary to show that the

decisive influence was actually exercised<sup>66</sup>. The possibility of exercising such influence, and hence, the existence of the veto rights alone is sufficient to establish that Altice had the possibility to exercise decisive influence; the number of times that Altice exercised that right is therefore not relevant. By analogy, when considering veto rights with regard to whether a minority shareholder can exercise control, paragraph 67 of the Consolidated Jurisdictional Notice explicitly specifies that it is not necessary for the Commission to show that the acquirer of joint control will actually make use of its decisive influence.

- (174) Second, the Commission concludes that the possibility for Altice to exercise decisive influence was indeed effective. The rights were enshrined in the Transaction Agreement which was a legally enforceable contract. Moreover, Altice's rights in Article 6 of the Transaction Agreement were underpinned by indemnity provisions in Article 7 of the Transaction Agreement. Under Article 7, Oi undertook to repay Altice a portion of, or adjustment to, the purchase price for any loss arising in connection with a breach the covenants in Article 6 of the Transaction Agreement. Altice submits in the SO Response that it had limited options for judicial recourse against Oi for breach of contract<sup>67</sup> (and hence did not have the rights equivalent to a minority shareholder). Oi directly contradicts this argument, specifically referring to the need to manage the risk of litigation by Altice when responding to the Commission's RFI in relation to how it interpreted the Transaction Agreement<sup>68</sup>. In light of the foregoing, and in the absence of any evidence to support Altice's claim that it had limited options for judicial recourse in the event of breach of Article 6.1(b) of the Transaction Agreement, the Commission considers that Altice's possibility to exercise decisive influence was indeed effective.
- (175) Third, the fact that Altice actually denied its consent under the relevant provisions of the Transaction Agreement as described by Altice in its response, and as described in Section 4.2 of this decision, concretely demonstrate that it could effectively exercise its veto right under the Transaction Agreement.
- (176) Fourth, as detailed in recital (121), the contemporaneous evidence on the Commission's file shows that Altice considered the rights under Article 6 of the Transaction Agreement afforded it a consent right.
- 4.1.3.4. Conclusion on the Commission's assessment of the relevant provisions of the Transaction Agreement
- (177) Based on the elements described above, the Commission concludes that the veto rights in Article 6.1(b) of the Transaction Agreement and described above, individually and collectively, went beyond what was necessary to preserve the value of the Target's business pending the closing of the Transaction, and granted Altice the possibility to exercise control over the Target.

## **4.2. Altice's influence over the Target**

- (178) Evidence on the Commission's file shows that between the Signing Date and adoption of the Clearance Decision, Altice was heavily involved in the decision

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<sup>66</sup> Consolidated Jurisdictional Notice, paragraph 16; judgment in Case T-282/02 *Cementbouw v Commission*, paragraph 58, [2006] ECR II-319

<sup>67</sup> See paragraph 190 of the SO Response.

<sup>68</sup> Doc ID [693], see for example the responses to Question 2. Indeed, in its response to the letter of facts, Altice recognises that Oi justified its interpretation of the Transaction Agreement by its alleged fear that Altice might have initiated a claim against it for misrepresentations

making processes at PT Portugal. Even in situations where the Target was not obliged to obtain Altice's agreement in relation to commercial decisions pursuant to the Transaction Agreement, a variety of commercial decisions were not made unless and until Altice consented.

- (179) The Commission considers that the evidence presented in this section, demonstrates that Altice exercised operational control over numerous aspects of the Target's business prior to the adoption of the Clearance Decision, and in some instances prior to notification of the Transaction.

#### 4.2.1. *Altice's role in PT Portugal's commercial decisions*

- (180) In a number of instances, as described in Section 4.2.1, the Target sought Altice's instructions and agreed to implement, or actually implemented Altice's instructions in relation to commercial decisions prior to the date of notification and/or prior to the date of the Clearance Decision.

##### 4.2.1.1. Post-paid mobile campaign

###### (a) Facts

- (181) Between 28 January 2015 and mid-May 2015,<sup>69</sup> PT Portugal ran a post-paid mobile campaign targeted at the consumer segment in Portugal ("B2C") with the aim of increasing the number of PT Portugal's post-paid subscribers, focusing on the promotion of on-net post-paid contracts (the "Post-paid Campaign"). The purpose of the campaign was to increase the pace of migration from prepaid to post-paid contracts.<sup>70</sup>
- (182) PT Portugal's internal documents show that the purpose of the Post-paid Campaign was to consolidate PT Portugal's mobile customer base and increase its average revenue per user ("ARPU") by increasing the migration of customers from prepaid contracts to post-paid contracts.<sup>71</sup> Specifically, PT Portugal forecasted that this campaign would increase pre-paid to post-paid customer migrations by 25% (around [...] to [...] customers) between 19 January 2015 and 28 February 2015, thereby increasing ARPU and reducing customer churn.<sup>72</sup> The Post-paid Campaign therefore constituted part of PT Portugal's commercial strategy on the retail mobile market in Portugal.
- (183) The evidence also shows that the Post-paid Campaign was designed in the autumn of 2014 and the proposal for the Post-paid Campaign was submitted to PT Portugal's board of directors for approval by an internal note dated 18 December 2014.<sup>73</sup> The Post-paid Campaign was then approved by a resolution of PT Portugal's board of

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<sup>69</sup> Altice's response to Commission's decision of 15 March 2016, memorandum to the Commission of 6 April 2016, page 13.

<sup>70</sup> Presentation on the mobile campaign "Proposta Campanha de Saldos", of 15 December 2014, ID[AL-00101637].

<sup>71</sup> Presentation on the mobile campaign "Proposta Campanha de Saldos", of 15 December 2014, ID[AL-00101637].

<sup>72</sup> General customer churn, not customer specific churn as referred to in Article 6.1(b)(xxvi) of the Transaction Agreement. Although, even if this were considered to be specific customer churn, this would constitute yet another reason why this promotion fell outside the scope of the Transaction Agreement, and therefore, PT Portugal should not have been seeking Altice's consent.

<sup>73</sup> Internal note to PT Portugal's board of directors, dated 19 December 2014, ID[AL-00101873].

directors on 22 January 2015<sup>74</sup>. Between these dates however, PT Portugal sought and received the agreement of Altice with regard to the Post-paid Campaign's main features promoting post-paid mobile tariff plans to accelerate migration of customers from prepaid to post-paid contracts as detailed in recitals (184) to (191).

- (184) Specifically, on 15 January 2015, [Mr. J] (general secretary of PT Portugal) reminded [Mr. K] (CEO of PT Portugal) by internal email that it had been decided by the PT Portugal board of directors that [Mr. K] would contact Altice and that [Mr. L] (CFO of PT Portugal), would contact Oi in order to accelerate the decision process regarding the Post-paid Campaign<sup>75</sup>. In response, [Mr. M] (director of PT Portugal responsible for the consumer segment) confirmed on 16 January 2015 that Oi agreed with the features of the Post-paid Campaign and asked [Mr. K] whether he had had the opportunity to consult Altice on the matter. On 18 January 2015, [Mr. L] stated in an email to [Mr. A] (CEO of Altice) that: *"As agreed with [Mr. K], I'm sending you in attach the document with the proposed postpaid marketing campaign"*. The text of the email summarises the objectives of the Post-paid Campaign and its main features:

*"It's a campaign focused on promoting On-net postpaid tariff plans, with a 24 month loyalty contract and a strong incentive to subscribe the direct debit service (automatic payment from customer bank account) and electronic invoice. The rationale for performing this campaign is as follows:*

*Accelerate the migration from prepaid to post-paid plans with a 24 month loyalty contract in order to reduce the high churn rate in place (due to the pressure of the NOS convergent offer);*

*Focus on On-Net tariffs since MEO has a competitive advantage in on-net;*

*Reposition the Post Paid tariff plans in order to regain competitiveness on On-Net tariffs (properly balanced against the remaining mobile tariff plans available in the market);*

*Promote above-the-line mobile tariff plans on a stand alone basis, which is critical given that MEO does not promote any mobile price plan for more than a year (except the low cost tariff - UZO - and the tariff for young people);*

*Improve the price perception on MEO Mobile offers in which we currently face a disadvantage against our competitors;*

*With this campaign we estimate to increase by 20 to 25% the current rate of migration from prepaid to postpaid (more [...] / month). The campaign will run from January to the end of February."<sup>76</sup>*

- (185) The attachment to the email contained a slightly shorter version of the presentation,<sup>77</sup> which had been submitted to the PT Portugal board of directors for approval. The version that Altice was sent contained the main slides regarding the features of the Post-paid Campaign, including the proposed tariffs, duration of the campaign and

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<sup>74</sup> See Altice's Response to Commission's decision of 15 March 2016, page 13, and the internal resolution of PT Portugal's board of directors, of 20 January 2015, provided as annex 6.4 to Altice's response to Commission's decision of 15 March 2016.

<sup>75</sup> Email from [Mr. J] to [Mr. K], of 15 January 2015, ID[AL-00107577].

<sup>76</sup> Email from [Mr. M] to [Mr. A], of 18 January 2015, ID [AL-00005135].

<sup>77</sup> Powerpoint presentation attached to the email of [Mr. M] to [Mr. A], of 18 January 2015, ID[AL-0005136].

products offered as shown in Figure 1. It also contained a sensitivity analysis submitted to the PT Portugal board, as shown in Figure 2.

### Figure 1-Main features of the proposed Post-paid Campaign

[...]

### Figure 2- Sensitivity analysis

[...]

- (186) Figure 1 and Figure 2 show that Altice obtained access to information of a very sensitive nature, in particular on the pricing and commercial strategy of one of its competitors.<sup>78</sup>
- (187) On 19 January 2015, [Mr. A] forwarded an email to [Mr. F] (COO of Altice) and to other members of Altice's management, indicating that: "*the management of PT Portugal would like Altice's point of view/agreement as regards a new mobile campaign*", and asking who would be available for a call with PT Portugal on this topic.<sup>79</sup>
- (188) On 20 January 2015, a conference call was organised between [Mr. M], [Mr. K] (PT Portugal), [Mr. F] (Altice) and [Mr. A] (Altice) to discuss the campaign. Immediately following this call, [Mr. F] wrote to [Mr. K] and [Mr. M] (PT Portugal) with precise instructions regarding the Post-paid Campaign:
- (189) "*Following our today's call I confirm that you have a go for the new campaign to test during 3 weeks an evolution of the postpaid pricing to accelerate your prepaid/postpaid migration with a target to reach up to 100k migration per quarter (vs around 75/80k in Q3/Q4 2014) and with the assumption that we should be able to maintain the ARPU or at least minimize the ARPU decrease to less than [...] euros. [...]. Please let us know exactly when you go on air with the campaign (and share also ASAP the advertisement spot).*"<sup>80</sup>
- (190) Furthermore, in the same email, [Mr. F] pointed out Altice's intention to receive information about and monitor the results of this commercial matter during the implementation of the campaign: "*We will review together in the coming weeks the first results of that campaign and decide if we continue with it or if we stop it.*"<sup>81</sup> Furthermore, this email also shows that Altice considered that it was up to Altice to decide whether the campaign should continue or should be stopped. Indeed, Altice was also involved in the review of this commercial matter and in a further decision as to whether the campaign should be continued or not.
- (191) Following receipt of Altice's approval, the Post-paid Campaign was implemented by PT Portugal and ran from 28 January 2015 (prior to notification of the Transaction and prior to clearance) to mid-May 2015.
- (192) This indicates that Altice was involved in: (i) shaping and giving granular instructions as to the commercial targets of this commercial policy (PT Portugal to

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<sup>78</sup> Commission Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements (2011/C 11/01), paragraph 86.

<sup>79</sup> Email from [Mr. A] to [Mr.K], [Mr. S], and [Mr. F] of 19 January 2015, ID[AL-00097569].

<sup>80</sup> Email from [Mr. F] to [Mr. M] and [Mr. F], copying [Mr. A] of 20 January 2015, ID[AL-00107338].

<sup>81</sup> Email from [Mr. F] to [Mr. M] and [Mr. K], copying [Mr. A] of 20 January 2015, ID[AL-00107338].

target "[...] an evolution of the postpaid pricing to accelerate your prepaid/postpaid migration with a target to reach up to 100k migration per quarter (vs around 75/80k in Q3/Q4 2014) and with the assumption that we should be able to maintain the ARPU or at least minimize the ARPU decrease to less than [...]"); (ii) giving instructions as to the manner and objective of launching the campaign ("test during 3 weeks an evolution of the post-paid pricing"); (iii) the decision for PT Portugal, one of Altice's competitors at the time, to proceed with this price promotion ("Following our today's call I confirm that you have a go for the new campaign to test during 3 weeks"); and (iv) by requiring oversight as to the marketing of the campaign ("Please let us know exactly when you go on air with the campaign (and share also ASAP the advertisement spot").

- (193) Following on from its stated intention, Altice monitored the implementation of the Post-paid Campaign, with the Target reporting to Altice on the results of the Post-paid Campaign and responding to Altice's questions in this regard. These exchanges involved the exchange of confidential information<sup>82</sup>.
- (194) PT Portugal sent regular, detailed updates to Altice ([Mr. F]) on the implementation and the results of the campaign either via email or by call-conferencing (see recitals (195) to (198)).
- (195) Altice received written reports from PT Portugal on the results of the Post-paid Campaign by email on several occasions. On 24 February 2015, following a call regarding the preliminary results of the Post-paid Campaign, [Mr. M] wrote to [Mr. F] and sent him a summary of the results of the Post-paid Campaign assuring him that: "So far the results are aligned with the expectations." In response, Altice asked for more information: "Hi [Mr. M] thanks for the data. For existing customers any impact on handsets or accessories or VAS (Like MEO Music) sales volumes that could offset the [...]€ ARPU decrease? What is the percentage of attachment of handsets and/or accessories after the campaign and before the campaign for new customers and the average value and margin on those additional sales? Do you sale other items like insurance when you sale handsets?"
- (196) [Mr. M] provided the information on the same day: "We don't have that data crossed sales terminals - sales tariff plans out of the shelf but I just asked to do it. We currently don't sell accessories in our stores even though the Team is accessing that opportunity. We are asking quotes to suppliers based on a model that we will not take the stock risk. More a couple of weeks the work will be concluded. If you are selling accessories in any of Altice operations it would be perfect to speak with you or somebody that you find appropriate. We sell insurance in our MEO stores. Our latest numbers point to numbers around 15 to 20% of smartphones sold with insurance."<sup>83</sup>
- (197) In another instance, on 4 March 2015, [Mr. M] sent [Mr. F] detailed updates on the implementation of the Post-paid Campaign, alongside other information which had been requested by Altice:

*"In attach you will find the data that you asked, namely:*

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<sup>82</sup> Email correspondence between [Mr. F] and [Mr. M] of 26 February 2016, ID[AL-00075553].

<sup>83</sup> Email correspondence between [Mr. F] and [Mr. M] of 24 February 2015 ID [AL-00075699]. Email correspondence between [Mr. F] and [Mr. M] of 26 February 2015, ID[AL-00075553].

*Update of the Postpaid campaign (the other data that you asked: ARPU of the NBO is [...]€ with VAT; clients that buy a campaign postpaid plan and at the same time buy a mobile phone is [...])*

*Breakdown of the Marketing Budget 2015 vs 2014*

*Handset purchases and breakdown by Vendor*

*Consumer Segment Weekly operational KPIs*

*Regarding the [...], the subject will be discussed in the next Board which will be next Tuesday.*"<sup>84</sup>

- (198) One of the attachments to this correspondence contained the main findings of the campaign as depicted in Figure 3, including data on the evolution of ARPU:

**Figure 3 - Post-paid campaign main findings**

[...]

- (199) PT Portugal's correspondence with Altice shows that PT Portugal also gave feedback to Altice on the Post-paid Campaign via call-conferencing. In an email of 20 February 2015 for instance, [Mr. K] wrote to [Mr. F] indicating that: "*We are ready to give you feedback on how the mobile campaign went. Would you like to have a call or just a quick summary of results?*" In reply, [Mr. F] stated that: "*A call would be more convenient*".<sup>85</sup>

- (b) The Commission's findings

- (200) For the reasons set out below, the Commission considers that Altice was directly involved in the decision making process concerning PT Portugal's Post-paid Campaign, which formed part of the Target's competitive strategy on the market. Altice also monitored the implementation and the results of the campaign. Such involvement contributes to the Commission's conclusion that, through the actions described in Section 4.2 of this decision, Altice exercised decisive influence over aspects of the Target's business prior to the Commission having declared the Transaction compatible with the internal market.

- (201) First, the Commission notes that PT Portugal sought Altice's agreement in relation to the campaign (see recital (184)) and Altice after discussing the campaign with PT Portugal over the phone (see recital (188)) gave instructions in writing to PT Portugal as regards the targets to be attained and the duration of the campaign (see recital (189)). Altice also monitored the campaign, receiving updates from PT Portugal on the implementation (see recitals (193) and (194)). On each of these occasions, Altice received commercially sensitive information from the Target.

- (202) Second, considering the aims and the value of this campaign, Altice's consent was requested on a matter which went beyond what could reasonably be considered as necessary for preserving the value of the Target in the period between the Signing Date and the Closing Date. In fact, at the time of the Transaction, in Portugal, telecom operators carried out promotional campaigns quite frequently, from once a month up to every two other weeks. Therefore, being able to respond promptly to competitors' promotional offers was an important part of PT Portugal's day-to-day business.

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<sup>84</sup> Altice's response to the Commission decision of March 11, 2016, Annex 6.25, ID [AL-00074949].

<sup>85</sup> Email from [Mr. F] to [Mr. K] dated 21 February 2015, ID[AL-00009237].

- (203) Furthermore, given the value of the campaign, such a campaign was unlikely to have a material and/or long-lasting impact on the Target's value such that Altice's involvement in the Post-paid Campaign could be justified by a need to ensure the maintenance of the Target's value between the Signing Date and the Closing Date.
- (204) In this regard, the Commission notes that the budget allocated to the Post-paid Campaign (less than EUR [...]) did not even reach the materiality thresholds established by the Parties<sup>86</sup> in Article 6.1(b) of the Transaction Agreement, therefore the Post-paid campaign fell outside the remit of Article 6.1(b) (vii) and (xxvii) of the Transaction Agreement. Therefore, even on the basis of the materiality thresholds established by Altice and Oi in the Transaction Agreement (which the Commission considers to be inadequate as shown in Section 4.1.2.), the Post-paid Campaign did not constitute a matter that could be considered material enough to impact the value of PT Portugal's business.
- (205) On the occasion of these exchanges, Altice asked for and received commercially sensitive information on PT Portugal's commercial strategy (including future pricing intentions). The information received was akin to the type of information that Altice would only be entitled to receive following the Closing Date. The exchange of such commercially sensitive information, as well as Altice instructing the Target on the campaign makes it difficult, if not impossible, for the Commission to restore the prior competitive situation because once the information had been exchanged, the harm to competition could be considered as having already materialised. This aspect is further aggravated by the fact that the Commission raised concerns as regards the compatibility of the Transaction with the internal market.
- (c) Altice's views
- (206) In its response to the Commission's RFI of 15 March 2016, Altice claimed that the Post-paid Campaign was entirely designed, prepared and implemented by PT Portugal, with Altice being informed and consulted only for courtesy reasons, and only once PT Portugal's board of directors had formally approved the project.
- (207) Furthermore, in the SO Response, Altice first submits that the Post-paid Campaign was a matter outside of PT Portugal's ordinary course of business, as it represented a major change in PT Portugal's commercial strategy in the B2C segment. The objective of the campaign was to reposition its strategy towards standalone mobile offers as opposed to its former positioning mainly focused on smartphone offers and multiplay offers. According to Altice, it was the first sales campaign ever in tariff plans. It was not only expected to promote post-paid contracts, i.e., to increase by 20% to 25% the migration rate from prepaid to post-paid contracts, but was also expected to enable PT Portugal to completely reposition itself in the B2C segment by focusing on standalone mobile offers and offering discounts of up to 50%<sup>87</sup>. These changes in strategy would have necessarily had an impact on the long-term performance of PT Portugal.
- (208) Furthermore, Altice considers it could not have possibly been involved in the development of the Post-paid Campaign given that it had been designed long before it was presented to Altice. Second, it submits that Altice did not cause PT Portugal to modify the campaign or its modalities, but simply confirmed its agreement to launch

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<sup>86</sup> According to the internal resolution of 22 January 2014, provided as annex 6.4 to Altice's response to Commission's decision of 15 March 2016, the budget allocated to the campaign was EUR [...].

<sup>87</sup> Slides presented by Altice at the Oral Hearing. Slide no. 131.

the campaign. Altice also claims that the information it received on the three occasions when it was contacted by PT Portugal in relation to the Post-paid Campaign was extremely limited, compared to the information that circulated internally at PT Portugal which was detailed (number of new subscriptions on a daily basis, share of new subscriptions according to client's origin, offer and sale channel, variation of monthly revenues depending on the client's profile etc). Altice explains that the results of the Post-paid Campaign were circulated within the company weekly whereas Altice only received two updates.

- (209) Finally, Altice points out that neither of its business in Portugal - Cabovisão or Oni - were active in the market for mobile telephony services<sup>88</sup>.
- (210) Therefore Altice concludes that the Post-paid Campaign was a matter outside the ordinary course of business and Altice did not interfere in any manner in the implementation of the Post-paid Campaign, therefore it did not exercise any decisive influence over PT Portugal's launch of the Post-paid campaign prior to the Clearance Decision.
- (d) The Commission's assessment of Altice's views
- (211) The Commission rejects Altice's arguments for the reasons set out below.
- (212) Altice submitted that the Post-paid Campaign was innovative and therefore outside the ordinary course of business and its impact on the business would have been higher than its budget would suggest. That was, in Altice's view, the reason why PT Portugal consulted Altice regarding this campaign. However, the evidence in the file does not support these claims for several reasons:
- (213) Promotional campaigns are a common feature of the Portuguese telecoms market: telecom operators carry out promotional campaigns quite frequently, from once a month up to every two other weeks<sup>89</sup>. Therefore, conducting promotional campaigns and offering discounts as part of the campaigns was not something out of the ordinary in the retail mobile communications market at the time of the Transaction, and it was part of PT Portugal's normal course of business. In fact, between the Signing Date and the Closing Date, PT Portugal conducted many promotional campaigns, some offering significant discounts<sup>90</sup>. In terms of targets, as shown by the presentation regarding the campaign (recital (184) "*Accelerate the migration from prepaid to post-paid plans with a 24 month loyalty contract in order to reduce the high churn rate in place*") one of the objectives of the Post-paid Campaign was to reduce churn, which is a common objective of promotional activities of telecoms operators. Such objective suggests again that the campaign was part of PT Portugal's normal course of business. Further, the correspondence between Altice and PT Portugal (see recitals (182) and (189)) shows that PT Portugal did not expect a significant drop in the average revenue per user (ARPU), on the contrary, it expected to be able to maintain the ARPU and *estimated "to increase by 20 to 25% the current rate of migration from prepaid to postpaid"*. Taking into account the value of PT Portugal's business (EUR 7.4 billion) and the purchase price (over EUR 2.5 billion), it is unlikely that the campaign could have affected the value of PT Portugal's business.

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<sup>88</sup> Slides presented at the Oral Hearing by Altice, slide 131.

<sup>89</sup> Response to Commission's RFI of 21 December 2016, question 4 and annex 4.2 [ID 573 and 574].

<sup>90</sup> SO Response, paragraphs 280 and following. According to Altice, PT Portugal took launched 19 promotional campaigns between the the Signing Date and the Closing Date.

- (214) Furthermore, the Post-paid Campaign did not fall within the scope of issues deemed by the Parties as material to PT Portugal's business (even on the basis of the Parties' own assessment of what was considered material to the value of the business, which as shown in Section 4.1.2, the Commission does not accept as appropriate). Even in the Parties' own acceptance of what could be considered material to PT Portugal's business, this campaign did not warrant Altice's involvement.
- (215) The Commission considers that whether the Post-paid Campaign was or not in the ordinary course of business is not decisive. What matters in the case at hand is whether Altice's involvement in this aspect of PT Portugal's business prior to having received clearance for the concentration pursuant to Article 7(1) of the Merger Regulation (and prior to notification of the concentration pursuant to Article 4(1) of the Merger Regulation) can be justified on the basis that the campaign could impact the value of PT Portugal. However the elements in the file do not support Altice's claim.
- (216) Altice also argued that it did not interfere in the modalities of the Post-Paid Campaign. As regards Altice's argument that it simply confirmed its agreement without modifying the campaign, the Commission first notes that Altice not only received a detailed presentation of the campaign's objectives and modalities, but also discussed the campaign over the phone with the responsible people at PT Portugal before giving its agreement in writing. Furthermore, despite Altice's claims, the evidence presented shows that in fact PT Portugal requested and received Altice's agreement in relation to the Post-paid Campaign before proceeding with the implementation. In particular, this is attested to by the email exchange between the management of PT Portugal in preparation of the board of director's meeting of 20 January 2015 (see recital (184)). In fact, PT Portugal's board of directors had decided that PT Portugal's management should contact Altice to ensure that the decision making process would be sped up. Clearly, PT Portugal's board of directors wanted to receive Altice's approval before going forward with the Post-paid Campaign. Furthermore, as shown in recital (192) Altice was consulted on the features and targets of the Post-paid Campaign and gave instructions in writing to the management of PT Portugal on the targets and the duration of the campaign. In its email to PT Portugal's management Altice also pointed out that after three weeks, PT Portugal should reassess whether the campaign had met its targets or not "*We will review together in the coming weeks the first results of that campaign and decide if we continue with it or if we stop it*"<sup>91</sup>. Therefore, despite its claims, Altice did actually play an essential role in the approval, the modalities and monitoring of the Post-Paid Campaign.
- (217) Finally, in relation to monitoring the implementation of the campaign, Altice also claims that the information it received on the three occasions when it was contacted by PT Portugal in relation to the Post-paid campaign was extremely limited, compared to the information that circulated internally at PT Portugal which was detailed and that it did not exercise decisive influence over PT Portugal launching the campaign.
- (218) However, the evidence in the file demonstrates that Altice's claims are without basis and that Altice monitored of the implementation of the Post-paid Campaign on the basis of commercially sensitive information provided by PT Portugal in response to

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<sup>91</sup> Email from [Mr. F] to [Mr. M] and [Mr. K], copying [Mr. A] of 20 January 2015, ID[AL-00107338].

its requests. The Commission first notes that, contrary to its claims, Altice did receive essential information on the results of the campaign during implementation. As shown in recital (198), Altice not only received granular information on the results of the Post-paid Campaign (Figure 3 - Post-paid campaign main findings), including on the number of customers who had migrated to post-paid contracts and on the increase of ARPU depending on each type of offer, but had asked for, and received, further details regarding PT Portugal's commercial strategy on handsets and other accessories. Second, the Commission considers that it is irrelevant whether more information circulated inside PT Portugal, as long as Altice received the relevant information which allowed it to be able to monitor the campaign. Third, the Commission notes that Altice also had calls to discuss the results with the managers of the campaign.

- (219) Finally, even if Altice was, at the time, not active in the market for mobile telecommunications services where the Post-Paid Campaign was implemented, this does not change the fact that Altice still exercised decisive influence over an aspect of the Target's business. The provisions of Articles 4 and 7 of the Merger Regulation apply irrespective of whether the acquirer and the target are active in the same markets or not.

#### 4.2.1.2. Porto Canal

##### (a) Facts

- (220) PT Portugal was party to a [...] contract for the distribution of the TV channel Porto Canal<sup>92</sup> on MEO, the pay-tv service of PT Portugal, valid from [...] and scheduled to expire on [...] <sup>93</sup>. The existing contract provided for an annual flat fee of EUR [...] <sup>94</sup>. The channel was also carried by competitors of MEO, namely, NOS, Vodafone, and until September 2014, Cabovisão (one of Altice's Portuguese subsidiaries).
- (221) Evidence in the Commission's file demonstrates that from 18 December 2014<sup>95</sup>, PT Portugal commenced an internal assessment of a possible renewal of the distribution contract with Porto Canal<sup>96</sup>. As of 18 February 2015, the renewal of the contract was frequently discussed between Altice and PT Portugal, with the most frequent discussions taking place from 16 March 2015 onwards<sup>97</sup>.
- (222) Around 18 February 2015, Altice and PT Portugal held a telephone conversation<sup>98</sup> during which Altice was informed of the on-going discussions for the renewal of the

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<sup>92</sup> According to Altice, PT Portugal started distributing the Porto Canal channel in [...].

<sup>93</sup> Internal note from [Mr. M] (PT Portugal Board Member in charge of B2C) to [Mr. P] (PT Portugal Head of B2C Segment for TV), Altice's response to the Commission decision of 11 March 2016, Annex 7.06, ID[35-72].

<sup>94</sup> [...].

<sup>95</sup> According to Altice, Porto Canal approached PT Portugal in order to renegotiate its distribution contract towards the end of [...] and beginning of [...].

<sup>96</sup> E-mails between [Mr. P] (PT Portugal Head of B2C Segment for TV) and [Mr. M] (PT Portugal Board Member in charge of B2C) of 18 December 2014 ID[AL-00102145] and 6 January 2015 ID[AL-00107870].

<sup>97</sup> Altice's response to Commission's decision of 15 March 2016, memorandum to the Commission of 6 April 2016, pages 15 and 16, ID[35-154].

<sup>98</sup> E-mail from [Mr. K] (PT Portugal CEO) to [Mr. M] (PT Portugal Board Member in charge of B2C) dated 18 February 2015 ID[AL-00009388]. In this e-mail, [Mr. K] informs [Mr. M] that he had talked to [Mr. I] (Altice Head of Group Purchasing) on the subject Porto Canal.

Porto Canal distribution agreement<sup>99</sup>. During that conversation, Altice asked PT Portugal to send it the relevant material and fix a date for a further conference telephone call<sup>100</sup>. During the same call, Altice also informed its competitor, PT Portugal, that: "*in the case of Cabovisão they [Porto Canal] asked [...] and they [Altice/Cabovisão] have chosen to withdraw the channel*"<sup>101</sup>.

- (223) On 20 February 2015, PT Portugal sent an internal note to Altice, by email<sup>102</sup>. This internal note contained detailed PT Portugal confidential information relating to the distribution contract including: information on the terms of the existing contract, the performance of the relevant channels, the renegotiation process and the proposal to Porto Canal. It also included two possible scenarios for the distribution fee structure going forward: [...]<sup>103</sup>. In the same e-mail, PT Portugal asked for a conference call to be held with Altice on the matter. The call was held on 23 February 2015<sup>104</sup>. On 25 February 2015, PT Portugal sent Altice detailed figures on the number of hours that subscribers spend watching Porto Canal<sup>105</sup>.
- (224) On 24 February 2015, the board of directors of MEO discussed the renegotiation of the distribution agreement with Porto Canal<sup>106</sup>.
- (225) On 10 March 2015, the MEO board approved the renegotiation of the contract and put as a condition to the contract with Porto Canal that the [...]<sup>107</sup>. The MEO board also decided that its decision on the renegotiation of the contract was to be sent to Oi and to Altice. By letter of 25 March 2015, Oi requested Altice's consent on the renewal of the distribution contract of Porto Canal for an annual fee of EUR [...], as per Article 6.1(b) of the Transaction Agreement:

*"14. Renewal of the Distribution Contract of Porto Channel: Approval of the renewal of the distribution contract of the Porto Channel, with an annual cost of*

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<sup>99</sup> Altice's response to Commission's decision of 15 March 2016, memorandum to the Commission of 6 April 2016, page 17, ID[35-154].

<sup>100</sup> E-mail from [Mr. K] (PT Portugal CEO) to [Mr. M] (PT Portugal board member in charge of B2C) dated 18 February 2015 ID[AL-00009388]. It is noted that in this e-mail [Mr. K] told [Mr. M] that [Mr. I's] e-mail address was [...].

<sup>101</sup> Translation by the Commission.

<sup>102</sup> E-mail from [Mr. M] (PT Portugal board member in charge of B2C) to [Mr. I] (Altice Head of Group Purchasing) dated 20 February 2015 ID[AL-00112257].

<sup>103</sup> E-mail from [Mr. M] (PT Portugal board member in charge of B2C) to [Mr. I] (Altice Head of Group Purchasing) dated 20 February 2015 ID[AL-00112257].

According to Altice, with respect to the financial terms of the contract, two following scenarios were envisaged. [...].

<sup>104</sup> Calendar invitation dated 23 February 2015 ID[AL-00000218].

<sup>105</sup> E-mail from [Mr.K] (PT Portugal CEO) (using the e-mail account: [...]) to [Mr. I] (Altice Head of Group Purchasing) dated 25 February 2015 submitted in Altice's response to Commission's decision of 15 March 2016, memorandum to the Commission of 6 April 2016, Annex 7.05 bis, ID[35-70].

<sup>106</sup> Altice's response to Commission's decision of 15 March 2016, memorandum to the Commission of 6 April 2016, Annex 7.13 ID[35-79].

<sup>107</sup> Minutes of the Board of 10 March 2015 submitted as Annex 3.7, Attachment 1, of Altice's reply to information request of 20 July 2016, dated 23 August 2016, ID[130-82]:

*"135. Renovação do contrato de distribuição do Porto Canal (analisado no CA de 24 fevereiro)*

*Apreciado favoravelmente, ficando a contratação condicionada a que [...] do Cliente FCP; a remeter para conhecimento da Oi e da Altice;"*

*Translation: "135. Renewal of the distribution agreement of Porto Canal (discussed in the Board of Directors' meeting of 24 February)*

*Assessed favourably, the contract being conditional on [...] of customer FCP; forward for information to Oi and to Altice;"*

[...]. It will be required as a condition, that [...] Futebol Clube do Porto (FCP), owner of this channel."<sup>108</sup>

(226) By letter of 2 April 2015, Altice denied its consent:

*"14. Renewal of the Distribution Contract of Porto Channel": this matter shall only be discussed and negotiated after Closing.*"<sup>109</sup>

(227) However, it appears from the following internal documents, that soon after this letter, Altice expressed its consent for PT Portugal to continue negotiating with Porto Canal. On 8 April 2015, PT Portugal asked for Altice's agreement to continue negotiating the deal with Porto Canal, in particular in relation to negotiations which were scheduled for 9 April 2015. PT Portugal's CEO wrote the following e-mail to Altice<sup>110</sup>:

*"Mr [D] and [Mr I],(cc Mr. E)*

*The Porto Canal contract finished [...].*

*We have been in negotiations with them and have been informing [Mr. I] of this. Attached is the document we shared and we are working [...].*

*Last week OI received an email from Altice (signed by [Mr. A] and [Mr. E]) which mentions*

*"14. Renewal of the Distribution Contract of Porto Channel": this matter shall only be discussed and negotiated after Closing.*

*As discussed with both of you telephonically, we need your urgent ok to continue to negotiate as we have next round of negotiations tomorrow."*

(228) In response to PT Portugal's request, Altice gave its agreement to continue negotiating the contract with Porto Canal and asked PT Portugal to follow the targets that Altice had been setting out<sup>111</sup>:

*"It's ok to continue to negotiate. Please keep [Mr. I] very closely involved as you proceed along the lines of your discussions with him including the targets he set out."*

(229) Internal e-mails from Altice confirm that Altice (Mr. I) had indeed been giving targets to PT Portugal:

*"Yes I am informed of this and I have been giving targets. They can keep negotiating but need validation before closing a deal"*<sup>112</sup>

*"Strategy of negotiation with Porto Canal: we confirm the strategy defined with [Mr.I]. Please update on the output if any so far"*<sup>113</sup>

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<sup>108</sup> Annex 4.3 of Altice's reply to information request of 20 July 2016, dated 23 August 2016, ID[130-114].

<sup>109</sup> Altice letter to Oi, dated 2 April 2015 ID[AL-00145492].

<sup>110</sup> E-mail from [Mr. K] (PT Portugal CEO) to [Mr. D] (Altice Head of M&A) and [Mr. I] (Altice Head of Group Purchasing) dated 8 April 2015 ID[AL-00050213].

<sup>111</sup> E-mail from [Mr. D] (Altice Head of M&A) to [Mr. K] (PT Portugal CEO) dated 8 April 2015 ID[AL-00109070].

<sup>112</sup> E-mail exchanges between [Mr. D] (Altice Head of M&A) and [Mr. I] (Altice Head of Group Purchasing) dated 8 April 2015 ID[AL-00013706] and ID[AL-00050205]. [Mr. D] writes to [Mr. I] (at his e-mail address [...], which also appears in some e-mails as [...] (ID[AL-00050210])): "Received a call from [Mr. K]. [Mr. I] - let us know if we can lift barring them from finalizing the discussion". [Mr. I] responds (from his e-mail [...]): "Yes I am informed of this and I have been giving targets. They can keep negociating but need validation before closing a deal".

- (230) In particular, Altice had been giving the instructions to PT Portugal to [...]:  
 "[...]."<sup>114</sup>
- (231) The discussions between Altice and PT Portugal and the agreement they reached on how to conduct the negotiations are also reflected in the formal letter dated 10 April 2016 (sent to Altice following the procedure prescribed in Article 9(7) of the Transaction Agreement as required by Article 6.1(b) of the Transaction Agreement) in which Oi wrote:  
*"14. Renewal of the Distribution Contract of Porto Channel: The contract expired [...]. We should negotiate the renewal as soon as possible, to continue with the channel. Our Head of Consumer business and our CEO have been in contact with [Mr. I] and have agreed on a negotiation strategy. We kindly ask the Buyer to confirm."*<sup>115</sup>
- (232) By letter of 16 April 2015, Altice requested Oi to provide an update on the renewal of the contract with Porto Canal:  
*"14. Renewal of the Distribution Contract of Porto Channel": please update on the output, if any so far."*<sup>116</sup>
- (233) Soon afterwards (on 20 April 2015), the Clearance Decision was adopted. PT Portugal and Porto Canal agreed on financial terms for the distribution of the channel on 23 July 2015<sup>117</sup> and entered into a contract in December 2015.
- (b) The Commission's findings
- (234) For the reasons set out below, the Commission considers that Altice was directly involved in setting the targets and the negotiating strategy regarding the renewal of PT Portugal's contract with Porto Canal which formed part of the Target's competitive strategy on the market, a market in which Altice was itself competing via its subsidiaries. Such involvement contributes to the Commission's conclusion that, through the actions described in Section 4.2 of this decision, Altice exercised decisive influence over aspects of the Target's business prior to the Commission having declared the Transaction compatible with the internal market.
- (235) Considering the value and subject matter of this contract, Altice's consent was requested on a matter which went beyond what could reasonably be considered as necessary for preserving the value of the Target in the period between the Signing Date and the Closing Date. The value of this contract was potentially between EUR [...] and EUR [...] per year, which is very small compared to the purchase price for the acquisition of PT Portugal (which was EUR 7 400 million) and PT Portugal's annual turnover (which was EUR 2 533 million in 2014): in light of this the contract cannot be considered as material for preserving the value of the Target's business in the period between the Signing Date and the Closing Date. In addition, as a supplier

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<sup>113</sup> E-mail from [Mr. F] (Altice COO) to [Mr. E] (Altice general secretary, head of corporate and business development), dated 11 April 2015, ID[AL-00049646].

<sup>114</sup> E-mail from [Mr. I] (Altice Head of Group Purchasing), sent from the e-mail address [...] dated 11 April 2015 ID[AL-00025245] in response to an e-mail from [Mr. F] (Altice COO) dated 10 April 2015 asking for an update on the Porto Canal negotiation. Translation by the Commission.

<sup>115</sup> Annex 4.5 of Altice's reply to information request of 20 July 2016, dated 23 August 2016, ID[130-116].

<sup>116</sup> Annex 4.6 of Altice's reply to information request of 20 July 2016, dated 23 August 2016, ID[130-117]

<sup>117</sup> According to Altice, PT Portugal and Porto Canal finally agreed on the following financial terms for the period from [...] until [...]: [...].

of TV services to end users, it was part of PT Portugal's ordinary business to enter into agreements with TV channels (such as Porto Canal), of which PT Portugal had more than [...] contracts in place<sup>118</sup>.

(236) PT Portugal sought instructions from Altice as to whether it should continue negotiating with Porto Canal; Altice gave instructions to PT Portugal determining whether the negotiations should continue and specific instructions on negotiating positions PT Portugal should take, [...]. In turn, PT Portugal implemented these instructions, notably by continuing to negotiate with Porto Canal and by agreeing to [...]. On this occasion, Altice received sensitive information on the commercial strategy of the Target (including on offers and negotiation strategy made to FC Porto by PT Portugal), which, at that time, was one of Altice's competitors in the market. The information received was akin to the type of information that Altice would only be entitled to receive following the Closing Date and should not be disclosed between competitors. This information exchange went therefore beyond what could be considered acceptable before clearance of the Transaction and took place without specific non-disclosure agreements in place. Such sensitive information exchange, as well as Altice instructing the Target how to negotiate its TV content contract makes it difficult for the Commission to restore the prior competitive situation because once the information exchanged, the harm to competition could be considered as already having been done. This aspect is further aggravated by the fact that the Commission raised concerns as regards the compatibility of the Transaction with the internal market.

(c) Altice's views

(237) Altice initially submitted that the purpose of these exchanges was for PT Portugal to let Altice know about the negotiations regarding Porto Canal as it wanted to avoid a situation where it would lose Porto Canal distribution rights in the interim period until Altice would take ownership of PT Portugal. Altice further submitted that the negotiations with Porto Canal were carried out at a slow pace and no contract with Porto Canal was entered into prior to the Closing Date and therefore "*any pre-closing exchange with Altice could not have any impact on the negotiations*"<sup>119</sup>.

(238) In the SO Response, Altice submitted two lines of argumentation: Altice considers (i) that the matter was outside of PT Portugal's normal and ordinary course of business<sup>120</sup> and (ii) while Altice provided guidance to PT Portugal in relation to the renegotiation of the contract for the distribution of Porto Canal, such guidance could not in any event have any impact on the outcome of the negotiations<sup>121</sup>.

(239) In particular, Altice submits that the consultation of Altice was justified under the terms of the Transaction Agreement since the contract represented a value between EUR [...] and EUR [...] per year and a minimum total value of EUR [...] and fell therefore within the scope of Article 6.1(b)(ii) and (iii) of the Transaction Agreement. In addition, the matter fell outside of PT Portugal's ordinary course of business in the sense of Article 6.1(a) of the Transaction Agreement since the negotiations did not consist of a mere renewal of the existing distribution contract, as

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<sup>118</sup> ID[AL-00106633].

<sup>119</sup> Altice's response to Commission's decision of 15 March 2016, Memorandum to the Commission of 6 April 2016, page 17, ID[35-154].

<sup>120</sup> SO Response, paragraphs 350 to 355.

<sup>121</sup> SO Response, paragraph 427 and paragraphs 433 to 437.

Porto Canal had reinforced its grid with additional sports content and intended to modify the financial terms of the contract. Furthermore, the channel was of strategic importance to PT Portugal in terms of positioning itself in the Portuguese market, from a geographic<sup>122</sup> and a content<sup>123</sup> viewpoint.

(240) Altice further submits that its exchanges with PT Portugal had no impact on the outcome of negotiations. First, the negotiations were carried out at a very slow pace and no contract was entered into with Porto Canal prior to the Closing Date. Second, PT Portugal continued distributing the channel in the period between [...] and [...] (that is to say, after the term of the previous agreement) pursuant to the terms of the previous agreement and therefore any exchanges with Altice regarding the renewal of the contract with Porto Canal could not have any impact in PT Portugal's conduct of business during this time-period. Third, Altice submits that its exchanges with PT Portugal could not have had any impact on Cabovisão, which had stopped distributing the channel [...].

(d) The Commission's assessment of Altice's views

(241) The Commission rejects Altice's claims for the reasons set out below.

(242) Altice's claim that the renewal of the distribution contract with Porto Canal reached the thresholds of Article 6.1(b)(ii) and (iii) of the Transaction Agreement, does not entail that this matter would have a material impact on the value of PT Portugal. As explained in recital (94) the monetary thresholds in Articles 6.1(b)(ii) and (iii) of the Transaction Agreement were set at a level that included contracts of a value that would not have a material impact on the value of the PT Portugal business.

(243) That the matter fell outside of PT Portugal's ordinary course of business in the sense of Article 6.1(a) of the Transaction Agreement, as claimed by Altice, does not entail that it had a material impact on the value of the PT Portugal business. Altice's claim is also not supported by the facts, since Oi requested Altice's consent on the basis of Article 6.1(b) of the Transaction Agreement (see recital (225)). This is further confirmed by Oi's Reply<sup>124</sup> stating that it requested Altice's consent since the Porto Canal contract was a material contract with a television program (content) provider and therefore it was a Communication Agreement under Article 5.15(a)(ix) of the Transaction Agreement<sup>125</sup>: it follows from Oi's Reply that it considered that the Porto Canal contract fell within the definition of "*Material Contracts*" of Article 1 of the Transaction Agreement. In practical terms this meant that Oi requested Altice's consent pursuant to Article 6.1(b)(vii) of the Transaction Agreement, and not Article 6.1(a), and that Oi requested Altice's consent regardless of whether the Porto Canal contract was in the ordinary course of business (see in this regard also recital (102)).

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<sup>122</sup> Altice submits that Porto Canal provides content specifically related to this region.

<sup>123</sup> Altice submits that Porto Canal is a premium channel and its programming grid includes the broadcast of second tier sports as well as the live broadcast of football matches of the second football team (FCP B), representing in 2012 already 20% of the channel content on a daily basis (50% when a live event is broadcasted).

<sup>124</sup> Doc ID [693]

<sup>125</sup> In particular, Oi stated that Article 6.1(b)(vii) of the Transaction Agreement provided that the Seller should request the Buyer's approval to enter into any "Material Contract", as defined in Article 1 of the Transaction Agreement. The latter definition included "Communication Agreements" (letter (c)). Communication Agreements, in turn, included any material contracts with television program (content) providers, which Oi believed to be the case for Porto Canal.

- (244) In any event, what matters to establish whether Altice's conduct could be regarded as necessary for the preservation of the value of the Target, is not whether Altice's conduct was allowed by the Transaction Agreement (which, for the reasons set out at recitals (58) to (177) granted Altice rights with respect to PT Portugal going beyond what was necessary to protect the value of Altice's investment in the period prior to clearance) but rather whether the Porto Canal contract was of such a magnitude that it would materially affect the value of Altice's investment .
- (245) Having regard to the value and content of this contract, Altice's involvement cannot be reasonably considered as necessary for preserving the value of the Target in the period between the Signing Date and the Closing Date.
- (246) The fact that Porto Canal had reinforced its grid with additional sports content from the Porto Football Club and consequently intended to modify the financial terms of the contract, as claimed by Altice (see recital (239)), does not modify the nature of that contract to such an extent that Altice's involvement was necessary for preserving the value of the Target. Altice's claim that the channel was of strategic importance to PT Portugal in terms of positioning itself in the Portuguese market, merely confirms that Altice interfered in a matter that was a business decision of its then-competitor, PT Portugal.
- (247) As to Altice's claim that Altice's exchanges with PT Portugal did not have any impact on the outcome of the negotiations, on the basis of the facts described in recital (220) onwards, it is apparent that Altice sought to be and was, involved in on-going negotiations between PT Portugal (a competitor at that time) and a TV channel and sought to shape the terms of PT Portugal's agreement with its supplier. Altice received PT Portugal's internal documentation containing detailed confidential information. Moreover, Altice disclosed terms which Porto Canal had sought to agree with Cabovisão, a competitor of PT Portugal, to PT Portugal.
- (248) The fact that negotiations were carried out "at a very slow pace" and that no contract was entered into with Porto Canal prior to the Closing Date, as claimed by Altice (see recital (240)), is not relevant as it does not change the fact that Altice was effectively involved, including by giving negotiating targets, in a business decision of its competitor PT Portugal prior to the adoption of the Clearance Decision. Altice was, at that time, in on-going negotiations with the TV channel Porto Canal. In any event, it cannot be excluded that the pace of the negotiations were, to a certain extent, also influenced by Altice's own conduct. The evidence presented in recitals (227) to (232) demonstrates that PT Portugal's management wanted to move forward with the negotiations because the existing contract had expired, while Altice took the position on 2 April 2015 that no discussions or negotiations could take place before the Closing Date. Later, when Altice gave its consent on 8 April 2015 for PT Portugal to continue the negotiations, Altice was closely involved in setting the targets and negotiation strategy with Porto Canal, a strategy which included "playing for time". The fact that the negotiations went slowly does not, therefore, show that Altice's involvement did not have an impact on the negotiations.
- (249) Equally Altice should not draw any conclusion from the fact that PT Portugal continued distributing the channel between [...] and [...] pursuant to the terms of the previous agreement, as this does not mean that Altice did not intervene in PT Portugal's negotiation of the renewal of the contract. Rather, the continued distribution of Porto Canal [...] challenges Altice's claim that it was essential for Altice to be involved to ensure that PT Portugal was legally able to distribute the channel from [...] onwards.

- (250) Finally, given that Cabovisão was a competitor of PT Portugal even if it did not carry that specific TV channel, the fact that Cabovisão had stopped distributing the channel [...] is not relevant.

#### 4.2.1.3. Selection of RAN supplier

##### (a) Facts

- (251) PT Portugal had several radio access network ("RAN")<sup>126</sup> suppliers, namely [...]. PT Portugal wished to reduce the number of suppliers<sup>127</sup> and in March 2015 asked Altice for instructions on whether to continue its selection process for its RAN suppliers, or to wait for the closing of the Transaction.
- (252) On 17 March 2015, PT Portugal (Mr. Q) sent an email to Altice ([Mr. F] and [Mr. C]) with regard to the selection of a RAN supplier<sup>128</sup>. In the introduction of the email, PT Portugal explained that this was an important competitive issue for PT Portugal as it concerns: "*national mobile coverage of PT, where things are heating up now that Vodafone is catching us up on 4G coverage – we have had the lead since 4G launch, but Vodafone is investing hard and fast.*" However, PT Portugal noted that "[t]he objective of the e-mail is NOT however to ask for mobile capex, but to highlight the need to simplify the supplier ecosystem in mobile RAN". PT Portugal stated that: "*we believe that Altice should look at this issue sooner rather than later.*" PT Portugal also stated that it had not been able to proceed in the preceding 18 months.
- (253) PT Portugal further explained in that email that, as different technologies were rolled out, PT Portugal had ended up with two RAN suppliers per site, and with three RAN suppliers in total ([...]). PT Portugal had the intention to rationalise so as to have only one RAN supplier per site to reduce operation expenditure and to simplify the network. PT Portugal explained that this had not yet come about because of delays regarding the transaction with Oi (that is to say, the Oi / Portugal Telecom merger<sup>129</sup>) and in the meantime, PT Portugal had not made any major investments in the RAN network. This would be an issue notably for upgrades to the [...] equipment, certain [...] maintenance support, and maintenance support for all three RAN networks by the end of 2015. In particular, PT Portugal wanted to avoid having to upgrade the [...] network for operational purposes if, as was highly likely, it would be phased out by PT Portugal in the near future<sup>130</sup>.

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<sup>126</sup> In the SO Response (paragraphs 313 and 314), Altice explains that RAN equipment provides the radio functions of the mobile network by transmitting signals between the mobile handset and the core portion of the mobile network. RAN equipment can be grouped into standard generations, that is to say 2G, 2.5G, 3G, 4G (the latest generation being currently deployed by mobile operators in Europe and the USA) and the future 5G (in the development phase).

<sup>127</sup> In the SO Response (paragraph 315), Altice explains that while network equipment used to be technology specific, in the past few years, so-called Single RAN technology had been developed, which enables mobile operators to run and operate multiple mobile telecommunications standards on a single network. As a result of the deployment over time of multiple standard generations of RAN equipment, PT Portugal was supplied by three RAN vendors throughout the Portuguese territory and in order to simplify its RAN equipment supply system, PT Portugal considered switching to one single (or potentially two) RAN supplier(s) per site (SO Response, paragraph 317).

<sup>128</sup> ID[AL-00039255].

<sup>129</sup> SO Response, paragraph 318.

<sup>130</sup> In the SO Response (paragraph 317), Altice explains that PT Portugal considered that a [...]. In particular, PT Portugal determined that the contract with [...] would likely be terminated and therefore PT Portugal wanted to avoid incurring investments in [...] software updates before such termination.

- (254) PT Portugal explained that the purpose of the email was "to seek guidance on the process regarding swapping to a single (or maybe dual) RAN vendor in Mobile" and proposed the following two options to Altice:

*"We have I believe two options:*

*(A) Wait for completion of Altice/PT and only then initiate selection (and I am assuming that Altice already has done some work and thinking in this area given relationships with [...] and [...])*

*Or*

*(B) Continue with PT process so that we have a good selection and detailed swap process and timing for a final negotiation to be closed by Altice when the PT/Altice deal is closed."*

- (255) PT Portugal expressed a preference to Altice for option B:

*"We are aware of Altice purchasing power on this subject, but given [...], we believe an ideal scenario (if possible) would be to have PT continue its single-RAN RFP selection process so that it will be ready for final negotiations be Altice sooner rather than later. The issue is timing versus network capacity and saving opex on having less suppliers." [sic]*

- (256) PT Portugal also explained that timing was crucial in view of the costs of software licences involved:

*"The advantage of Option B is timing given the fact that we have been waiting for considerable time and are worried about having to spend unnecessarily on SW licenses in the current configuration."*

- (257) Finally, PT Portugal explained that option B would only work: "if Altice also speaks with [...] to tell them to respond aggressively to the PT process."

- (258) Instead, in response to PT Portugal's request, on 18 March 2015 Altice ([Mr. F]) asked PT Portugal to take option A and to start exchanging information with Altice's purchase manager so as to prepare for the negotiations to take place after the closing of the Transaction:

*"I would rather go for scenario A with a twist: prepare ASAP the negotiation we will have after closing by exchanging information*

*I put [Mr. I] in the loop.*

*[Mr. I] is the Altice Purchase Manager and has personally managed the [...] RAN vendors negotiation during the last months.*

*He will contact you ASAP to start gathering the data he needs to expedite the negotiation."<sup>131</sup>*

- (259) Altice's internal e-mails from 18 March 2015 mention the possibility of Altice initiating discussions with vendors. [Mr. F] wrote to [Mr. C] on 18 March 2015: "Do you want to deal with it? I transfer the mail to [Mr. I] that may have time to initiate discussion with vendors and anyway will manage it? Or you prefer to take the lead to put a foot on network by the RAN ?"<sup>132</sup>. [Mr. C] responded: "Any way transfer to [Mr. I], I will start deal with the Ran and not just, cause we must build the next step

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<sup>131</sup> ID[AL-00002472].

<sup>132</sup> ID[AL-00044227].

for the networks. I am starting to meet all the vendors to and make analysts. Also here [...] I will start to drilldown"<sup>133</sup>. [Mr. F] responded: "Good!"<sup>134</sup>.

(260) Despite having expressed a clear preference for option B, PT Portugal agreed to take the way forward suggested by Altice. On 18 March 2015, PT Portugal ([Mr. Q]) responded to Altice:

"OK – understood"

(261) Subsequently PT Portugal proceeded with implementing Altice's request. PT Portugal contacted Altice's purchase manager to schedule a call and exchange information<sup>135</sup>. In the context of these exchanges, Altice ([Mr. I]) wrote:

"I already have a group agreement with [...] and [...] with prices defined. [...]"<sup>136</sup>

(262) A call between Altice and PT Portugal to discuss the issue was scheduled to take place on 23 March 2015<sup>137</sup>, however the Commission does not have evidence on its file regarding the outcome of this call.

(263) [...], PT Portugal entered into contracts relating to the provision of single RAN technology per site with [...] and [...]"<sup>138</sup>.

(b) The Commission's findings

(264) For the reasons set out below, the Commission concludes, that Altice was directly involved in establishing PT Portugal's selection process for RAN suppliers, which formed part of the Target's competitive strategy on the market. Such involvement contributes to the Commission's conclusion that, through the actions described in Section 4.2 of this decision, Altice exercised decisive influence over aspects of the Target's business prior to the Commission having declared the Transaction compatible with the internal market.

(265) At the outset, the Commission notes that the objective of PT Portugal's request was to obtain Altice's consent on whether PT Portugal should continue the RAN supplier selection process before the closing of the Transaction. It is apparent from PT Portugal's 17 March 2015 e-mail to Altice that PT Portugal did not request Altice's consent to enter into an agreement with RAN suppliers. This is also clear from the stated objective of the e-mail, that is to say to highlight the need to simplify the supplier ecosystem in mobile RAN but not to ask for mobile capital expenditure, and the fact that under both options proposed by PT Portugal final negotiations, and *a fortiori*, final agreement(s) with vendor(s), would take place when the Altice / PT Portugal transaction closed<sup>139</sup>.

(266) Altice's consent was requested on the RAN supplier selection process which went beyond what could reasonably be considered as necessary for preserving the value of the Target in the period between the Signing Date and the Closing Date.

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<sup>133</sup> ID[AL-00044227].

<sup>134</sup> ID[AL-00039165].

<sup>135</sup> ID[AL-00023547]. See also ID[AL-00015699].

<sup>136</sup> ID[AL-00002463].

<sup>137</sup> ID[AL-00015599] and ID[AL-00015307].

<sup>138</sup> SO Response, paragraph 319.

<sup>139</sup> Under "option A" PT Portugal would wait for the completion of the Altice / PT Portugal transaction and "only then initiate selection", while "option B" envisaged that PT Portugal would continue its on-going selection process with "a final negotiation to be closed by Altice when the PT/Altice deal is closed".

- (267) The RAN supplier selection process was a negotiation with an equipment supplier. PT Portugal sought instructions from Altice regarding how to approach the selection of its RAN suppliers; Altice interfered in PT Portugal's negotiation strategy and gave instructions to PT Portugal to wait with the selection process and to exchange information on the matter, as a result of which PT Portugal changed its selection process strategy; and, PT Portugal implemented these instructions, notably by suspending the selection process and providing commercially sensitive information to Altice. Altice's conduct amounts to direct interference with respect to an important parameter of how PT Portugal conducts its business and competes on the market. PT Portugal had itself noted in the introduction of its e-mail to Altice that mobile network coverage is a key parameter of competition for the business.
- (c) Altice's views
- (268) In the SO Response, Altice raises two lines of argumentation: (i) the switch to a single RAN vendor is a matter outside of PT Portugal's normal and ordinary course of business; and (ii) Altice did not interfere in the decision-making process but merely agreed with PT Portugal / Oi that it was preferable to wait until the Closing Date before undertaking any firm and definitive commitment. Both arguments are further detailed below.
- (269) According to Altice, RAN constitutes the backbone of the mobile network of a telecommunications operator and therefore the selection of a technology vendor constitutes a critical decision for a telecommunications operator. *A fortiori*, the transition from multiple RAN vendors towards a single RAN vendor per site is, according to Altice, a strategic decision with significant and long-term effect for the value of PT Portugal. Furthermore, the value of the contracts amounted to more than EUR [...] <sup>140</sup> and exceeded the thresholds of Article 6.1(b) of the Transaction Agreement. Altice also considers that the matter was therefore outside of PT Portugal's normal and ordinary course of business in the sense of Article 6.1(a) of the Transaction Agreement.
- (270) Furthermore, Altice argues that it did not exercise any decisive influence on the negotiations relating to PT Portugal's selection of a new RAN vendor. In reply to [Mr. Q's] request proposing two options, [Mr. F] replied that he "*would rather go for scenario A*", that is to say, to wait for the completion of the Transaction before selecting the RAN vendor(s). Therefore, Altice argues that it opted for the least intrusive option, namely to prepare for the negotiation that would take place after completion of the Transaction, and refused to contact [...] in order to encourage them to make attractive proposals to PT Portugal. According to Altice, the Altice Group Purchase Manager ([Mr. I]) was merely included in the discussions, to prepare the negotiations that would take place after the Closing Date. Further, Altice claims that it had no intention of contacting vendors regarding the negotiations with PT Portugal prior to completion of the Transaction and the Commission does not provide any evidence that Altice contacted vendors regarding the negotiations with PT Portugal prior to the Closing Date. In any event, Altice states that the fact that contracts with RAN vendors were entered into in the end of 2016 confirms that no decision was taken and therefore no guidance was provided by Altice prior to the Clearance Decision or even the Closing Date.

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<sup>140</sup> Contracts relating to the provision of single RAN technology per site were entered into with [...] and [...] at the end of 2016 for a total value of EUR [...] and EUR [...] [...].

- (d) The Commission's assessment of Altice's views
- (271) The Commission rejects Altice's claims for the reasons set out below.
- (272) Altice's reference to the value of the contracts entered into with [...] and [...], which according to Altice exceeded the thresholds of Article 6.1(b) of the Transaction Agreement, is misplaced. The objective of PT Portugal's request of 17 March 2015 was not to obtain Altice's consent to enter into an agreement with any RAN suppliers. The signature of those contracts with [...] and [...] is a separate matter and in fact they were entered into [...], when the Commission had already cleared the Transaction.
- (273) The objective of PT Portugal's request of 17 March 2015 however focused solely on the issue whether PT Portugal should continue the RAN supplier selection process before the Closing Date. PT Portugal informed Altice that it had already initiated the process in its purchasing department and favoured continuing with the selection process so as to have a selection and process in place by the time of the closure of the Transaction. There is no indication that continuing this selection process would have had an unusually significant impact on the value of the Target. Altice's interference in PT Portugal's negotiation strategy therefore went beyond what could reasonably be considered as necessary for preserving the value of the Target in the period between the Signing Date and the Closing Date.
- (274) On the basis of the evidence on file it cannot be excluded that the issue whether to continue the selection process of a RAN supplier was not even caught by the provisions of the Transaction Agreement. Oi has confirmed that there was no communication from Oi to Altice in the scope of Article 6.1(b) of the Transaction Agreement regarding this matter. Therefore, PT Portugal requested instructions from Altice, outside of the scope of the procedure foreseen in Article 6.1(b) of the Transaction Agreement. It is therefore unlikely that the thresholds of Article 6.1(b) of the Transaction Agreement were met as claimed by Altice, since Oi would have been contractually obliged to apply the procedure foreseen in Article 9.7 of the Transaction Agreement, had the thresholds been met. For that reason, the selection process for a RAN supplier would not even under the provisions of the Transaction Agreement constitute a matter that could materially affect the value of the Target in the period between the Signing Date and the Closing Date which would require oversight by Altice.
- (275) In addition, the Commission recalls that Article 6.1(b)(i) of the Transaction Agreement provides that Altice should provide its consent to any capital expenditure exceeding the amount provided in the annual budget. In this regard, PT Portugal stated in its e-mail to Altice that its intention was not to ask for mobile capital expenditure but to highlight the need to simplify the supplier ecosystem in mobile RAN. Thus, the RAN supplier selection process was not an issue that the Parties considered would affect the value of the business since it did not imply PT Portugal to incur capital expenditure not provided in the annual budget, which should be subject to oversight by Altice in order to protect the value of the Target between the Signing Date and the Closing Date.
- (276) That the matter fell outside of PT Portugal's ordinary course of business in the sense of Article 6.1(a) of the Transaction Agreement, as claimed by Altice, is also not likely, since Oi did not request Altice's consent on the basis of Article 6.1(a) of the Transaction Agreement.
- (277) In any event, what matters is whether Altice's involvement in this aspect of PT Portugal's business prior to having received clearance for the concentration pursuant

to Article 7(1) of the Merger Regulation can be justified on the basis that such conduct could be regarded as necessary for the preservation of the value of the Target, and not whether Altice's conduct was allowed by the Transaction Agreement (which, for the reasons set out at recitals (58) to (177) granted Altice rights with respect to PT Portugal going beyond what was necessary to protect the value of Altice's investment in the period prior to clearance). Having regard to the subject matter which concerned a supplier selection process, Altice's involvement in the present case cannot be reasonably considered as necessary for preserving the value of the Target in the period between the Signing Date and the Closing Date, but formed part of the Target's competitive strategy on the market.

- (278) That the selection of a RAN technology vendor constitutes a critical decision for a telecommunications operator and the transition from multiple RAN vendors towards a single RAN vendor per site is, according to Altice, a strategic decision with significant and long-term effect for the value of PT Portugal, does not entail that in the period between the Signing Date and the Closing Date Altice's involvement was necessary for preserving the value of the Target. Indeed, as stated in recital (265) when PT Portugal requested Altice's consent, it was not seeking consent to select a particular RAN technology vendor or to enter into an agreement with any single RAN supplier. Such agreements were only entered into at the end of 2016, more than a year after the Closing Date. Rather, PT Portugal's request for Altice's consent covered specifically the question whether PT Portugal should continue the RAN supplier selection process before the closing of the Transaction and there is no indication that this selection process would have had an unusually significant impact on the value of the Target before the Closing Date.
- (279) As to Altice's claim that Altice's behaviour was the least intrusive option, it is not relevant whether there was a more intrusive option available to Altice which it did not chose. It is apparent that Altice gave instructions to PT Portugal to wait with the selection process and to exchange information on the matter, as a result of which PT Portugal changed its selection process strategy: Altice opted for a modified scenario A, namely to prepare "*as soon as possible*" the negotiation "*by exchanging information*". The Commission considers that in relation to this issue, and despite Altice not having contacted vendors directly, Altice and PT Portugal went far beyond what would have been necessary for Altice to approve an investment or expenditure by PT Portugal, which in any event would need to be sufficiently high to materially impact the value of the Target.
- (280) Finally, contrary to Altice's claim, the fact that contracts with RAN vendors were entered into in the end of 2016 does not entail that no guidance was provided by Altice prior to the Clearance Decision.

#### 4.2.1.4. Video on demand / Electronic sell-through contract

##### (a) Facts

- (281) Starting on 1 February 2015, MEO/PT Portugal and Cinemundo<sup>141</sup> planned on entering into a [...] agreement for the supply of various movies to MEO's VOD platform. At the same time, PT Portugal and Cinemundo wished to establish

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<sup>141</sup> According to its website (<http://www.cinemundo.pt/>) Cinemundo is a Portuguese company, created in 2014 for the distribution of cinema content on, among others, the Portuguese market. The company offers subscription channels and is active in the area of distribution of cinema.

commercial conditions for EST<sup>142</sup> to be launched on MEO during 2015<sup>143</sup>. The commercial conditions for such an agreement covering VOD and EST with Cinemundo would consist of [...].

(282) MEO, PT Portugal's pay-tv service, already carried the movie channel Cinemundo in its basic TV channels, which was the subject of a separate agreement concluded [...]<sup>144</sup>.

(283) On 10 February 2015, Altice and PT Portugal started several e-mail and phone exchanges on the VOD / EST agreement. This exchange started with an email on 10 February 2015 from PT Portugal to Altice<sup>145</sup> consulting Altice on whether the agreement would be in line with Altice's commercial strategy and whether Altice would agree to PT Portugal entering into the agreement:

*"As discussed last week, we do not have any major agreements to sign for content until Altice owns the company, but just received one to look at for VOD where we are negotiating as per attached photo. Is this similar to what you are doing in other Operators ? Do you want to get involved in more detail here or ok for us to sign a 2 year contract with these conditions?"*

(284) This email had in attachment a photograph from an internal MEO / PT Portugal note with the key commercial terms of PT Portugal's agreement, including the revenue share with Cinemundo and the minimum royalties per movie, as shown in Figure 4<sup>146</sup>.

**Figure 4 – Information provided to Altice by PT Portugal regarding proposed conditions of a two-year VOD contract**

[...]

(285) Later that day, the agreement with Cinemundo was discussed by the MEO board of directors<sup>147</sup>.

(286) Altice replied to PT Portugal's request that it would like to get involved<sup>148</sup> before PT Portugal proceeded with the agreement and asked for a call to discuss the issue: *"We are indeed signing similar agreements in other territories, specifically in [...] and [...]. I would be glad to discuss in further detail that agreement before you proceed. Could we organize a call tomorrow around 18h00 CET / 17h00 Portugal?"*<sup>149</sup>

(287) A call took place between PT Portugal ([Mr. M]) and Altice ([Mr. F]) to discuss the Cinemundo contract on 11 February 2015<sup>150</sup>. According to internal Altice e-mails,

<sup>142</sup> Electronic sell-through refers to a type of VOD whereby the acquired file is downloaded and stored on a hard drive.

<sup>143</sup> See MEO / PT Portugal internal note dated 30 January 2015, ID[AL- 00003276], which was attached to ID[AL-00003275] e-mail dated 2 March 2015 of [Mr. J] to [Mr. K].

<sup>144</sup> ID[AL-00104139]. In the SO Response, Altice further explains that PT Portugal entered into an agreement with Cinemundo on [...] for the distribution of the channel from [...] until [...] . The contract had an estimated annualized value of EUR [...] (2014) (see ID[AL-00106526]) to EUR [...] (in 2015) (ID[AL-00010240]) and for the year 2016, the annual cost amounted to EUR [...].

<sup>145</sup> Email from [Mr. K] to [Mr. F], of 10 February 2015, ID[AL-00009799].

<sup>146</sup> Email from [Mr. K] to [Mr. F], of 10 February 2015, ID[AL-00009799].

<sup>147</sup> ID[AL-00144810], Agenda of the MEO Board of Directors, item 11.

<sup>148</sup> [Mr. F] shared [Mr K's] email with an employee of HOT, Altice's business in Israel, in order to discuss whether other such VOD contracts had been signed more advantageously by Altice.

<sup>149</sup> Email from [Mr. F] to [Mr. K], of 10 February 2015, ID[AL-00004228].

<sup>150</sup> Email from [Mr. F] to [Mr. K], of 10 February 2015, ID[AL-00076573].

[Mr. F] had been involved in the set up of a VOD and EST platform for the group in other countries<sup>151</sup>. Evidence in the Commission's file demonstrates that during this call Altice informed PT Portugal that it believed it had better terms for VOD for its other subsidiaries and therefore it was decided that PT Portugal should postpone the signing of the deal until the Closing Date<sup>152</sup>.

- (288) Further PT Portugal e-mail correspondence indicates that Altice directed PT Portugal not to sign a long-term contract ([...]) but only a [...] contract<sup>153</sup>.
- (289) The contract for the provision of content for the MEO VOD platform was entered into between PT Portugal and Cinemundo on [...], starting from [...] and ending on [...] and was automatically renewed and remained valid until [...]<sup>154</sup>.
- (290) In summary, PT Portugal sought guidance from Altice regarding the terms of a content agreement and Altice provided such guidance, with reference to its commercial policy. This communication included the exchange of commercially sensitive information. This conduct occurred prior to the date of notification and prior to adoption of the Clearance Decision.
- (b) The Commission's findings
- (291) For the reasons set out below, the Commission concludes that Altice was directly involved in defining the terms for the negotiation of a supply agreement between PT Portugal and Cinemundo, which formed part of the Target's competitive strategy on the market, a market in which Altice was itself competing via its subsidiaries. Such involvement contributes to the Commission's conclusion that, through the actions described in Section 4.2 of this decision, Altice exercised decisive influence over aspects of the Target's business prior to the Commission having declared the Transaction compatible with the internal market.
- (292) Considering the value and subject matter of this contract, Altice's consent was requested on a matter which went beyond what could reasonably be considered as necessary for preserving the value of the Target in the period between the Signing Date and the Closing Date. As a supplier of TV services to end users, it was part of PT Portugal's ordinary business to enter into agreements with suppliers of movies.
- (293) PT Portugal provided Altice with very detailed information on its current ongoing contract negotiation with Cinemundo; asked whether Altice was signing similar contracts; and asked for instructions whether it should sign the contract. Altice in turn informed PT Portugal that it was signing similar deals under more favourable commercial terms, asked PT Portugal not to proceed on that agreement until it had been discussed with Altice and instructed PT Portugal, to shorten the duration of the contract to one year.
- (294) The granularity of information shared both with Altice and PT Portugal was excessive for Altice to be able to exercise justifiable oversight of the PT Portugal business with a view to value preservation in the period between the Signing Date and the Closing Date. In particular, Altice's sharing benchmarking information with

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<sup>151</sup> ID[AL-00046181]. E-mail exchange dated 17 December 2014 between [Mr. F] and [Mr. C], stating "[...]."

<sup>152</sup> Email from [Mr. M] to [Mr. K] of 11 February 2015 ID[AL-00115804]. See also Email from [Mr. K] to [Mr. M] of 11 February 2015, ID[AL-00009725].

<sup>153</sup> E-mail exchange dated 2 March 2015 between [Mr. M] and [Mr. K], ID[AL-00112137].

<sup>154</sup> SO Response, paragraph 365.

PT Portugal cannot be considered as necessary to achieve this objective. The information received was akin to the type of information that Altice would only be entitled to receive following closing of the Transaction and should not be disclosed between competitors. Such sensitive information exchange makes it difficult for the Commission to restore the prior competitive situation as it can be considered that once the information has been exchanged, the harm to competition has already been done. This aspect is further aggravated by the fact that the Commission raised concerns as regards the compatibility of the Transaction with the internal market.

(c) Altice's views

(295) Altice initially stated that the Chief of Staff of PT Portugal's CEO and PT Portugal's Head of B2C Segment for TV were not aware of any guidance provided by Altice to PT Portugal on the VOD contract prior to the Closing Date<sup>155</sup>.

(296) In the SO Response, Altice submits that, the conclusion of a contract for the provision of content for MEO VOD platform with Cinemundo can be regarded as falling within the scope of Article 6.1(b) of the Transaction Agreement and as a matter outside of PT Portugal's normal and ordinary course of business in the sense of Article 6.1(a) of the Transaction Agreement<sup>156</sup>. According to Altice the value thresholds of Article 6.1(b)(ii) and (iii) of the Transaction Agreement are met since the contract of [...] with Cinemundo can be estimated at EUR [...] over the entire duration of the contract ([...]). Furthermore, according to Altice, PT Portugal intended to extend the scope of its relationship with Cinemundo, by acquiring new TV content to be broadcasted through the innovative VOD and EST channels [...]: that decision was critical for PT Portugal's commercial strategy because it had a direct impact on the nature of the services it may offer to its customers<sup>157</sup>. Furthermore, such kind of contract is generally concluded for a relatively long duration in practice, as telecommunications operators and TV content providers generally seek to establish long-term partnerships.

(297) Altice further submits that while it provided guidance to PT Portugal, such guidance could not have had and did not have any impact on the outcome of the negotiations<sup>158</sup>. Altice notes that its involvement consisted of only two email exchanges between PT Portugal and Altice, that were not submitted to Altice through the process of Article 6.1(b) of the Transaction Agreement (see in this regard recital (66))<sup>159</sup>: (i) PT Portugal informed Altice that it was negotiating a VOD content agreement (as a result of which Altice proposed a call to discuss this and [Mr. M] informed [Mr. K] that, since Altice apparently had better conditions regarding VOD, they decided to wait until the Closing Date) and (ii) an email exchange suggesting that Altice proposed to enter into a VOD contract with Cinemundo [...]. According to Altice, PT Portugal did not follow Altice's suggestion to wait until the Closing Date (as the VOD contract was signed [...]) and the contract, [...].

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<sup>155</sup> Altice's response of 18 December 2015 to Commission's RFI of 4 December 2015, page 1.

<sup>156</sup> SO Response, paragraphs 366 to 371.

<sup>157</sup> In the SO Response (paragraph 369), Altice further notes that PT Portugal's objective was to make available the most relevant cinematographic titles to its clients (Cinemundo owns the rights for the distribution of titles such as Malapata, Mother's Day and Robinson).

<sup>158</sup> SO Response, paragraphs 427 and 438 to 442.

<sup>159</sup> Altice notes that the Board of MEO decided to refer this matter for prior approval to Oi.

- (d) The Commission's assessment of Altice's views
- (298) Altice's claim that the VOD / EST contracts with Cinemundo reached the thresholds of Article 6.1(b)(ii) and (iii) of the Transaction Agreement does not entail that this matter would have a material impact on the value of PT Portugal. As explained in recital (94), the monetary thresholds in Articles 6.1(b)(ii) and (iii) of the Transaction Agreement were set at a level that included contracts of a value that would not have a material impact on the value of the PT Portugal business.
- (299) In any event, it is unlikely that the value thresholds of Article 6.1(b)(ii) and (iii) of the Transaction Agreement were even met. Altice's reference to EUR [...] contract was to the contract of [...] with Cinemundo for the distribution of the pay-TV Cinemundo channel from [...] until [...]. However, this is not the value of the contract that was the subject of Altice's communications with PT Portugal in February and March 2015, which was the potential conclusion of a VOD / EST agreement with Cinemundo (a contract that was signed in [...]). Furthermore, Altice's statements are contradictory in this respect since it follows from the Reply to the Letter of Facts (pages 32-33) that Altice considered that the VOD / EST contract had a value below EUR [...]. In addition, Oi stated that it could not find any communication from PT Portugal to Altice on this matter and that [Mr. Q] of PT Portugal did not and had no powers to represent Oi, especially for the purposes of Articles 6.1(b) and 9.7 of the Transaction Agreement. It is therefore unlikely that the VOD / EST contract fell under Article 6.1(b)(ii) and (iii) of the Transaction Agreement. In that case, the VOD / EST contract would not, even under the provisions of the Transaction Agreement, constitute a matter that could materially affect the value of the Target in the period between the Signing Date and the Closing Date which would require oversight by Altice.
- (300) That the VOD / EST contract was a matter that fell outside of PT Portugal's ordinary course of business in the sense of Article 6.1(a) of the Transaction Agreement, as claimed by Altice, does not entail that it had a material impact on the value of the PT Portugal business. In any event, it is unlikely that this matter could be considered as falling outside the ordinary course of business. PT Portugal's MEO was already offering VOD services, having generated more than EUR [...] of revenues in 2013 and 2014, through contracts with more than [...] content providers, including [...] US majors as well as Portuguese providers<sup>160</sup>. Furthermore, it appears from internal PT Portugal documents that MEO / PT Portugal considered the contractual conditions applicable to this contract to be in line with the market practices<sup>161</sup>.
- (301) In any event, what matters is to establish whether Altice's conduct could be regarded as necessary for the preservation of the value of the Target, and not whether Altice's conduct was allowed by the Transaction Agreement (which, for the reasons set out at recitals (58) to (177) granted Altice rights with respect to PT Portugal going beyond what was necessary to protect the value of Altice's investment in the period prior to clearance). Having regard to the value and subject matter, Altice's involvement in the present case cannot be reasonably considered as necessary for preserving the value of the Target in the period between the Signing Date and the Closing Date, but formed part of the Target's competitive strategy on the market.

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<sup>160</sup> ID[AL-00104139]. See also ID[AL-00103208], e-mail dated 26 March 2015 from [Mr. R] to [Mr. M] and [Ms. S].

<sup>161</sup> See MEO / PT Portugal internal note dated 30 January 2015, ID[AL- 00003276], which was attached to ID[AL-00003275] e-mail dated 2 March 2015 of [Mr. R] to [Mr. K].

- (302) Altice's claim that that decision was critical for PT Portugal's commercial strategy because it had a direct impact on the nature of the services it can offer to its customers, further confirms that Altice was involved in a business decision of a competitor prior to the Clearance Decision.
- (303) Contrary to Altice's claim, Altice's guidance did have an impact since PT Portugal did not proceed until the agreement had been discussed with Altice. In addition, PT Portugal followed Altice's instruction to shorten the duration [...].
- (304) The Commission does not therefore consider this communication with, and oversight by, Altice to be a justifiable protection of its interests as the purchaser of the PT Portugal business.

#### 4.2.1.5. DOG TV

##### (a) Facts

- (305) Talks between PT Portugal and World Channels, the distributor of DOG TV, a premium TV channel specifically dedicated to dogs in Portugal, took place at least since November 2014<sup>162</sup>. In early April 2015, PT Portugal sought instructions from Altice concerning the potential inclusion of DOG TV in its offer.
- (306) In a letter dated 25 March 2016<sup>163</sup>, Oi requested Altice's consent to the DOG TV deal pursuant Article 6.1(b) of the Transaction Agreement, following identification by the PT Portugal board as a contract falling under this provision<sup>164</sup>: "**Entry of a new premium channel in MEO's grid – DOG TV: Approval of the contracting and the entry of the premium DOG TV channel in MEO's grid, [...]. [...].**"
- (307) By letter of 2 April 2015, Altice denied its consent to allow the addition of DOG TV to PT Portugal's offering and requested that PT Portugal provide further information. "*We hereby confirm that we do grant our consent for the performance of the necessary actions to implement and/or carry out the items as presented in the Notice, except for the following items, for which our consent is denied at this stage (in respect of some of the items identified below, we request further information in order to reassess our current denial of consent).*" The list includes the DOG TV contract (item 12):
- "*“12. Entry of a new premium channel in MEO's grid – DOG TV”: please detail the revenue sharing model which is mentioned in this Item.*"<sup>165</sup>
- (308) On 10 April 2015, again through the formal process set out under Article 6.1(b) of the Transaction Agreement, Oi responded with granular details of the revenue sharing model that would have been applicable to the DOG TV contract:
- "*[...].*"<sup>166</sup>
- (309) On 11 April 2015, Altice ([Mr. F]) reached out bi-laterally by email to PT Portugal ([Mr. K]), requesting PT Portugal get in touch with [Mr. I] at Altice who was in charge of the PT Portugal Transaction (and who appeared not to be aware yet of

<sup>162</sup> ID[AL-00101652]; Altice RFI response of 23 August 2016.

<sup>163</sup> Annex 4.3 of Altice's response to the Commission's RFI of 20 July 2016

<sup>164</sup> See ID[AL-00002705], ID[AL-00002706], ID[AL-00002714], ID[AL-00002715].

<sup>165</sup> ID[AL-00145492]. Email exchange dated 11 April 2015 between [Mr. F] and [Mr. I], using [Mr. I's] Cabovisao email address.

<sup>166</sup> Annex 4.5 of Altice's response to the Commission's RFI of 20 July 2016

DOG TV issue)<sup>167</sup> regarding the DOG TV deal which he stated: "*we are requested to approve*"<sup>168</sup>. In particular, [Mr. F] asked PT Portugal: "*to clarify the role of World channels and the break even point definition in that deal.*" In other words, Altice wanted to know more about the revenue sharing between PT Portugal and World Channels with regard to the DOG TV Channel. PT Portugal ([Mr. K]) responded: "*Sure*"<sup>169</sup>.

- (310) On 13 April 2015, PT Portugal ([Mr. K]) provided a one page summary directly to Altice ([Mr. F] and [Mr. I])<sup>170</sup>. This document included detailed and commercially sensitive information on the agreement between DOG TV and World Channels, in particular, the performance forecast, retail price and allocation of set-up costs – see for example an extract in Figure 5.

**Figure 5 - Information provided to Altice by PT Portugal regarding DOG TV**

[...]

- (311) In the same e-mail [Mr. K] asked when it would be suitable to discuss DOG TV<sup>171</sup>.
- (312) On 15 April 2015 PT Portugal ([Mr. K]) asked Altice ([Mr. F]) whether he needed "*any further info on this topic*"<sup>172</sup>. Later that day, PT Portugal ([Mr. K]) asked Altice ([Mr. F] and [Mr. E]) to discuss during a call a series of topics, including DOG TV, that were submitted "*through the standard channel*".<sup>173</sup>
- (313) On 16 April 2016 through the formal Article 6.1(b) process of the Transaction Agreement, Altice requested certain additional information from Oi, similar to the information requested informally referred to in recital (309) i.e.:
- "What is the definition of breakeven? What is the role of World channels? Distributor in Portugal"*
- (314) The answers to these questions were provided through the formal channels under Article 6.1(b) of the Transaction Agreement on 4 May 2015, after the Commission adopted its Clearance Decision. Altice submits that PT Portugal launched the DOG TV Channel on 22 May 2015.
- (b) The Commission's findings
- (315) For the reasons set out below, the Commission considers that Altice was directly involved in the decision whether to include the DOG TV channel in PT Portugal's TV offering, which formed part of the Target's competitive strategy on the market, a

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<sup>167</sup> ID[AL-00025244]. The Commission notes in particular that this email chain included [Mr. I's] Cabovisão email address. The fact that [Mr. I] had an email address at Cabovisão suggests that Altice's management was not completely separate from the management of its subsidiaries in Portugal.

<sup>168</sup> ID[AL-00001277]. Prior to this e-mail [Mr. F] had consulted internally within Altice as well as external counsel, and identified further information he would like to receive on the DOG TV: "*what is the definition of breakeven? What is the role of World channels? Distributor in Portugal? Did you involve [Mr I] in that negotiation?*" (ID[AL-00049646]). See also ID[AL-00049588]).

Following this request of [Mr. F], [Mr. K] asked [Mr. M] to prepare a document (ID[AL-00007363]).

<sup>169</sup> ID[AL-00023064].

<sup>170</sup> ID[AL-00023016] and ID[AL-00023017]. It appears from internal documents that the information had been provided by [Mr. M] to [Mr. K] on the same day (ID[AL-00113277]).

<sup>171</sup> ID[AL-00023016].

<sup>172</sup> ID[AL-00022968].

<sup>173</sup> ID[AL-00007172].

market in which Altice was itself competing via its subsidiaries. Such involvement contributes to the Commission's conclusion that, through the actions described in Section 4.2 of this decision, Altice exercised decisive influence over numerous aspects of the Target's business prior to the Commission having declared the Transaction compatible with the internal market.

- (316) First, the Commission notes that PT Portugal sought instructions from Altice with regard to the negotiation of the contract which Altice responded to, in the first instance by refusing to allow PT Portugal to enter this contract. As shown in recital (307), in its the letter of 2 April 2015 from Altice to Oi<sup>174</sup> Altice explicitly states that consent is denied: "*We hereby confirm that we do grant our consent for the performance of the necessary actions to implement and/or carry out the items as presented in the Notice, except for the following items, **for which our consent is denied at this stage** (in respect of some of the items identified below, we request further information in order to reassess our current denial of consent).*" The list includes the DOG TV contract (item 12). It is thus clear that Altice gave instructions to Oi on how to proceed when it did not give authorisation for this channel to be included in the PT Portugal's product offering, despite it not being something previously contemplated by the Parties as having the potential to materially negatively impact the value of the PT Portugal business.
- (317) Second, the Commission notes that the annual value of the DOG TV contract (EUR [...]) was below the materiality threshold set in Article 6.1(b) of the Transaction Agreement and whilst it could fall within the definition of Communication Agreement, it is not listed in Schedule 5.15(a) to the Transaction Agreement. In its Response to Commission RFI of 6 October 2017, Oi explained that it requested Altice's agreement with regard to this contract because it concerned TV content and it was therefore a Communication agreement (according to Article 5.15 (a)(ix) Communication agreements include any material contracts with television program (content) providers). However, despite the contract potentially falling under the provision of the Transaction Agreement concerning the Communication agreements, having regard to the value and content of this contract, Altice's involvement cannot be reasonably considered as necessary for preserving the value of the Target in the period between the Signing Date and the Closing Date.
- (318) Third, Altice received commercially sensitive information from the Target. The amount of information that was sent by PT Portugal to Altice appears to have been far more detailed and extensive than would have been required to achieve this goal, in particular the exchange of granular and forward looking pricing and revenue data. The information received was akin to the type of information that Altice would only be entitled to receive following Closing Date and should not be disclosed between competitors.
- (319) Finally, the Commission notes that the conduct occurred prior to the Clearance Decision. The behaviour relating to such a small contract indicates both the breadth of the scope as well as the granularity in terms of intrusion by Altice into the Target's affairs. Moreover, it also indicates the breadth of the scope of Altice's possibility to influence the affairs of the Target pursuant to the Transaction Agreement.

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<sup>174</sup> ID [AL-00145492]

- (c) Altice's views
- (320) Initially, Altice submitted<sup>175</sup> that it was consulted by Oi within the framework of Article 6.1(b) of the Transaction Agreement, and that it did not give any instructions to PT Portugal with regard to DOG TV. Altice submitted that DOG TV has an extremely limited audience, and in April 2015 represented a value of EUR [...] which cannot be considered as an important TV channel from a commercial point of view.
- (321) In its SO response Altice argued on the contrary that while the DOG TV contract did not meet the monetary thresholds provided by the Transaction Agreement, it was a matter outside the ordinary course of business given the particularities of that specific TV channel. Altice submits that a TV channel aimed at pets had not previously been included in the PT Portugal TV grid and it was therefore unable to assess the possible future performance of such a channel and was therefore outside the ordinary course of business.
- (322) Furthermore, Altice disputes that it refused to give its consent to DOG TV being included in the TV grid. Oi had requested that consent in a formal letter pursuant to Article 6.1(b) of the Transaction Agreement on 25 March 2015. Altice submits that it did not provide any instructions on the matter to PT Portugal and its only response consisted of requesting clarifications on the revenue sharing model of the channel. Indeed, its lack of response to [Mr. K's] (PT Portugal CEO) emails demonstrates that it had little interest in the matter.
- (d) The Commission's assessment of Altice's views
- (323) The Commission rejects Altice's claims for the reasons set out below.
- (324) As to Altice's argument that the DOG TV contract was outside PT Portugal's ordinary course of business, the evidence in the file does not support that claim: as a supplier of TV services to end users, it was part of PT Portugal's ordinary business to enter into agreements with TV channels (such as DOG TV), of which PT Portugal had more than [...] contracts in place. Moreover, while the DOG TV channel may be somewhat specific given its target audience, PT Portugal carried many other less-known premium channels targeting specific audiences such as "Caça & Pesca" (hunting and fishing), "Toros TV" (bull fighting), or "Cazavision" (hunting). The decision of whether or not to include such a low value channel therefore clearly falls within what should be considered as PT Portugal's ordinary course of business.
- (325) Furthermore, determining whether the DOG TV contract was or not in the ordinary course of business is not decisive. What matters in this case is whether whether Altice's involvement in this aspect of PT Portugal's business prior to having received clearance for the concentration pursuant to Article 7(1) of the Merger Regulation is justifiable on the basis that the contract could have a material impact on the value of PT Portugal. The Commission considers that, in light of the reasoning set out in recitals (315) to (319), Altice's argument fails to show how the DOG TV contract, given its value of only EUR [...] could have a material impact on the value of the business of PT Portugal.
- (326) Second, as demonstrated in recital (316), Altice did in fact deny its consent as regards the DOG TV contract and instead asked for more information. Therefore Altice's argument is contradicted by the evidence in the file.

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<sup>175</sup> Altice's Response to Commission's RFI of 20 July 2016, page 11 and 12 [ID 133].

#### 4.2.1.6. SIRESP Shares

##### (a) Facts

- (327) SIRESP is the operator of the National Network of Public Safety, a public-private partnership promoted by the Ministry of Interior in Portugal. At the relevant time, SIRESP was owned by PT Portugal (30.55%), Galilei (a Portuguese investment fund – 33%), Motorola (14.9%) and two other smaller shareholders.
- (328) On 4 March 2015, [...] sent a letter of intent (dated 24 February 2015) to each of the other SIRESP shareholders, including PT Portugal, setting out the terms on which it would be prepared to acquire the shares of each of the other shareholders. On 5 March 2015, PT Portugal informed Oi of the proposal.
- (329) By email dated 9 March 2015, [Mr. T] (Oi) informed Altice ([Mr. E] and [Mr. D]) that PT Portugal had received the letter of intent from [...], which intended to: "*(i) acquire [other shareholders'] shares or (ii) ask them to declare its position on preemptive rights*". In this respect, Oi informed Altice that it did not intend to sell PT Portugal's shares in SIRESP, nor exercise its pre-emptive rights. Oi then enquired whether Altice had a different view on this issue.
- (330) In reply to Oi's email, on 10 March 2015, Altice requested more information on SIRESP's business plan, on an upcoming SIRESP service contract with [...], and on PT Portugal's valuation of the shares.
- (331) Following this request, on 23 March 2015, Oi sent Altice its internal evaluation of SIRESP and more information on the service contract. It also requested permission to officially reject [...] offer. On the same day, Altice stated that it was not willing to sell PT Portugal's shares in SIRESP – indicating: "*Clearly, we are not sellers at this price*".
- (332) Altice went further and requested more information on the shareholder structure, with a view to potentially acquiring the other SIRESP shareholders' shares itself: "*Do you think some of the other shareholders are sellers at this price? Could you remind us again the shareholder structure? I am wondering whether it would make sense to buy the other out at this price*".
- (333) On 25 March 2015, Oi provided the requested information requested and informed Altice that [...] was cash constrained and willing to sell its shares in SIRESP.
- (334) Also on 25 March 2015, Altice contacted PT Portugal to get more insight into the issue and [Mr. K] (PT Portugal CEO) and [Mr. F] (Altice COO) agreed to discuss it the following day.
- (335) On 26 March 2015, [Mr. D] (Altice Head of Strategy and Business Development) wrote back to Oi, indicating that Altice wanted PT Portugal to exercise its pre-emptive rights, something that PT Portugal had hitherto not considered.
- (336) In response, on 27 March 2015, Oi informed Altice that Oi/PT Portugal could not in fact exercise any pre-emptive rights regarding these shares and provided Altice with SIRESP shareholders agreement.
- (337) On 28 March 2015, Altice informed Oi and PT Portugal that it wanted to make a counter offer to [...] in order to acquire control of SIRESP, again something that Oi/PT Portugal had not previously considered.
- (338) On 29 March 2015, [Mr. F] (Altice) forwarded the correspondence with Oi to [Mr. K] (PT Portugal CEO) and reiterated Altice's intention that [...] shares should be bought by PT Portugal. Altice clarified that it wanted to get directly involved in the

negotiations with [...] and asked PT Portugal to get in contact with [...] as well as other shareholders of SIRESP to: "*see whether they would be inclined to sell their stakes at all*". On the same day, PT Portugal ([Mr. K]) confirmed that it would do so.

(339) As a follow-up, on 30 March 2015, PT Portugal ([Mr. K]) informed Altice ([Mr. D]) that it had more details on the sale as well as contacts of SIRESP.

(340) Furthermore, on 1 April 2015, PT Portugal sent a comprehensive email to Altice confirming that PT Portugal had signalled to [...] that Altice was interested in speaking with them and suggesting that [...] should first speak with Altice before taking a decision about selling its shareholding in SIRESP. In the same email, PT Portugal also provided Altice with a comprehensive summary about SIRESP, its shareholding, board of directors, network and financials (budget, revenues).

(341) On 15 April 2015, [Mr. K] asked Altice whether it had indeed contacted [...]; Altice had not been available to meet with [...] representatives on the proposed dates. Soon afterwards (on 20 April 2015), the Clearance Decision was adopted.

(b) The Commission's findings

(342) For the reasons described in recitals (343) and (344), the Commission considers that Altice was engaged, prior to adoption of the Clearance Decision in a matter pertinent to the commercial policy of PT Portugal and which formed part of the Target's business strategy. Such involvement contributes to the Commission's conclusion that, through the actions described in Section 4.2 of this decision, Altice exercised decisive influence over aspects of the Target's business prior to the Commission having declared the Transaction compatible with the internal market.

(343) The Commission notes that initially Oi solicited instructions from Altice regarding the offer by [...] to purchase PT Portugal's shares in SIRESP and that Altice gave Oi instructions in this regard: Altice confirmed that this sale should not take place at the indicated offer price. While the exchanges on this issue were not formalised in a notice pursuant to Article 6.1(b) and Article 9(7) of the Transaction Agreement<sup>176</sup>, the Commission considers that such sale of the Target's shares in SIRESP could potentially be considered as a matter on which Altice could legitimately be consulted, given that, in light of the overall value of such shares, their sale could potentially have a material impact on the value of the Target between the Signing Date and the Closing Date.

(344) However, the Commission considers that, by instructing PT Portugal to contact [...] in its name, Altice overstepped the boundaries of what could be considered appropriate conduct necessary to preserve the value of the Target between the Signing Date and the Closing Date. Altice's conduct demonstrates that it expressly indicated that it wanted PT Portugal to buy other shareholders' stakes to the extent possible and instructed PT Portugal to get in touch with [...] representatives for that purpose. In turn, the Target acted on Altice's instructions and contacted [...] representatives.

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<sup>176</sup> In its Response to Commission's RFI of 6 October 2017, Oi argued that the email regarding SIRESP was sent as a courtesy message and not as a request in the sense of Article 6.1(b) of the Transaction Agreement since the Transaction Agreement did not include any provision that would require the Buyer's consent not to sell and asset, but only to buy an asset.

- (c) Altice's views
- (345) Altice submits that PT Portugal's 30.5% shareholding in SIRESP was valued at EUR [...] by Oi. Therefore the sale of these assets was material to the business of PT Portugal and was a matter outside the normal course of business. This matter therefore required Altice's consent in accordance to Article 6.1(b)(ix) of the Transaction Agreement<sup>177</sup>.
- (346) Altice also argues that Altice's suggestions to PT Portugal on this matter do not qualify as actual guidance. Altice wanted to understand the economic data underlying the SIRESP shareholding, but did not intend to interfere in PT Portugal's decision-making. This is evidenced by the fact that, when PT Portugal offered Altice a meeting with [...] on April 9 or 10, 2015, Altice did not follow up in spite of a reminder of [Mr. K] dated April 15, 2015. Altice also points out that none of the envisaged transactions in relation to the SIRESP shares (sale to [...] of PT Portugal's shares in SIRESP or acquisition of additional shares in SIRESP from [...]) succeeded. As of today, the shareholding of SIRESP is still the same. Therefore, any involvement of Altice in the negotiations could not have any impact on the outcome of such negotiations. Altice considers that in any event, these envisaged transactions were of a purely financial nature and did not entail any short-term commercial aspects. Therefore, in the event PT Portugal would have sold its SIRESP shares to [...] or purchased [...] shares in SIRESP, such a transaction would not have had any short-term impact PT Portugal's business conduct in the Portuguese wholesale or retail telecommunications market.
- (d) The Commission's assessment of Altice's views
- (347) The Commission does not contest Altice's view that the sale of PT Portugal's shares in SIRESP was a matter which could have a material impact on the value of PT Portugal's business.
- (348) However, the Commission rejects the rest of Altice's claims for the reasons set out below.
- (349) First of all, based on the evidence on the file, it was on Altice's instructions that PT Portugal contacted [...] as well as other shareholders of SIRESP to: "*see whether they would be inclined to sell their stakes at all*" (see recital (338)). Therefore, Altice cannot credibly claim that it did not give guidance to PT Portugal. In this particular instance, Altice took the initiative with respect to these contacts.
- (350) Altice also claimed that even in the event PT Portugal would have sold its SIRESP shares to [...] or purchased [...] shares in SIRESP, such a transaction would not have had any short-term impact PT Portugal's business conduct in the Portuguese wholesale or retail telecommunications market.
- (351) In the first instance, the Commission does not consider it a determining factor in its assessment whether or not there was agreement on a particular course of action, rather the fact that instructions were sought and given is the relevant factor. Nor does

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<sup>177</sup> According to this article, Altice's consultation was required in case PT Portugal envisaged to acquire any assets the aggregate value of which exceeded EUR [...].

the Commission consider it a relevant factor in its analysis that the instructions could not ultimately be carried out because the sale did not ultimately go ahead<sup>178</sup>.

- (352) The Commission considers that Altice's involvement in this corporate matter demonstrates the breadth of scope as well as the granularity and intrusive nature of Altice's involvement in the Target's affairs. Furthermore, Altice's intrusion in relation to the acquisition of [...] shares in SIRESP was clearly not aimed at the preservation of PT Portugal's value, but it went further than it was required for that purpose. In fact, in asking PT Portugal to contact [...] and seek to know whether [...] would be inclined to sell their stakes at all, Altice acted as if it already controlled PT Portugal.

#### 4.2.1.7. [...] Contract

##### (a) Facts

- (353) On 23 December 2014 PT Portugal won a tender for the provision of outsourcing services and solutions to [...], a Portuguese agri-business. PT Portugal would have had to make some infrastructure investments in order to provide the services foreseen by the outsourcing contract to [...].
- (354) The contract term was [...] and the investments required for the first year equated to approximately EUR [...] in capital expenditures and EUR [...] in operational expenditures. This amount falls below the EUR [...] threshold specified in Article 6.1(b) the Transaction Agreement.
- (355) On 6 April 2015, Oi sent a formal letter under Article 6.1(b) of the Transaction Agreement seeking approval for the investments required to be able to fulfil the [...] contract<sup>179</sup>. In reply to Oi's letter, on 10 April 2015, Altice requested highly confidential information on this commercial supply agreement regarding: (i) the incremental yearly revenues related to the contract; and (ii) the payback period for the investment.
- (356) On 16 April 2015, Oi responded indicating that the [...] contract would generate approximately the same revenue as the revenue PT Portugal was already obtaining from the services it was providing to [...]. Oi further stated that the total revenues resulting from the new [...] contract could be estimated at approximately the same revenues as those to be achieved in 2015, [...]. On the second point, Oi responded that the payback period was [...], [...].
- (357) In parallel, Altice and PT Portugal were in telephone contact regarding the [...] contract. On 10 April 2015, PT Portugal wrote to Altice requesting a conference call to discuss the [...] contract and on 15 April 2015, PT Portugal wrote again to Altice, requesting a conference call on a number of topics, including the [...] contract. In that email, [Mr. K] remarked that: "*These topics are being (have been) submitted through the standard channel but we would like to explain them so that the approval process is faster. We are at your disposal for the call.*" While the calls appear to

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<sup>178</sup> As evidenced by the emails mentioned in Section 0, it was Altice that requested to be directly involved/replace PT Portugal in the negotiations with [...]. The meeting did not take place only because Altice's representatives were not available in the suggested dates.

<sup>179</sup> Oi's letter provided: "*Global [...] Service Management Contract – Ordering of services managed as Outsourcing, [...]: The [...] customer awarded MEO a new global service management contract as outsourcing, [...]. The aim is to approve the placement of orders for the acquisition of equipment, installation and maintenance services, totalling € [...] (CAPEX) and €[...] (OPEX), for 2015, for the provision of services to that Customer.*"

have taken place on 11 April 2015<sup>180</sup>, there is no information on the Commission's file regarding the discussions held on these calls.

(b) The Commission's findings

(358) For the reasons set out below, the Commission concludes that Altice was directly involved in decisions regarding the [...] contract, which formed part of the Target's competitive strategy on the market. Such involvement contributes to the Commission's conclusion that, through the actions described in Section 4.2 of this decision, Altice exercised decisive influence over the Target prior to the Commission having declared the Transaction compatible with the internal market.

(359) First, the Commission notes that Oi sought instructions from Altice about the [...] contract and Altice requested more commercially sensitive information on this contract regarding: (i) the incremental yearly revenues related to the contract; and (ii) the payback period for the investment. Oi provided the requested information and in parallel, Altice and PT Portugal were in telephone contact regarding this contract. On 10 April 2015, PT Portugal wrote to Altice requesting a conference call to discuss the [...] contract and on 15 April 2015, PT Portugal wrote again to Altice, requesting a conference call a number of topics, including the [...] contract.

(360) Second, the Commission notes that while the [...] contract was an issue which could, potentially, fall into the definition of a "Communication Agreement" and hence within the remit of Article 6.1(b) of the Transaction Agreement, the value of the investment for that contract was barely above EUR [...] and therefore it cannot be considered as material for the preservation of the value of the Target's business pending the Closing Date.

(361) Third, on this occasion, Altice received commercially sensitive information from the Target. The amount of information that was sent by PT Portugal to Altice appears to have been far more detailed and extensive than would have been required to achieve this goal, in particular the exchange of granular information on revenues expected. The information received was akin to the type of information that Altice would only be entitled to receive following the Closing Date and should not be disclosed between competitors.

(c) Altice's views

(362) Initially, Altice submitted that the [...] contract was a procurement agreement for network equipment qualifying as a "Communication Agreement" falling under Article 5.15 a (vi) of the Transaction Agreement.<sup>181</sup> In the SO Response, Altice presents additional information in relation to this contract and submits that the [...] contract, which amounted to EUR [...], was a matter outside the ordinary course of business. Beside the value of the contract, [...] was a strategic client given its size and the revenues it generated for PT Portugal. Altice claims that this contract therefore fell into the scope of Article 6.1(b)(ii) and (iii) of the Transaction Agreement.

(363) Altice also argues that it did not provide any guidance to PT Portugal regarding the investments required for the performance of the [...] contract. This is evidenced by: (i) the evidence in the file not containing any document showing that Altice answered Oi's letter dated 16 April, 2015 or further discussed this matter; (ii) the two

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<sup>180</sup> ID[AL-00001283].

<sup>181</sup> Altice's Response to Commission's RFI of 21 December 2016.

emails sent by [Mr. K], CEO of PT Portugal on April 15 and 21, 2015 show that PT Portugal had not received any instruction from Altice; (iii) the MEO board of directors had in any event ratified the decision to proceed with the investments on 14 April 2015, before the two reminders sent by [Mr. K] (CEO PT Portugal) to [Mr. F] (CFO Altice).

- (364) Therefore Altice considers that it did not exercise any decisive influence over PT Portugal's decision in relation to this matter.
- (d) The Commission's assessment of Altice's views
- (365) The Commission rejects Altice's claims for the reasons set out below.
- (366) As regards Altice's argument that the [...] contract was not in the ordinary course of business, this does not appear to be the case since the [...] contract was the renewal of an existing contract with similar revenue levels<sup>182</sup>. In any event, whether the [...] contract was or not in the ordinary course of business is not decisive. What matters in the case at hand is whether Altice's involvement in this aspect of PT Portugal's business prior to having received clearance for the concentration pursuant to Article 7(1) of the Merger Regulation can be justified on the basis that this contract could impact the value of PT Portugal.
- (367) As regards Altice's argument that the value of the contract was almost EUR [...] and that [...] was an important customer for PT Portugal and therefore this contract was material to the business of PT Portugal, the Commission makes the following observations:
- (368) While the Commission, as shown in Section 4.1.2 does not consider the thresholds defined in article 6.1(b) as appropriate for preserving the value of the Target, according to Article 6.1(b) it is the value of the investment that matters. As shown in Figure 6, taken from Annex 69 of Altice's SO Response, the overall investment that PT Portugal had to make was slightly above EUR [...] during [...]. The figure of EUR [...] that Altice pointed to in the SO Response represents the sum that [...] would pay to PT Portugal for the services provided ([...] would pay PT Portugal this sum in [...]), and not the investment that PT Portugal had to make for this contract. Therefore, the sum that PT Portugal would have to invest was much lower than EUR [...] and would not in any case have any material impact on the value of PT Portugal's business.

#### **Figure 6- [...] contract breakdown of investments required**

[...]

- (369) Furthermore, even if the value of the contract were to be considered EUR [...] <sup>183</sup> for [...], the Commission considers that the contract with [...] cannot be viewed as material to PT Portugal's business, in particular when taking into account that PT Portugal's turnover in 2014 was EUR 2 533 million and the purchase price of the Target was EUR 7 400 million.
- (370) Finally, the size of the client does not change the conclusion that this was not a contract that was material to the business of PT Portugal. Furthermore, apart from pointing out that [...] was an important client for PT Portugal, Altice provides no

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<sup>182</sup> See Annex 69 of the SO Response.

<sup>183</sup> Based on the information in Annex 69 of the SO Response, [...].

evidence that this contract was among those which would have an impact on the value of PT Portugal's business.

(371) While there is no written evidence to suggest that Altice gave instructions to PT Portugal on how to proceed with the contract, PT Portugal sought approval on this issue from Altice, in light of other examples set out in this Section 4.2, that PT Portugal interpreted its relationship with Altice as requiring PT Portugal to inform and request Altice's approval, even for trivial contracts. Moreover, PT Portugal supplied highly confidential information regarding the expected customer revenues with Altice, which was a competitor in the telecoms market in Portugal at that time. The evidence on the Commission file shows that Altice did receive sensitive information regarding this contract and discussed the contract with PT Portugal during the conference call on 11 April 2015<sup>184</sup>.

4.2.1.8. Considerations on the relevance of decisions on which Altice's consent was not requested

(a) Altice's views

(372) In the reply to the SO and at the Hearing, Altice contested the Commission's findings that it exercised decisive influence over PT Portugal from the Signing Date and claimed that between the Signing Date and the Clearance Decision, Altice was actually consulted only on a minority of decisions taken by PT Portugal, whereas a great number of critical decisions pertaining to PT Portugal's strategic and commercial policies were taken without Altice being consulted or even informed thereof<sup>185</sup>. According to Altice, out of [...] matters addressed by the MEO and PT Portugal Boards between the Signing Date and the Clearance Decision, Altice was consulted on [...] subject matters only but was not consulted on [...] subject matters<sup>186</sup>. Altice was not consulted on [...] critical decisions<sup>187</sup> including: (i) at least [...] matters with a value above EUR [...] (that is to say the threshold of Article 6.1(b)(ii), (iii), (iv), (v) and (ix) of the Transaction Agreement)<sup>188</sup>; (ii) [...] Communication Agreements<sup>189</sup>; (iii) [...] decisions regarding PT Portugal's strategy in the Portuguese wholesale and retail telecommunications market<sup>190</sup>. Altice argued that if it were to have exercised decisive influence over PT Portugal prior to the

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<sup>184</sup> See email correspondence between [Mr.E] and [Mr. F] (Altice) and [Mr. K] (PT Portugal), ID[AL-00001283].

<sup>185</sup> SO Response, paragraph 257.

<sup>186</sup> SO Response, paragraph 262 and Altice's presentation at the Hearing, slide 52.

<sup>187</sup> SO Response, paragraph 262. The Commission notes that at the Hearing, Altice argued that it was not consulted on [...] decisions critical for PT Portugal's business, [...] of which had a value above the thresholds provided in Article 6.1(b)(ii)(iii)(iv)(v) and (ix) of the Transaction Agreement (that is to say EUR [...] threshold in the aggregate or the EUR [...] until 9 January 2015). See Altice's presentation at the Hearing, slide 52.

In the Addendum, Altice claimed that it was consulted on [...] subject-matters, while it was not consulted on [...] matters, [...] of which related to critical decisions for PT Portugal's business. Altice later stated that it was consulted on [...] matters (Reply to the Letter of Facts, paragraph 119).

<sup>188</sup> These included: investments required by the performance of contracts entered into with PT Portugal's customers; business and IT support applications and activities; financial transactions; intra-group transactions; and miscellaneous decisions.

<sup>189</sup> Including: interconnection and backhaul agreements; a wholesale agreement with [...]; support, implementation, development, maintenance, outsourcing agreements relating to PT Portugal's network; procurement agreements for network equipment; basic telecommunications network purchase agreements; procurement agreements for handsets; contracts with television program content providers; and, co-location, site-sharing, access and maintenance agreements for Network sites.

<sup>190</sup> Including promotional campaigns and other commercial decisions.

Clearance Decision, Altice would have necessarily been informed of these matters, considering their value and the strategic importance they entailed with respect to PT Portugal's business activities.<sup>191</sup> In particular, Altice argued that Communication Agreements are, by their very nature, critical to PT Portugal as they relate to its core businesses and activities.<sup>192</sup> Altice also notes that it was not transmitted any of the information regarding PT Portugal's budget and strategic plan which was provided to the Boards of Directors of MEO and PT Portugal SGPS<sup>193</sup> and that between the Signing Date and the Clearance Decision, Altice did not have access to certain commercial and financial information that was transmitted to PT Portugal SGPS and MEO Boards of directors.<sup>194</sup> On that basis Altice argues that PT Portugal took many critical decisions for its day-to-day business without consulting Altice<sup>195</sup>. Therefore, by comparison Altice was consulted on a very limited number of matters and could not be regarded, on the basis of the cases in which it was consulted, as having exercised operational control over PT Portugal's business and acted as the controlling shareholder of the Target.

(b) The Commission's assessment

(373) The Commission does not share Altice's view for the following reasons.

(374) It is not necessary for Altice to have been asked to provide its consent on all or a majority of matters discussed by the PT Portugal SGPS and MEO Boards of directors between the Signing Date and the Clearance Decision for Altice's behaviour to constitute early implementation in the form of instances of actual exercise of control. Neither is it necessary that Altice's consent be requested on all decisions taken by the management of PT Portugal without any consultation of the Boards of Directors. What matters to support the Commission's findings in this section of the present decision is that Altice through its behaviour exercised decisive influence on PT Portugal.

(375) For completeness, the Commission verified Altice's claims and found that Oi had in fact requested Altice's consent through formal notices/letters on seven of the decisions taken by PT Portugal on which Altice had claimed that it had not been consulted or even informed thereof<sup>196 197</sup>.

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<sup>191</sup> SO Response, paragraphs 269, 279 and 281.

<sup>192</sup> SO Response, paragraph 270.

<sup>193</sup> SO Response, paragraph 282.

<sup>194</sup> SO Response, paragraph 283.

<sup>195</sup> Altice also argues that these figures are very conservative as they result from a review of the decisions taken by the Boards of Directors of PT Portugal SGPS and MEO, but it is possible that other similar decisions might have been taken by the management of PT Portugal without any consultation of the Boards of Directors. See SO Response, paragraph 285.

<sup>196</sup> Six items (listed in paragraphs 265 to 267 and paragraph 280 of the SO Response) were mentioned in the Notices sent by Oi to Altice dated 2 and 10 February 2015 and 25 March 2015. In particular, among them there were the following two items: (i) Purchase of temporary labour and outsourcing services for MEO customer services (including customer service, informational services, product management and pre-sales) for a value of EUR [...]; and (ii) New MEO commercial offer for TV clients (subject to Oi's approval), including: (a) IPTV[...]. In addition on a seventh item ("Advertising campaign regarding the post-paid mobile unlimited plans including a discount up to 40% for 24 months", mentioned in paragraph 280 of the SO Response) Altice was involved as described in Section 0 of this decision (the post-paid mobile campaign).

<sup>197</sup> In the Addendum, Altice claimed that among these seven matters, Altice was effectively consulted on only three of them, while as regards the four other matters, it was either merely informed thereof or

- (376) Furthermore, and contrary to Altice's claims, evidence on the Commission's file also shows that Altice's consent was in fact requested through formal letters from Oi to Altice on a large number of other matters between the Signing Date and the Clearance Decision. These decisions concerned the following subject matters: the adoption of new mobile tariffs; the purchasing of telecommunications equipment, including mobile phones, [...], mobile terminal equipment and tablets; the hiring of temporary workers; the extension of a maintenance and security services contract and payment of services rendered; the termination of the lease of a satellite transponder and removal of channels from the MEO satellite offer; the issuance of a purchase order for [...] mainframe outsourcing services; the outsourcing of customer services; the renewal of roaming contracts with [...]; the renewal of a contract for the distribution the [...] television channel; the organization of the payment of the debt of a customer<sup>198</sup>.
- (377) In any event, even if Altice's consent was not sought by Oi in relation to a number of agreements which Altice claims do fall within the scope of the Transaction Agreement, this would only further support the Commission's findings that the Transaction Agreement granted Altice the possibility to exercise decisive influence on a significant number of matters, which as Altice admits, pertain to PT Portugal's strategic and commercial policies and in respect of which it is not necessary for Altice to be able to exercise oversight in order to preserve the value of its investment in PT Portugal in the period between the Signing Date and the Closing Date.

#### 4.2.2. *Exchanges of commercially sensitive information between Altice and PT Portugal*

- (378) The evidence on the Commission file indicates that in addition to the behaviour described in Section 4.2.1, Altice (which was a direct competitor of PT Portugal in several telecommunications markets in Portugal at the time of the Transaction) and the Target also engaged in behaviour which involved the systematic and extensive provision of commercially sensitive information by PT Portugal to Altice: (i) partly prior to the date of the notification; and (ii) prior to the date of the Clearance Decision, either during meetings between the management of the two companies, or on an *ad-hoc* basis, as a follow-up to these meetings or on specific topics which did not fall within the remit of the Transaction Agreement. Many of these exchanges took place at Altice's initiative, with Altice proposing agenda for the meetings and requesting specific information from PT Portugal in the follow-up of the meetings.
- (379) These information exchanges took place in three ways: (i) the ad-hoc meetings between the Parties of: (a) 3 February 2015; (b) 20 March 2015; and (c) 25 – 27 March 2015, discussed below in this Section; (ii) bi-lateral communications to discuss specific issues, some of which are described above in Section 4.2.1 and some areas discussed below in Section 4.2.2.2(a); and (iii) the systematic exchange of KPIs by email at the request of Altice, as discussed below in Section 4.2.2.2(b).

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consulted after the matter had already been approved by the board of PT Portugal making it practically impossible to modify the decision afterwards

<sup>198</sup> See Letter of Facts, paragraph 5.

#### 4.2.2.1. Ad-hoc meetings between Altice management and PT Portugal

(a) Facts

(i) Meeting of 3 February 2015

(380) According to Altice's internal documents, Altice wanted to have a meeting on 3 February 2015 in order to start the coordination of the decisions with PT Portugal:

(1) *"I want to organise a day in Portugal to see the management over there and try to synchronise a little bit. [...] I would ask [Mr. O], [Mr. C], Altice CTO, [Mr. E], General Secretary, [Mr. G], Finance] and [Mr. H], Operational Finance] to come as well if possible".*<sup>199</sup>

(2) *"We are going to head down to Lisbon with the entire operating team to see PT to **start coordinating**."*<sup>200</sup> [Emphasis added]

(3) *"Meeting next Tuesday at PT from 11h until 19h. Meeting with their management for an update on the business and in order to **prepare the pre-closing and coordination of the decisions**."*<sup>201</sup> [Emphasis added]

(4) *"Everyone, We have planned a full day at Portugal Telecom next Tuesday from 11am to 7pm. The idea would be to get an update of each of their businesses, get to know the key personnel (N-1 and N-2) and **start coordinating the transition before closing (expected in April)**."*<sup>202</sup> [Emphasis added]

(381) Altice communicated the same message to PT Portugal on 27 January 2015 when [Mr. A] (Altice CEO) wrote to [Mr. K] (PT Portugal CEO) and [Mr. M] (PT Portugal Head of B2C), inviting them to suggest any topics on which they would like to seek guidance (including decisions that would not have required Altice's prior consent under the Transaction Agreement):

*"We will have the full operational team from Altice there ([Mr. O], [Mr. F], [Mr. C] our cto, our operational finance guys + [Mr. D], [Mr. E] and myself).*

*The idea would be to get an update of each of the businesses and also to introduce our team so that your team can **start coordinating any key decisions that require our consent as per the contract + any initiatives you would like to run by us**."*<sup>203</sup> [Emphasis added]

(382) PT Portugal ([Mr. K] PT Portugal CEO) responded as follows :

*"We do have a number of important topics and areas that we would like to discuss and get some guidance on from you, so would like to have some time dedicated to operational type of issues."*<sup>204</sup> [Emphasis added]

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<sup>199</sup> Email from [Mr. A] (Altice CEO) to [Mr. F] (Altice COO), of 27 January 2015, ID[AL-00077401]. Translation by the Commission.

<sup>200</sup> Email from [Mr. A] (Altice CEO) to [Mr. D] (Altice Head of Strategy and Business Development), of 27 January 2015, ID[AL-00057729].

<sup>201</sup> Email from [Mr. A] (Altice CEO) to [Mr. O] (one of the founders of Altice), copying other Altice personnel ([Mr. I], [Mr. C], [Mr. H], [Mr. G], [Mr. F], [Mr. E] and [A]), of 27 January 2015, ID[AL-00097056].

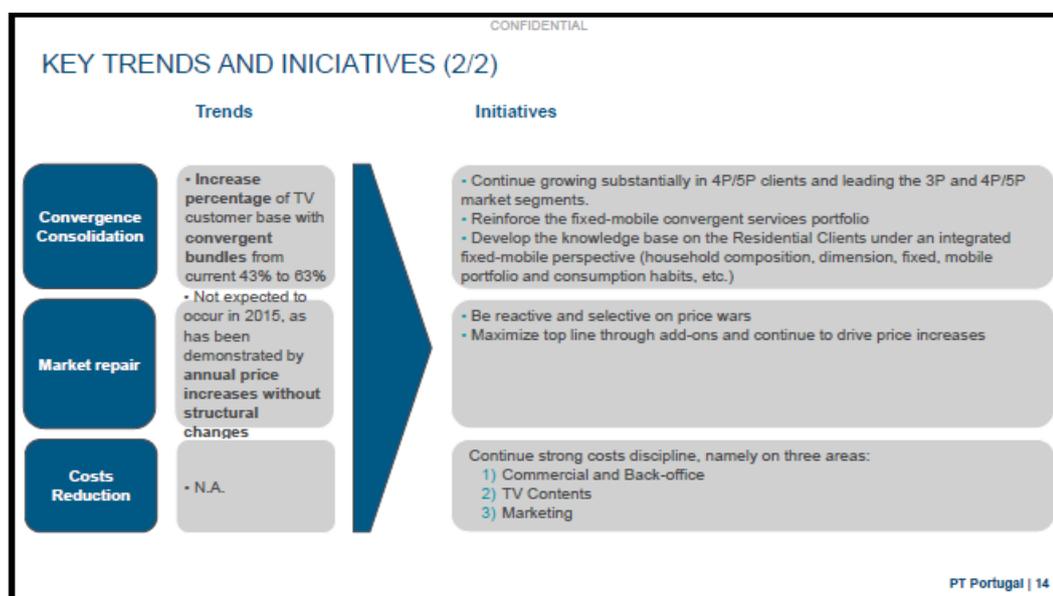
<sup>202</sup> Email from [Mr. A] (Altice CEO) to [Mr. I], [Mr. C], [Mr. H], [Mr. G], copying [Mr. F], [Mr. E] and [Mr. D] and [Mr. O], of 27 January 2015, ID[AL-00020343].

<sup>203</sup> Email from [Mr. A] to [Mr. K] and [Mr. O], of 27 January 2015, ID[AL-00010130].

<sup>204</sup> Email from [Mr. K] to [Mr. A], of 27 January 2015, ID[AL-00010130].

- (383) At the meeting, Altice was represented by Mr. O (one of the founders of Altice), [Mr. A] (CEO), [Mr. B] (CFO), [Mr. C] (CTO), [Mr. D] (head of strategy and business development); [Mr. E] (general secretary, head of corporate and business development); [Mr. F] (COO); [Mr. G] (director of corporate affairs and M&A); [Mr. H] (director finance) and [Mr. I] (director, acquisitions).<sup>205</sup> On the side of PT Portugal, its management was present ([Mr. K] (CEO), [Mr. L] (CFO), Mr. Q (CTO), [Mr. U] (head of human resources), [Mr. M ] (Head of B2C), [Mr. V] (chief of staff of PT Portugal CEO) and [Mr. W] (Planning and control director)).
- (384) During the meeting PT Portugal shared with Altice detailed information on its key initiatives in terms of commercial policy; key supplier relationships; updates on its fibre sharing agreement with Vodafone and an update on TV content. It also updated Altice on internal reorganisation. These topics were included in the presentations that PT Portugal prepared for Altice's visit and which are described in the following recitals.
- (385) In relation to key initiatives, PT Portugal indicated its commercial strategy and plans in relation to market trends such as convergence, or costs reduction, as indicated in Figure 7.

**Figure 7 – Presentation by PT Portugal - Key initiatives 2015**



- (386) Figure 7 demonstrates that at the meeting, PT Portugal shared with Altice its view as to what were the key market trends at the moment (that is convergence consolidation, market repair and cost reductions), its objectives and the detailed initiatives that Altice was planning to take in order to tackle the changes in the market. For example, as to the convergence consolidation, PT Portugal shared with Altice its intention to continue to push the growth of specific categories of customers, to reinforce some of its commercial policies (the fixed-mobile convergent services portfolio) and to develop an increased knowledge of some of its customers from a specific commercial view point. Similarly, for market repair, PT Portugal shared its future market strategies (for example, regarding the key areas, its strategy to "maximize top line through add-ons and continue do drive price increases") and, for cost reduction,

<sup>205</sup> Documents provided in response to Commission's decision C(2015) 4846 of 20 July 2015, first set of documents, document 13 [ID 97].

PT Portugal revealed the three main areas where it intended to "continue strong costs discipline". The information about these planned initiatives was commercially sensitive to PT Portugal's business.

- (387) At the meeting, PT Portugal also shared information on the status of the implementation of its fibre sharing agreement with Vodafone, including detailed figures (how many households had been covered up to January 2014 and the monthly planning for the following year) as shown in Figure 8.

**Figure 8 – Presentation by PT Portugal - Status of Agreement with Vodafone**

[...]

- (388) Figure 8 shows the monthly progress of the share agreement with Vodafone for the previous months and the expected results for the following quarters. It also includes information about the actual implementation of the agreement and the operational problems encountered by the parties. This information is commercially sensitive for PT Portugal because, as network operators not only compete on price, but also on other elements such as network coverage or network quality.
- (389) The annexes to the presentation included recent data on the revenues and commercial margin of PT Portugal in the first weeks of 2015, data which was not public at the time of the presentation.

**Figure 9 - Presentation by PT Portugal - revenues and margins early 2015**

[...]

- (390) Figure 9 provides information about the revenues and commercial margin of PT Portugal, as well their evolution over the last two years (including details about the methodology used to calculate them). This means that Altice had access to some of the most sensitive information concerning a competitor, since it concerns the most recent data of PT Portugal on its margins and revenues data.
- (391) PT Portugal also provided Altice with information about its spending on TV content, including the value of the contracts, as depicted in Figure 10.

**Figure 10 - PT Portugal presentation - TV content**

[...]

- (392) Figure 10 shows PT Portugal's content contracts for its basic channels between 2015 and 2018, with the identity of the counterparty, the exact value and the expiry date, thus giving a clear idea of PT Portugal's programming costs. This kind of information is valuable for a competitor in the same market, in particular the information on the value of each contract.
- (ii) Meeting of 20 March 2015
- (393) At the second visit to PT Portugal, Altice was represented by [Mr. N] (founder and executive chairman); [Mr. A] (CEO), [Mr. F] (COO), [Mr. E] (general secretary, head of corporate and business development), [Mr. D] (head of strategy and business development) and [Mr. Z] (head of communication).
- (394) As shown in an email from [Mr. F] to [Mr. K], Altice had proposed an agenda that would involve the Altice and PT Portugal engaging in detailed and granular discussions of PT Portugal's business operations, performance and forthcoming commercial initiatives:

*"As discussed please find below the tentative agenda we propose for our visit on the 19th and 20th of March [...] For the work session at 14:00 on 19/3 ideally we would*

*like to review with you. For B2C - On Fixed and 4/5P : Gross adds/churn/net adds volumes, ARPU and mix by packages (M30, M40, M50, etc) range of offers (light 1 or 2 packages, Total 100/200/400 etc.) and technology (fiber, DSL, satellite). - On mobile prepaid / postpaid and handsets figures Gross adds/churn/net adds volumes, ARPU and mix. On prepaid: recharge activities.- The new UI that you just launched.- The last and coming promotions and advertisement campaign and other above and below the line marketing activities. This is of course the time to address the issue we already discussed together regarding the B2C sales. For B2B : a shorter update with overall sales results, main new contracts, main renewed and lost contracts, value of those contracts (monthly revenue, monthly gross margin, length) as we will not have the time to do much more."*<sup>206</sup>

- (395) As it can be seen in the email above in recital (394), Altice wanted to review some of PT Portugal's most commercially sensitive information: detailed financial results and performance indicators such as new consumer customers, churn results, new B2B customers (including granular information on a monthly basis), and margins, further divided by type of clients (fixed, 4/5P, or prepaid). Altice also asked to be informed about past and especially future promotions, advertisement campaigns and marketing activities.
- (396) Altice's representatives first visited PT Inovacao, PT Portugal's innovation department. Due to time constraints (the visit had been planned for two days, but was eventually shortened to one day), PT Portugal focused its presentation on a number of aspects set out in the following recitals.
- (397) During the afternoon work session mentioned in the email above in recital (394), PT Portugal presented the overview of the telecoms market in Portugal and the position of PT Portugal in the market, as well as the latest financial results of PT Portugal for February 2015. While the first part of the presentation had a more general character, the second part, which dealt PT Portugal results, was a lot more detailed, as depicted in Figure 11, Figure 12 and Figure 13, taken from the presentation by PT Portugal.
- (398) In that afternoon work session, PT Portugal presented its most recent results (February 2015) and a comparison against the previous year for revenues, margins, and capital expenditure. The data on margins was broken down by segment (B2B, B2C), with explanations on the results compared to the previous year. Furthermore, PT Portugal provided detailed data on specific KPIs (ARPU, net adds, churn etc), broken down by service (fixed voice, fixed internet and TV), as well as comments on the evolution over the previous year. In addition, a separate presentation was made on the communication budget and initiatives for 2015.

**Figure 11 - PT Portugal presentation - Financial results February 2015**

[...]

**Figure 12 - PT Portugal presentation - PT Portugal's results by segment**

[...]

**Figure 13 - PT Portugal presentation - KPIs**

[...]

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<sup>206</sup> Email from [Mr. F] to [Mr. K], of 10 March 2015, ID[AL-00002884].

- (399) The slides in Figure 11, Figure 12, and Figure 13 demonstrate that Altice was provided with commercially sensitive information regarding PT Portugal's latest financial data in the B2C market segment at its request (as Altice proposed the topics of the meetings). That commercially sensitive information included margins, ARPU, churn data and other key performance indicators - information which was essentially strategic to PT Portugal's business. Such information, as Altice acknowledges in the SO Response <sup>207</sup>, is generally considered commercially sensitive by undertakings. The disclosure of such information to a competitor in the same markets would not only be harmful to the interests of the business of PT Portugal, but makes it impossible for the Commission to restore the competitive situation in the market.
- (400) In the context of the meeting of 20 March 2015, Altice asked and received detailed information on a possible extension of the FTTH (fibre) network to the entire [...]. The day after the meetings, Altice asked PT Portugal via email for more information on its network: number of base transceiver stations, how many were fibre connected, detailed calculation of the cost per home passed in each area, maintenance cost and power cost of PT Portugal's copper network and that of the satellite platform.<sup>208</sup> In response, PT Portugal sent a detailed presentation covering all these topics with precise figures, as depicted in Figure 14 in relation the network structure cost analysis, which shows a very detailed estimate of the costs broken down by element of the network, materials, labour, and project activities, all further divided by geographic area.<sup>209</sup>

**Figure 14 - PT Portugal presentation - Network Structure Cost**

[...]

- (401) PT Portugal thus communicated commercially sensitive information relating to its fiber network to Altice, at its request, as well as detailed estimates about its cost analysis. As telecoms operators compete not only on price, but also on other parameters such as network quality and network coverage, sharing detailed information regarding to the network and network costs with a competitor in the same market makes it difficult if not impossible for the Commission to restore the competitive situation in the market.
- (iii) Meeting of 25 – 27 March 2016
- (402) Altice again proposed the agenda for the meeting, stating that it intended to hold two days of meetings with PT Portugal that would include detailed discussions on the B2B segment of PT Portugal's business. Altice had proposed to discuss the following with PT Portugal on the first day of the meeting: the B2B product portfolio and network, including the main international traffic agreements; main roaming agreements; submarine cables, landing stations, cable capacities; national backbone and interconnections; PT Portugal's international assets; and the Corporate & PME products portfolio presentation. Altice also wanted to review the main product lines versus sales channels; ICT platforms, PT Portugal's data centre, as well as the organisation of PT Portugal's B2B department and TV content, including channels main providers and contract terms; offering / pricing - KPI on subscribers / usage /

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<sup>207</sup> SO Response, paragraph 527.

<sup>208</sup> Email from [Mr. N] to [Mr. K], of 21 March 2015, ID [AL-00073623].

<sup>209</sup> Email and presentation from [Mr. K] to [Mr. N] and [Mr. A], of 21 March 2015, ID[AL-00002245] and ID[AL-00002246].

revenue / costs. Finally, Altice also wanted to discuss with PT Portugal the: "B2C and B2B KPI and Financial reports formats alignment".<sup>210</sup>

- (403) On Altice's side, the meetings were attended by [Mr. F] and [Mr. X] (director B2B). The detailed nature of the topics proposed by Altice was such that the presence of additional PT Portugal employees who were specialised in the technical side of PT Portugal's operations, was required in order to be able to present and answer questions on those topics. PT Portugal's CFO explicitly warned [Mr. K] against involving employees other than PT Portugal's management in the discussions "Considering Altice's positioning in the Portuguese market and the pending approval of the transaction, / would not hold meetings involving many people. ! would just talk with our board members, without details. There is no need to run risks with the bidding authorities at this time."<sup>211</sup> It appears from that correspondence, that at least some members of PT Portugal's management were aware that discussing the topics proposed by Altice in detail with the management of Altice at the meeting might entail risks with authorities if such detailed discussions took place before the clearance of the Transaction and in the presence of even more operational employees. In the end, technical employees did not participate in the meetings.
- (404) Following the meetings, PT Portugal provided Altice with the presentations that had been made during the meetings, as shown in Figure 15.

**Figure 15 - PT Portugal presentations 25-26 March 2015**

Dear Patrice,

Please find below link to the presentations of last week:

- 1) Wholesale – PT participants: [redacted]
- 2) B2B – PT participants [redacted]
  - a. Products & services portfolio
  - b. Sales and go to market organization
  - c. SMES/SOHO products portfolio
- 3) SAPO – PT participants: [redacted]
- 4) Biz Demo [redacted]
- 5) B2C – Meo – Demo & Presentation – PT participants: [redacted]
- 6) KPI Overview – B2B & B2C – [redacted]
- 7) PT Pay – PT participants – [redacted]
- 8) Fibre vs. Copper – [redacted]

Link:

<https://meocloud.pt/link/fd6da589-d321-466d-837a-2c5012a862ad/PT%20Presentations%20-%20Altice/>

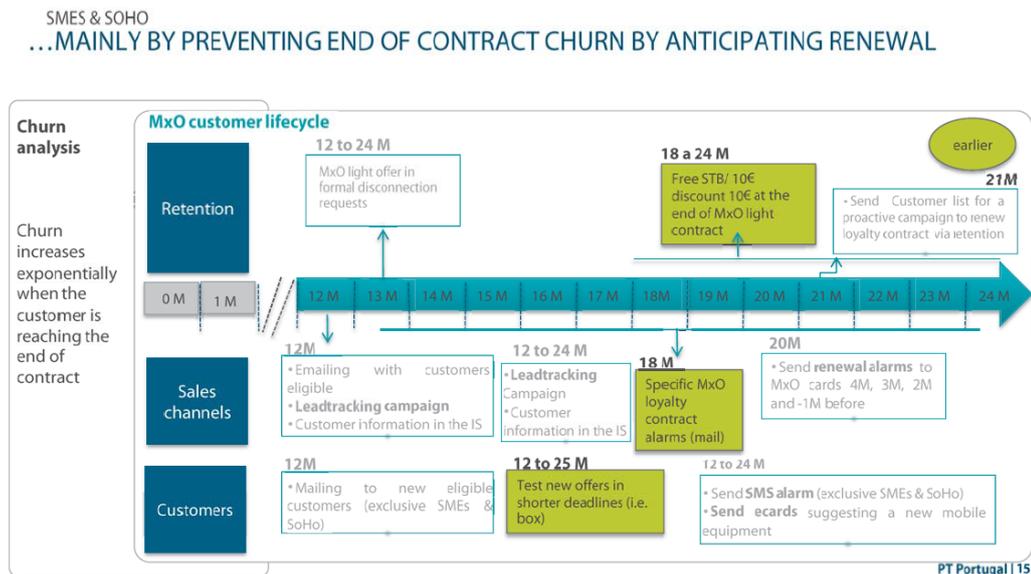
- (405) The presentations detailed PT Portugal's commercial strategy in B2B as shown in Figure 16, which explains the specific actions that PT Portugal put into place every month in order to prevent churn (that is, a customer not renewing its contract and possibly being acquired by a competitor, such as Altice). The slides details the commercial initiatives (such as discounts, sending alerts, emails or campaigns) taken

<sup>210</sup> Email from [Mr. F] to [Mr. K], ID[AL-00073594].

<sup>211</sup> Email from PT Portugal's CFO [Mr. L] to PT Portugal's CEO [Mr. K]. Documents provided in response to Commission's decision C(2015) 4846 of 20 July 2015, first set of documents, document 13 [ID 97].

by PT Portugal every month of a customer lifecycle. PT Portugal also made presentations on its cloud solutions, its PT Pay business plan<sup>212</sup> and on its TV and music streaming content.

**Figure 16 - PT Portugal presentation - B2B**



(406) This presentation showed PT Portugal's strategy to prevent churn in the B2B segment and the specific actions it envisaged. As Altice (through Oni) and PT Portugal were both competing for business customers at the time of the Transaction, such information can be regarded as commercially sensitive: sharing such information with a competitor would make it difficult for the Commission to restore the competitive situation in the market.

(407) Another presentation focused on PT Portugal's wholesale business, including the topics that Altice had indicated in its email (international traffic agreements; main roaming agreements; submarine cables, landing stations, cable capacities; national backbone and interconnections; PT's international assets), as can be seen in Figure 17.

**Figure 17 - PT Portugal presentation - Wholesale business**

[...]

(408) PT Portugal provided Altice, at its request, with information which can be regarded as commercially sensitive to its wholesale business. This information covered revenues and costs broken down by category (voice, capacity, roaming etc) from 2013 until 2015, together with detailed comments on the reasons for their increase or decrease over time, which was shared with a competitor in the same market. Sharing such information with a competitor would make it difficult for the Commission to restore the competitive situation in the wholesale telecommunications market.

(409) In the follow up of this meeting, Altice requested a copy of the financial results of PT Portugal for February 2015, which PT Portugal had presented during the meeting (see Figure 11, Figure 12 and Figure 13). [Mr. F] wrote to [Mr. K] "*Could you please send me the pdf of the February results you presented us last time I was in Lisbon*

<sup>212</sup> According to the presentation, PT Pay is a payment institution owned by PT Portugal.

with [Mr. N]? Do you know when you could give us a first idea of the main KPI for March and of the financial for March?". According to the internal correspondence of PT Portugal, these results were not public and Oi had not agreed to PT Portugal sending them to Altice<sup>213</sup>. However the Commission notes that this information had already been orally shared with Altice during the meeting of 20 March 2015, as demonstrated by [Mr. F's] email to [Mr. K] ("you presented us last time I was in Lisbon").

(410) After the meetings, PT Portugal established a list of actions which were to be taken by PT Portugal, in a presentation called: "Follow-up to the meeting with Altice". The actions were aimed at either providing Altice with more in-depth information on certain topics (such as PT Portugal's network structure as depicted in Figure 14), or at already implementing certain measures in the follow-up to the meeting, including putting operational employees of the two companies in contact ("Altice to introduce responsible of the operation to [Mr. Y](PT Portugal)").<sup>214</sup> The actions, which also concerned PT Portugal's commercial behaviour, were very detailed (and even broken down by specific channel, such as online payments or face-to-face business), were intended to be carried out in the first half of 2015 and appear to have been agreed with Altice as a follow up to the meeting. The information on the network (action point 1 in Figure 18) was sent by PT Portugal immediately after the first meeting of 3 February 2015, as indicated in recital (404).

**Figure 18 - PT Portugal presentation – Action points**

	Actions	Deadline	Owner
wholesale	<ul style="list-style-type: none"> <li>Information about SDH &amp; MPLS network and POPs               <ul style="list-style-type: none"> <li>MEO's international points of presence</li> <li>MEO's SDH and MPLS network</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>2 slides sent to [redacted] in the same day of the meeting</li> </ul>	[redacted]

<sup>213</sup> Email from [Mr. K] to [Mr. L], of 2 April 2015, ID[AL-00007652]

<sup>214</sup> At this point, Altice's Head of B2B ("Mr. X") expressed his unease to Altice's COO with these e-mail exchanges between Altice and PT Portugal in the pre-closing period: "[Mr. F], I am not comfortable with this type of emails which appear to me to be premature in the pre-closing period. What do you think?" ID[AL-00072198] Translation by the Commission. As noted above, Altice took no steps to distance itself from this conduct or otherwise dissuade PT Portugal from exchanging this information with Altice.

**Figure 19 - PT Portugal presentation – Action points**

Action points			
Actions	Deadline	Owner	
	<ul style="list-style-type: none"> <li>• [Altice] introduce responsible of the operation in OPS to [redacted]</li> </ul>	• TBD	• [redacted]
	<ul style="list-style-type: none"> <li>• In face-2-face business (war on cash), priority to close deals with :                             <ul style="list-style-type: none"> <li>– Vending Machines of Cigarettes, Drinks (Azkoien)</li> <li>– Newspaper Kiosks (VASP)</li> <li>– Parking;</li> </ul> </li> </ul>	• 1H15	• [redacted]
	<ul style="list-style-type: none"> <li>• Online – focus on getting the big merchants. Integrate with store builders;</li> </ul>	• 1H15	
	<ul style="list-style-type: none"> <li>• KYC – Simplify/automate the process. Analyze the legislation in other countries to find out if we can simplify the process by registering the operation HQ there;</li> </ul>	• 1H15	
	<ul style="list-style-type: none"> <li>• Cash Payments in our Stores - Evaluate the possibility of implement reverse ATM (automated payment in stores and cash deposits for Pay) to support such process;</li> </ul>	• 1H15	
	<ul style="list-style-type: none"> <li>• For each product/service (online / mobile payment / pinpads) create one slide with market analysis, competitors, price , etc;</li> </ul>	• 1H15	
	<ul style="list-style-type: none"> <li>• Evaluate the scenario of MEO utilizing the loyalty engine and create incentives for users to open accounts;</li> </ul>	• 1H15	
	<ul style="list-style-type: none"> <li>• Make necessary procedures to pressure consumers to pay with Meo Wallet instead of Multibanco payments (monthly PT invoices to MEO consumers).</li> </ul>	• 1H15	

(b) The Commission's findings

- (411) First, the Commission has observed in the present case that strategic<sup>215</sup> and commercially sensitive information was very frequently provided by PT Portugal to Altice, and that the information being exchanged was extensive and granular. Indeed, the information shared with Altice by the Target as shown in Figure 7 to Figure 19 above was of a strategic nature, as it focused on its commercial targets and behaviour in the market, tariffs, margin, costs, ARPU, details on PT Portugal's network, none of which was in the public domain.
- (412) The evidence on the file shows that Altice and PT Portugal saw these meetings as an opportunity for Altice to get a detailed and up-to-date overview of PT Portugal's business, rather than simple "introductory meetings"<sup>216</sup>.
- (413) Thus PT Portugal's presentations for Altice contained information about the key trends in the market for 2015 and its strategy to respond to such trends (Figure 7) and its plans to reduce churn in the B2B segment (Figure 16); up-to-date information about PT Portugal's network sharing agreement with Vodafone, including status of implementation and issues encountered with the roll-out of the network (Figure 8) and about PT Portugal's fibre network and network costs per type broken down by type of area (Figure 14).
- (414) The presentations included granular and up-to-date information on key activity areas: (a) content – PT Portugal presented its contracts with TV content providers, value and expiry dates as shown in Figure 10; (b) international wholesale

<sup>215</sup> According to the Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements: "*Strategic information can be related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes and their results. Generally, information related to prices and quantities is the most strategic, followed by information about costs and demand. The strategic usefulness of data also depends on its aggregation and age, as well as the market context and frequency of the exchange.*"

<sup>216</sup> See SO Response paragraph 480.

telecommunications business – PT Portugal presented the evolution of its revenues by segment (voice, leased lines, roaming and submarine cables).

- (415) Most importantly, PT Portugal presented Altice with up-to-date financial results of its business in the B2C (consumer segment), B2B (business segment) and international wholesale segment. Figure 11 and Figure 12 demonstrate that Altice was presented with some of the most strategic information relating to PT Portugal's business including revenues, costs, churn and net adds<sup>217</sup>. While some of this data is published sometimes in an aggregated manner on a quarterly basis by some telecom operators, the data presented by PT Portugal to Altice was much more granular and up-to-date.
- (416) The information shared by PT Portugal during the meetings of February and March 2015 was therefore commercially sensitive to its business (the Commission notes that Altice does not contest the commercially sensitive nature of this information<sup>218</sup>), and potentially harmful in the hands of a competitor. The topics discussed covered all the activities of the Target (consumer segment, business segment, international wholesale market).
- (417) The Commission further notes that it was Altice that proposed the topics to be discussed and the information it wanted to receive during the meetings (see [Mr. F] (COO Altice) email to [Mr. K] (CEO, PT Portugal) proposing to discuss in detail the financial results in the B2C and B2B segments in recital (394)).
- (418) After the meetings of February and March, Altice's management was in contact with PT Portugal's management requesting more detailed information on certain topics. For example, as discussed in recital (400) [Mr. N] (founder and main shareholder of Altice) asked for detailed information on the network of PT Portugal, including number of base transceiver stations, how many were fibre connected, detailed calculation of the cost per home passed in each area, maintenance cost and power cost of PT Portugal's copper network and that of the satellite platform, and PT Portugal followed up with a presentation as requested.
- (419) In particular, in the follow-up to meetings of February and March, as shown in Section 4.2.2.2 PT Portugal shared its business' detailed weekly KPIs (while aggregate KPIs are only published on a quarterly basis by some of the telecoms companies in Portugal) with Altice. This is further evidence of the extent to which this exchange of information was granular, strategic and up-to-date.
- (420) As shown in recital (409) PT Portugal even established a list of actions to be taken following the meeting with Altice. That list of actions was even circulated to Altice. While Altice's management was aware that such exchanges were possibly risky, Altice took no actions to distance itself from it.<sup>219</sup>
- (421) As explained in recital (5), the due diligence process had been carried out between 16 October 2014 and 27 November 2014 and Altice had evaluated PT Portugal business at the time for the purposes of the Transaction. In contrast, these detailed exchanges took place in an informal manner, during meetings between the management of the

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<sup>217</sup> Net adds are a term that telecom companies use to designate new customers.

<sup>218</sup> See SO Response, paragraph 527.

<sup>219</sup> Altice's Head of B2B ([Mr. X]) expressed his unease to Altice's COO with these e-mail exchanges between Altice and PT Portugal in the pre-closing period: "*[Mr. F], I am not comfortable with this type of emails which appear to me to be premature in the pre-closing period. What do you think?*" ID[AL-00072198]

two companies, as well as via email and outside any framework that would be justified by due diligence purposes.

- (422) Furthermore, the exchanges in the case at hand involved the entire management of Altice, including its operational employees and took place outside clean team arrangements or any other safeguards in place to ensure the confidentiality of the information exchanged<sup>220</sup>. In the follow-up of the meeting some of the members of Altice's management even continued interacting directly with PT Portugal management via email without any restrictions.<sup>221</sup>
- (423) Given the above, Commission thus takes the view that by requesting and receiving for and the receipt of such sensitive and granular information which went beyond what was necessary for the purposes of the Transaction by Altice, a competitor of PT Portugal in multiple markets, outside any clean team agreements and after the due diligence phase, Altice acted as if it already controlled PT Portugal and was therefore entitled to ask for and receive such information, which contributes to the Commission's finding that Altice exercised decisive influence over aspects of the Target's business.
- (424) Furthermore, the fact that such sensitive and granular information was shared by the Target with one of its competitors makes it difficult for the Commission to restore the prior competitive situation. This is due to the fact that once the information is exchanged, the harm to competition has already been done.
- (c) Altice's arguments
- (425) In the SO Response, Altice first argues that when assessing whether the information transmitted by PT Portugal to Altice contributed to the infringement of Article 4(1) and Article 7(1) of the Merger Regulation the Commission should have taken into account the specificities of the context of merger transactions instead of relying on the framework applicable to Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). Altice explains that such information exchanges in the context of merger transactions are lawful and indispensable for (i) assessing the relevance of the potential transaction; (ii) in the context of the due diligence process; (iii) in application of certain provisions of the Transaction Agreement and (iv) in the integration planning context (that is to say in order to prepare for the post-merger integration). Altice considers that it is legitimate for a future acquirer to be provided with financial and commercial information (including sales, clients, and margins) in order to be able to assess the value of the company and the benefits of the envisaged acquisition. It also submits that integration constitutes a long and complex process that needs to be started well before the Transaction is closed. Therefore, integration planning requires that certain information which may sometimes be relatively

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<sup>220</sup> No clean teams agreement was put in place as part of the Transaction (the only non-disclosure agreement that was entered into in relation to the Transaction was an agreement between Altice's counsel and Oi on 17 December 2014 with respect to exchanges of information for the preparation of the merger control notification of the Transaction).

<sup>221</sup> Clean team generally refers to a restricted group of individuals from the business that are not involved in the day-to-day commercial operation of the business who receive confidential information from the counter party to the transaction and are bound by strict confidentiality protocols with regard to that information. The aim of the clean team arrangements is therefore to ensure that the information provided for the purposes of the Transaction is provided on a need-to-know basis and in an aggregated manner to a limited number of relevant employees of the Buyer and its advisors, who are bound to confidentiality by the clean team agreement that they sign prior to receiving the information.

sensitive be exchanged between the target and the future acquirer before the Closing Date.

- (426) Furthermore, Altice claimed that the principle of the clean team arrangements (which Altice describes as having the purpose of limiting the exchange of information to specified individuals who review and digest the information, before the information is transmitted to the acquirer's management in an aggregated and/or anonymous way) is difficult to apply in practice, as the relevance of aggregated and anonymous data is quite limited where the main objective of collecting such data is to assess the value of the target and to understand its functioning and business model. In the end, the management of the acquirer needs to have access to information with a minimum amount of granularity in order to be able to carry out its own assessment under acceptable conditions. According to Altice, in practice, clean teams are setup to avoid that individuals holding operational functions at the future/possible acquirer receive commercially sensitive information relating to the target, when the target is an actual competitor of the future acquirer. At the time of the Transaction, Altice's executive management team was limited to only ten individuals: [Mr. N] (President), [Mr. A] (CEO), [Mr. B] (CFO), [Mr. E] (General Secretary), [Mr. F] (CFO), [Mr. O] (Head of Technical Operations), [Mr. D] (Head of M&A), [Mr. X] (Head of B2B), [Mr. X] (Head of Public Relationships), [Mr. H] (Group Controller) and [Mr. I] (Head of Group Purchasing). These individuals therefore constituted the actual and practical clean team for the purposes of the Transaction. None of Oni or Cabovisão's management team members belonged to such a clean team or were given access to information relating to PT Portugal. Altice therefore argues that the Commission's approach to the clean teams arrangements is purely academic and is not compatible to the reality of merger transactions.
- (427) Altice further argues that the relevant provisions of the Merger Regulation do not entail any prohibition of information exchanges *per se* and that the Commission did not demonstrate (and should demonstrate) that the information Altice received from PT Portugal allowed it to exercise decisive influence over the Target, thus infringing Altice's presumption of innocence as set out in Article 6(2) of the European Convention on Human Rights ("ECHR") and Article 48(1) of the Charter of Fundamental Rights of the European Union.
- (428) Second, Altice argued in relation to the information provided by PT Portugal that most of it did not entail any confidential information. Thus in relation to the meetings of February and March 2015, Altice points out that the purpose of these meetings was for Altice to establish preliminary contacts with the top management of PT Portugal and acquire some basic knowledge of the company and the company business. Altice claims that almost two months after the Signing Date and as the merger process progressed, it needed to start preparing itself to assume responsibility for PT Portugal upon the Closing Date. It is against this background that Altice's internal email exchanges discussing the organization of the February 3, 2015 meeting, as well as the email from [Mr. K], should be interpreted. The expressions which are quoted by the Commission, merely referred to the need for Altice to organise the transition phase and prepare for the post-merger integration. Altice considers that nothing more can or should be inferred from such quotes.
- (429) Furthermore, Altice explains the following in relation to the slides presented in this Section:
- (430) - Figure 7 referring to key initiatives for 2015: the information contained in the slides is vague and imprecise that it seems extremely difficult to draw any conclusion from a business or commercial standpoint.

- (431) - Figure 8 concerning the status of agreement with Vodafone: the existence of a fiber sharing agreement with Vodafone and the total number of homes reached was publicly known.
- (432) - Figure 10 regarding the MEO channels: the slide was merely for backup and was never shared with Altice.
- (433) - Figure 14 regarding PT Portugal fiber network: the information provided was extremely limited in light of the complexity associated with a telecommunication's operator network cost structure.
- (434) - Figure 16 on B2B churn: the information was limited and did not exceed what was necessary for the purposes of the Transaction.
- (435) – Financial information contained Figure 9, Figure 11, Figure 12 and Figure 17 (wholesale): although this type of data may constitute confidential information (SO Response, paragraphs 527 and 536), the transmission of such information to a future acquirer in the context of a merger transaction appears justified for the purpose of assessing the business to be acquired.
- (436) Altice therefore concludes that most of the information that was transmitted to Altice prior to the Clearance Decision was not of a commercially sensitive nature and did not enable Altice to exercise any decisive influence over PT Portugal. With respect to the information that might contain commercially sensitive data, the information was limited in scope and was not used by Altice to exercise any decisive influence over PT Portugal. In any event, the Commission did not demonstrate any potential or actual impact on the market that resulted from such transmission of information.
- (d) Commission's assessment of Altice's arguments
- (437) First, the Commission considers that exchanges of business-related information between a potential acquirer and a vendor could be considered as, if properly conducted, a normal part of the acquisition process, if the nature and purpose of such exchanges are directly related to the potential acquirer's need to assess the value of the business<sup>222</sup>. Such situations generally arise as part of a due diligence process. However, the Commission notes that in the present case this exchange of information took place before the Clearance Decision and long after the due diligence phase had been completed and was not by any means justified for the purposes of evaluating the business of PT Portugal.
- (438) Furthermore, the exchange of information took place in the absence of any type of confidentiality arrangement, be it a clean team-type of structure or any other measure aimed at limiting the number of individuals who would have access to the information and/or the circulation and dissemination of PT Portugal's confidential information within Altice prior to the Closing Date. As a matter of fact no arrangements were put into place for the purposes of the Transaction except for the non-disclosure agreement, which was entered into between Altice's counsel and Oi on 17 December 2014 with respect to exchanges of information for the preparation of the merger control notification of the Transaction, and a specific non-disclosure agreement between [...] and PT Portugal for a common [...] project (see recital (5)).

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<sup>222</sup> Altice argued that the Commission did not take into account the merger context and analysed the exchange of information rather in the context of Article 101 TFEU. That is not correct. The Commission has made reference to the Guidelines on the applicability Article 101 to horizontal co-operation agreements simply to point out what is meant by "commercially sensitive" or "strategic" information.

The exchange of information described in Section 4.2.2.2(a) did not fall within these arrangements and the information provided was granular, non-aggregated and up-to-date (in particular the financial information).

- (439) As regards Altice's argument that the management of Altice constituted the actual and practical clean team for the purposes of the Transaction, the Commission considers that such argument is invalid. Formally, no agreement to ensure confidentiality of the information exchanged was put in place. While Altice claimed that Oni or Cabovisão's operational management did not have access to the information, that is irrelevant, since Altice's management itself is operational (for instance [Mr. F] is CFO of Altice and he was heavily involved in all the correspondence and information sharing between Altice and PT Portugal, as shown in Section 4.3.)<sup>223</sup> and the said management was in any case involved in all the decision making process in relation to the implementation of Article 6.1(b) of the Transaction Agreement.
- (440) Altice also claimed that it did not use the information received to exercise decisive influence over PT Portugal. However, the Commission considers that it is not necessary to demonstrate that Altice has used the information received to exercise decisive influence over the Target. The test is not whether Altice used the information to exercise decisive influence over PT Portugal's business conduct. Firstly, as set out at recital (43) above, implementation for the purposes of Article 4(1) and Article 7(1) of the Merger Regulation takes place where the acquirer has the possibility to exercise decisive influence over the target, without it being necessary to demonstrate that such influence is actually exercised. Secondly, when it actively requested and received the information, Altice did exercise decisive influence over the Target: Altice actively sought, and was provided with granular, strategic and up to date information of the type that it would have been entitled to as PT Portugal's shareholder, but that should not be transmitted between competitors. Thirdly, such information exchange cannot be justified on the basis of, for example, the valuation of the target business as part of the due diligence phase (with the requisite safeguards in place.<sup>224</sup>
- (441) The Commission also disagrees with Altice's argument that some of the slides (shown in Figure 7, Figure 8, Figure 14 or Figure 16) presented non-confidential or high level information and it would have been difficult for Altice to draw any conclusion on the basis of the information presented.
- (442) As regards the slide in Figure 7, PT Portugal described what the main trends in the market as regards three topics - convergence, market repair and cost reduction were and explained which initiatives it was planning in reaction to these trends in the market. The Commission disagrees with Altice that these topics were vague and did not allow Altice to draw any conclusion. In fact the slides clearly spell out PT Portugal's strategies and initiatives for the following year. Similarly, Figure 16 explained in detail how PT Portugal was preventing churn in the B2B segment.

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<sup>223</sup> In its correspondence with PT Portugal quoted in recitals (380) and (381) Altice refers to its management team members participating to the meetings of February and March 2015 as "operational".

<sup>224</sup> The Court has already established that competitors are presumed to have taken into account the information received when determining their behaviour in the market. See for instance Case C-8/08 *T-Mobile*, of 4 June 2009.

- (443) As regards the slide in Figure 8 (agreement with Vodafone), Altice provided evidence that the network sharing agreement between PT Portugal and Vodafone and its objective of reaching 2 million households in Portugal was public. However, Altice did not provide any proof that the more granular information on the slide such as the monthly breakdown of households covered, as well as the fact that the two companies had operational issues or were slightly behind schedule was information in the public domain.
- (444) As shown in recital (401), the information in Figure 14 on the network costs is not as general or limited as Altice argues. The information comprises the network costs per type of area. In fact, despite Altice's claims that the information is imprecise and limited, the information in this slide was provided in response to Altice's questions regarding the network, including a request for a "detailed calculation of the cost per home passed in each area".
- (445) Altice also claimed that the slide in Figure 10 concerning the TV content contracts was never shared with Altice. This slide was part of the presentation and was likely discussed orally at the meeting. Altice has not produced any proof that the slide had not been presented or discussed at the meeting and only based its argumentation on the fact that the slide was "for backup."
- (446) In response to Altice's argument that the information exchanged was not confidential, the Commission also notes that all these slides were marked "confidential" by PT Portugal which means that they contained business secrets which if disclosed would have caused its business serious harm.<sup>225</sup>
- (447) Finally, Altice argued that the Commission did not prove that Altice used this information to reduce uncertainty in the Portuguese wholesale and retail telecommunications markets or that the information was used in any manner to reduce competition between PT Portugal and Cabovisão Oni. On this point, the Commission notes that Article 7(1) of the Merger Regulation does not require that the Commission demonstrate that early implementation of a Transaction actually has an impact on the market.
- (448) Therefore, the Commission takes the view that Altice requested and received strategic detailed information on the Target's commercial policy and that the information provided by PT Portugal during these meetings and in the follow-up contributes, together with the elements described in Section 4.2 of this decision as showing that Altice exercised decisive influence over certain conducts pertaining to the Target.

#### 4.2.2.2. Other bilateral communications

##### (a) 3P / 4P Pricing

- (449) On 20 February 2015, [Mr. K] (CEO of PT Portugal) emailed [Mr. F] (COO of Altice) requesting a discussion regarding "strategy of pricing".<sup>226</sup>

*" We are ready to give you feedback on how the mobile campaign went. Would you like to have a call or just a quick summary of results?"*

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<sup>225</sup> Reference to Commission's guidance on public versions.

<sup>226</sup> ID[AL-00003743], ID[AL-00075872].

*I have another topic I would like to discuss with you by phone or ideally video conferencing and would need one hour of your time. It is about strategy of pricing for 3P and 4P offers<sup>227</sup>. Let me know when would it be possible to speak."*

- (450) In the memorandum to the Commission of 30 July 2015 in relation to this topic, Altice submitted that PT Portugal provided it with some background elements on the mutual wholesale agreement entered into between Vodafone and NOS (one of the four telecoms operators in Portugal) which resulted in [...] and therefore required PT Portugal to adjust its strategy in the market conditions. Altice further submitted that since it had only been provided with very high level information, it was not in a position to advise or even answer PT Portugal's questions in that regard.
- (451) Following [Mr. K's] email, a conference call was held between Altice and PT Portugal on 27 February 2015.<sup>228</sup> Although no minutes of this call have been identified, "Pricing on 3P and 4P" was listed as an agenda item for another call between [Mr. F] (Altice) and [Mr. K] (PT Portugal) on 5 March 2015.<sup>229</sup>
- (452) Proposed pricing schemes for 3P were also covered at meeting between PT Portugal and Altice on 19 March 2015, as detailed in the "Consumer Segment Overview" slide presentations prepared for the meeting, as shown in Figure 20.<sup>230</sup> This slide clearly shows that PT Portugal provided Altice with details of pricing that it was proposing to offer in the market and the rationale for doing so.

#### **Figure 20 - PT Portugal presentation – 3P pricing**

[...]

- (453) The Commission notes that this topic is of a strategic nature, since it focused on the pricing strategy of the Target. Moreover, the Target sought input on such a sensitive topic from Altice, which was still a competitor at that time through Cabovisão and Oni.
- (454) The slide provided information to Altice as regards the options that PT Portugal was contemplating on how to respond to competitors' behaviour in the market and competitor's prices. It also showed the risks involved for each of the options. Such strategic discussion on pricing shows that PT Portugal did not hesitate to share its strategy (including when "*with a footprint above 1.5 million hours, the [...] EUR is unreasonable*" and how to "*retaliate in 4P with a special promotion*") with Altice who was still a competitor in the same markets.
- (b) Provision of information on key performance indicators
- (455) At frequent intervals from 11 March 2015 to 15 April 2015, at the request of Altice, PT Portugal shared highly commercially sensitive information with Altice in the form of weekly KPIs regarding PT Portugal's performance. KPIs are measurable values that demonstrate how effectively a company is achieving key business objectives. In the telecommunication business relevant KPIs include measurements such as the number of net adds by segment, number of disconnections, or ARPU. Detailed KPIs, in particular financial ones, allow a very good and thorough understanding of a business and its performance level.

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<sup>227</sup> The Commission understands this to refer to triple play and quadruple play bundles, that is the offer of 3 or 4 telecommunications services including fixed, mobile, television and/or internet.

<sup>228</sup> ID[AL-00003741].

<sup>229</sup> ID[AL-00074842].

<sup>230</sup> ID[AL-00103708].

- (456) By e-mail of 26 February 2015, Altice ([Mr. F]) requested PT Portugal ([Mr. M]) to provide KPI information on a weekly basis: "*would you mind starting to send me every week the weekly KPI you are using then I can continue to learn the business and be more efficient.*"<sup>231</sup>
- (457) By e-mail of the same day PT Portugal ([Mr. M]) responded that PT Portugal would provide this information to Altice: "*I will send the Kpis on a weekly basis.*"<sup>232</sup>
- (458) PT Portugal ([Mr. M]) sent the first KPI information for the B2C segment to Altice ([Mr. F]) on 11 March 2015.<sup>233</sup>
- (459) On 17 March 2015, Altice ([Mr. F]) requested a new table with updated and supplemental information and clarifications on the KPI sheet:<sup>234</sup>

*"[Mr. M]*

*Could you send me the update table please.*

*Questions: could you please remember me the number of subscribers of*

*TV Fibre*

*TV ADSL*

*TV SAT*

*Movel PPP unlimited*

*Movel PPP M4o*

*Movel PPS*

*then we can calculate churn rate from the gross / net adds.*

*There are no detailed budget targets per technology for TV (Fibre, DSL, SAT)?*

*Same no detailed budget targets per type of rate plan for mobile (unlimited, M4o, PPS Meo, PPS Moche, PPS Uzo) ?*

*What is effective+rotativo for the Mobile ?*

*Lines 49/52 : how do you reconcile for mobile the gross adds (lines 17/22) / net adds (Lines 39/46) and the activation and deactivation of those lines*

*do you have the data of the months of 2014 as a reference Jan-Dec 2014 ?*

*Then we can fill the seasonality*

*Last but not least what are the gross adds / churn / base ARPU of all those volumes ?*

*TV Fibre*

*TV ADSL*

*TV SAT*

*Movel PPP unlimited*

*Movel PPP M4o*

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<sup>231</sup> ID[AL-00075553].

<sup>232</sup> ID[AL-00112216].

<sup>233</sup> ID[AL-00112067] and ID[AL-00074375].

<sup>234</sup> ID[AL-00079974].

*Movel PPS*

*We can maybe have a call today or tomorrow or we will answer those question face to face on Thursday."*

(460) Altice thus wanted the KPIs to be further split by type of product, clearly considering that it should receive even more detailed KPIs than PT Portugal had already provided.

(461) On the same day, PT Portugal ([Mr. M]) sent the requested information and explanations to Altice ([Mr. F]) adding additional columns to allow Altice to compare the data to the same month of the previous year and a new worksheet with additional data:<sup>235</sup>

*"Tableau with all mobile data of the Week March 9;*

*- On the existing worksheet, 3 new columns with equivalent data for the same month of the previous year;*

*- A new worksheet with monthly information on the number of subscribers, gross adds, churn, churn rate and ARPU with the available detail*

*- Answers and clarifications directly in your email below*

*Please let me know at what time could be the call tomorrow."*

(462) Following this e-mail exchange, Altice and PT Portugal planned on discussing the KPIs further, either through a conference call or in a meeting in Lisbon.<sup>236</sup>

(463) PT Portugal continued to send this detailed KPI information to Altice for an extended period. Overall, the following weekly KPIs were sent to Altice:

(1) Week of 2 March 2015 (sent by e-mail of 11 March 2015);<sup>237</sup>

(2) Week of 9 March 2015 (sent by e-mail of 17 March 2015);<sup>238</sup>

(3) Week of 16 March 2015 (sent by e-mail of 24 March 2015);<sup>239</sup>

(4) Week of 23 March 2015 (sent by e-mail of 31 March 2015);<sup>240</sup>

(5) Week of 30 March 2015 (sent by e-mail of 8 April 2015); and,<sup>241</sup>

(6) Week of 6 April 2015 (sent by e-mail of 15 April 2015).<sup>242</sup>

(464) The information was included in an excel sheet setting out actual figures, projected figures and targets by consumer segment. At the request of Altice, PT Portugal also included a worksheet with monthly information on the number of subscribers, gross adds, churn, churn rate and ARPU.<sup>243</sup>

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<sup>235</sup> ID[AL-00073886].

<sup>236</sup> ID[AL-00073885]

<sup>237</sup> ID[AL- 00112067].

<sup>238</sup> ID[AL-00073926], ID[AL-00073886], ID[AL-00073887].

<sup>239</sup> ID[AL-00073266], ID[AL-00073267].

<sup>240</sup> ID[AL-00072425], ID[AL-00072427].

<sup>241</sup> ID[AL-00071753], ID[AL-00071754].

<sup>242</sup> ID[AL-00071407], ID[AL-00071408].

<sup>243</sup> ID[AL-00073886].

(465) An example of the strategic information sent can be seen below in Figure 21.

**Figure 21 - PT Portugal weekly KPI - Week of 6 April 2015**

[...]

(466) This slide shows PT Portugal's detailed KPIs for the week of 12 April split by category of product as Altice had requested in its email (see recital 192)

(467) It is noted that exchanges between Altice and PT Portugal on the KPIs also took place during meetings in Lisbon. On 26 and 27 March 2015, Altice and PT Portugal in particular discussed aligning formats for the KPIs both for the B2B and B2C segments<sup>244</sup> (see in this regard recital (290)).<sup>245</sup>

(468) Confidential information was also exchanged on this occasion. Following these meetings, on 27 March 2015 Altice ([Mr. F]) sent PT Portugal (Mr. W and Mr. M) a document via email<sup>246</sup> labelled "Strictly confidential" containing Alice's latest monthly financial report for Numericable BELUX<sup>247</sup> for January 2015.<sup>248</sup> This report included very detailed financial information, including among others: (i) monthly information on revenues, EBITDA, Capex, EBITDA-Capex; and (ii) a 13-month profit and loss ("P&L") table containing among others detailed revenue figures for TV, internet, VOIP, B2C and B2B fixed and mobile revenues. This exchange is an example of Altice acting as if PT Portugal had already been integrated into the Altice corporate structure (i.e. the situation resulting from implementation of the concentration). On the one hand Altice was sharing commercially sensitive information with PT Portugal and, on the other hand, Altice was providing PT Portugal with examples of the KPI reporting of other Altice subsidiaries for the purposes of PT Portugal's KPI reporting.

(c) Commission's findings

(469) The Commission first notes, based on the evidence presented in this section that granular, non-historic strategic information was provided by PT Portugal to Altice before the Clearance Decision. This information concerned future pricing strategy and up-to-date KPIs, therefore some of the most strategic information pertaining to the commercial policy of a company.<sup>249</sup> PT Portugal shared with Altice, a competitor at the time valuable information on its strategy as regards 3P/4P pricing, including on how to retaliate against third party competitors, and asked for its advice on how to proceed. Such disclosure of strategic information could not only be harmful to PT Portugal's business, but also lead to anticompetitive effects in the telecoms market. Altice did not distance itself from these exchanges, and PT Portugal went as far as to discuss these topics over the phone. As regards KPIs, Altice asked specifically to receive this information (see recital (456)) and when PT Portugal sent the weekly

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<sup>244</sup> The agenda for the meetings between PT Portugal and Altice on 25 to 27 March 2015 (ID[AL-00073594]) included, among others, the following items: "*Thursday 26/3 [...] 13h00-15h00 B2B KPI reports formats alignment*"; and, "*Friday 27/3 9h-12h00 B2C KPI and Financial reports formats alignment*".

<sup>245</sup> The list of action points following the March meeting included the following point regarding B2B: "*KPI formats to be send to PT - Business, sales and commissions*". The action point was to be performed by Altice's Head of B2B ([Mr. X]). ID[AL-00007624] and ID[AL-00007625]. ID[AL-00079679].

<sup>247</sup> Numericable Benelux was Altice's business in Belgium and Luxembourg.

<sup>248</sup> A spreadsheet with no figures containing the PT Weekly format B2C" was also attached to the e-mail.

<sup>249</sup> Indeed, such information is considered under the Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements as being particularly sensitive.

KPIs, Altice asked for even more detailed information, by type of product (see recitals (459) and (460)).

- (470) The receipt of such sensitive and granular information shared by Altice, a competitor of PT Portugal outside any clean team agreements placed Altice in a position as if it already controlled PT Portugal and was therefore was entitled to ask for and receive such information.
- (471) The Commission also notes that despite the extensive and detailed information shared, no safeguards were put in place to ensure the preservation of competition, such as clean teams or other protocols with regard to commercially sensitive information. As explained in recital (5), there was no non-disclosure agreement or clean team arrangement put into place for the purposes of the Transaction except for the non-disclosure agreement which was entered into between Altice's counsel and Oi on 17 December 2014 with respect to exchange of information for the preparation of the merger control notification of the Transaction, and a specific non-disclosure agreement between [...] and PT Portugal for a common [...] project.<sup>250</sup>
- (472) Furthermore, the fact that such sensitive and granular information was shared by the Target with one of its competitors makes it difficult for the Commission to restore the prior competitive situation because once the information exchanged, the harm to competition has already been done. This aspect is further aggravated by the fact that the Commission raised concerns as regards the compatibility of the Transaction with the internal market.
- (473) Therefore, the Commission takes the view that Altice requesting and receiving strategic detailed information on the Target's KPIs and future pricing strategy contributes to showing that Altice exercised decisive influence over certain conducts pertaining to the Target.
- (d) Altice's views
- (474) In relation to the 3P/4P pricing strategy, Altice indicated in the SO Response that the purpose of this call was to provide [Mr. F] with some background information on the mutual wholesale agreement which had been entered into by Vodafone and NOS and which resulted in an intensification of the price war in the Portuguese telecommunications market. This change in market conditions led PT Portugal to adjust its commercial strategy. Altice argues that during the call [Mr. K] (CEO PT Portugal) simply outlined to [Mr. F] (CFO Altice) the main aspects of PT Portugal's adjusted strategy, but Altice was not in a position to interfere in PT Portugal's decision on the topic. While Altice submits that the slide in Figure 20 may contain commercially sensitive information<sup>251</sup> Altice points out that there is no evidence on the file that Altice followed up on this issue.
- (475) As regards the provision of information on KPIs, Altice does not contest that it received such information and it claims it was only for the purpose of learning the business. Altice contests, however, that this information allowed Altice to exercise a decisive influence over PT Portugal.<sup>252</sup>

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<sup>250</sup> Altice's response to Commission's decision of 15 March 2016, Memorandum to the Commission of 6 April 2016, question 4, page 12.

<sup>251</sup> SO Response 535-536.

<sup>252</sup> SO Response 529-530.

- (e) Commission's assessment of Altice's arguments
- (476) The Commission considers that the purpose for which Altice asked for granular, up-to-date and commercially sensitive information from PT Portugal and why it engaged into discussing the future pricing of a competitor long after the due diligence phase had taken place (October-November 2014) is irrelevant for the current analysis. Altice was by no means entitled to discuss future pricing or learn the business (unless for due diligence purposes) before the Closing Date. Until the Closing Date, the buyer and the target should remain active as independent operators. Once the information has been exchanged it is difficult, if not impossible for the Commission to restore the prior competitive situation, as the harm to competition has already been done.
- (477) The Commission also considers that it is not necessary to demonstrate that Altice has used the information it received to exercise decisive influence over the Target. The test is not whether Altice used the information to exercise decisive influence over PT Portugal's business conduct. Firstly, as set out at recital (43), implementation for the purposes of Articles 4(1) and 7(1) of the Merger Regulation takes place where the acquirer has the possibility to exercise decisive influence over the target, without it being necessary to demonstrate that such influence is actually exercised. Secondly, the fact that Altice actively sought, and was provided with granular, strategic and up-to-date information of the type that it would have been entitled to receive as PT Portugal's shareholder, (but that should not be transmitted between competitors) contributes to showing that Altice exercised decisive influence on certain aspects of the Target's business. Thirdly, such information exchange cannot be justified on the basis of the valuation of the target business as part of the due diligence phase (with the requisite safeguards in place<sup>253</sup>).
- (478) The Commission therefore concludes that these information exchanges contribute to demonstrating that Altice exercised decisive influence over certain aspects pertaining to the Target.

### **4.3. Conclusion on breach of Article 7(1) of the Merger Regulation**

- (479) In light of the foregoing evidence, the Commission considers for the purposes of the present case that provisions of the Transaction Agreement and Altice's conduct from Signing Date amounted to early implementation of the Transaction, as: (i) the Transaction Agreement granted Altice the legal right to exercise decisive influence over PT Portugal's business; and (ii) Altice's conduct described in Section 4.2 constituted the actual exercise of decisive influence. In this respect, some of the instances described in Section 4.2, did not even reach the materiality thresholds provided by the Transaction Agreement. Even assuming, therefore, that the materiality thresholds provided by the Transaction Agreement were appropriate, (which the Commission considers is not the case for the reasons, as explained in Section 4.1) these instances fell outside the provisions and, therefore, were not material even by reference to the Parties' own standards.
- (480) With regard to the Transaction Agreement, the Commission concludes that the Transaction Agreement granted Altice the possibility to exercise decisive influence over PT Portugal's business in that it gave Altice a legal right to veto many of PT

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<sup>253</sup> The Court has already established that competitors are presumed to have taken into account the information received when determining their behaviour in the market. See Case C-8/08 *T-Mobile*, of 4 June 2009.

Portugal's corporate and commercial decisions and went beyond the aim of value preservation.

- (481) As described in Section 4.1, the provisions of the Transaction Agreement allowed Altice to interfere both in strategic decisions of the Target (the appointment and dismissal of PT Portugal's senior management), in the Target's pricing policies, as well as in day-by-day commercial matters (conclusion, modification or termination of contracts above a certain monetary threshold). As explained in Section 4.1.2, the Commission acknowledges that certain provisions can legitimately be put in place by an acquiring company for the purposes of preserving the value of a target's business in the period between signing and closing of a transaction. However, as described in Section 4.1.2., by virtue of the Transaction Agreement, Altice was in a position to veto strategic and day-by-day commercial decisions of the Target from the moment that the Parties signed the Transaction Agreement. These provisions went beyond what could have been considered justifiable for reasons of value preservation and granted Altice the possibility to exercise decisive influence over PT Portugal (see Sections 4.1.2.1., 4.1.2.2. and 4.1.2.3).
- (482) With regard to Altice's conduct described in Section 4.2., the Commission concludes that Altice's actions constitute actual exercise of decisive influence, for the following reasons.
- (a) Altice influenced a number of PT Portugal's day-by-day business decisions (for example, Altice consented on the conclusion of contracts (Section 4.2.1.5), gave specific instructions on how to negotiate contracts (Section 4.2.1.4), and it was directly involved in the implementation of one of PT Portugal's promotional campaigns (Section 4.2.1.1).
  - (b) Altice sought to influence the implementation of a number of PT Portugal's business decisions (for example, Altice requested and received information on the implementation of the Post-paid Campaign, and indicated to PT Portugal how to proceed with the negotiation of contracts).
  - (c) Altice exercised operational control over aspects of PT Portugal and acted as the controlling shareholder of the Target (for example, Altice instructed PT Portugal on how to proceed in relation to the issues covered in Section 4.2.). Altice also received sensitive, granular and up-to-date information that it would have only been entitled to in the capacity of a parent company or controlling shareholder of the Target (for example during meetings between the management of Altice and the management of PT Portugal and as a follow-up to these meetings). This exchange of information did not form part of a due diligence process or as part of Altice's valuation of PT Portugal and took place without appropriate non-disclosure agreements having been put in place (Section 4.2.2)
- (483) The fact that the acquisition of the possibility to exercise decisive influence and actual exercise of control occurred prior to adoption of the Clearance Decision, and in some instances prior to notification, leads the Commission to the conclusion that Altice has breached Article 7(1) of the Merger Regulation.
- (484) Therefore, the Commission considers that the Transaction was implemented prior to the date on which the Commission adopted the Clearance Decision, and in some instances prior to notification, in breach of Article 7(1) of the Merger Regulation.

## **5. BREACH OF ARTICLE 4(1) OF THE MERGER REGULATION**

- (485) As discussed in Section 2 of this decision, Article 4(1) and Article 7(1) of the Merger Regulation enshrine distinct legal principles.
- (486) On the one hand, Article 4(1) of the Merger Regulation relates to the act of bringing a proposed transaction with a Union dimension to the Commission's attention by way of a formal notification before such transactions are implemented. This safeguards the Commission's ability to detect and investigate concentrations. It constitutes a positive obligation to notify the Commission of a concentration prior to its implementation.
- (487) On the other hand, the standstill obligation under by Article 7(1) of the Merger Regulation imposes an obligation on parties to a concentration falling within the remit of the Merger Regulation, not to implement that concentration prior to its notification or prior to its clearance. It constitutes a negative obligation not to implement a concentration until it has been notified and cleared.
- (488) For the reasons set out below, the Commission considers that Altice breached Article 4(1) of the Merger Regulation.
- (489) First, the Commission concludes that Article 6.1(b) of the Transaction Agreement regarding Altice's veto right over the appointment of the Target's senior management (Articles 6.1(b)(xviii) and 6.1(b)(xx)), the setting of the Target's pricing policies (Article 6.1(b)(xxvi)) and the conclusion, modification and termination of contracts and other commercial actions (Articles 6.1(b)(ii), (iii), (ix) and (vii)/(xxvii)) granted Altice the legal right to exercise control over the Target as of the Signing Date. Given that this action took place prior to notification of the Transaction to the European Commission on 25 February 2015, the Commission concludes that this constitutes a breach of Article 4(1) of the Merger Regulation.
- (490) Second, on the basis of the evidence presented in Section 4.2, the Commission concludes that actions which Altice took following Signing Date, when taken together, demonstrate that Altice actually exercised control over PT Portugal. Certain of these actions took place prior to notification of the Transaction to the European Commission on 25 February 2015, namely all of the following:
- (1) The Post-paid Campaign: On 20 January 2015, PT Portugal requested and received Altice's approval to implement promotional campaign aimed at increasing the number of PT Portugal's post-paid subscribers, as described further in Section 4.2.1.1.;
  - (2) The VOD / EST contract: On 10/11 February 2015, PT Portugal requested approval to conclude a VOD contract with Cinemundo and received instructions to postpone the conclusion of the contract until closing of the Transaction, because Altice had better terms regard the VOD contract. This behaviour is described further in Section 4.2.1.4; and,
  - (3) The exchange of commercially strategic information at the meeting of 3 February 2015 between the management of Altice and the management of PT Portugal, including details on the Target's key initiatives in terms of commercial policy; key supplier relationships; updates on its fibre sharing agreement with Vodafone and update on TV content, as further described in Section 4.2.2.1.(a). On this occasion, Altice requested and received sensitive and granular information on the Target which Altice would have been entitled to receive if it were the parent company or the shareholder of the Target. Altice had thus no legal right to request and receive such information. Therefore,

Altice and the Target were already acting as if Altice was controlling the Target. Furthermore, the fact that such sensitive and granular information was shared by the Target with one of its competitors makes it difficult for the Commission to restore the prior competitive situation because once the information exchanged, the harm to competition has already been done.

- (491) Accordingly, the Commission concludes that Altice breached its notification obligations under Article 4(1) of the Merger Regulation.

## 6. PROCEDURE

### 6.1. Altice's arguments

- (492) In the SO Response, Altice argued that the Commission has committed a breach of the fundamental principles of due process, in particular the rights of the defence<sup>254</sup>.

- (493) First, according to Altice, the Commission infringed Altice's right to be heard and the duty of good administration by not taking Oi's interpretation of the Transaction Agreement into account<sup>255</sup>, which Altice considered was necessary for the assessment of the existence of an infringement by Altice of Article 4(1) and/or 7(1) of the Merger Regulation<sup>256</sup>.

- (494) Altice considered that the Commission compared Altice's rights under the Transaction Agreement to a veto right over corporate, competitive and commercial actions and that, under corporate law, a minority shareholder can, through its veto right, effectively exercise decisive influence over a company only in combination with other rights such as (i) the right to appoint (or to appoint jointly) the initial members of the board of directors and the management team, (ii) a full array of information rights, and (iii) the right to initiate judicial actions against the management of the company. Moreover, Altice argued that Oi was the only party to the Transaction Agreement able to determine which matters should be submitted to Altice, whereas Altice's role in the implementation of Article 6.1 of the Transaction Agreement was "*purely passive*" and it did not have the power to decide upon which subject-matters it should be consulted: Altice reviewed the subject-matters submitted to it and approved the contemplated course of action (or asked for its postponement) within a relatively limited time scope<sup>257</sup>. According to Altice, "*most of the time*" it did not know the value of the contract on which it was consulted by Oi or was not in a position to assess whether the contract was outside of the scope of the normal and ordinary course of business<sup>258</sup>. In substance, Altice argues that it had "*no or very little knowledge*" of the subject-matters on which Oi or PT Portugal requested Altice's consent<sup>259</sup>. Where the value of the course of action or contract was below the monetary thresholds of the Transaction Agreement, Altice assumed that said course of action or contract was being submitted because it was outside of PT Portugal's normal and ordinary course of business or was inconsistent with PT Portugal's past practice<sup>260</sup>.

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<sup>254</sup> SO Response, paragraphs 79-142.

<sup>255</sup> SO Response, paragraphs 82-99.

<sup>256</sup> SO Response, paragraph 86.

<sup>257</sup> SO Response, paragraph 84.

<sup>258</sup> SO Response, paragraph 84.

<sup>259</sup> SO Response, paragraph 85.

<sup>260</sup> SO Response, paragraph 85.

- (495) Specifically, in the SO Response Altice referred to the case-law of the Union Courts on the protection of the rights of the defense, according to which undertakings concerned should be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission. Altice noted that, in reply to an RFI requesting clarifications about certain provisions of the Transaction Agreement<sup>261</sup>, Altice replied that it was not the best placed party to respond to the Commission's questions and that it was preferable to consult Oi, which was effectively in charge of applying these provisions. Altice claimed that the Commission breached Altice's rights of defence by refusing to involve Oi in the investigation and to investigate the reasons for which Oi consulted Altice on certain matters, thereby depriving Altice of the opportunity to collect and present the Commission with all of the elements which were necessary to build its defense<sup>262</sup>.
- (496) In addition, the Commission allegedly also breached Altice's rights of the defense, as well as the principle of good administration, because the Commission's failure to involve Oi meant that the Commission was examining the case on the basis of partial and incomplete elements<sup>263</sup>. In that context, Altice refers to the case-law of the Union Courts according to which the guarantees afforded by the Union legal order in administrative procedures include, in particular, the duty of the competent institution to examine carefully and impartially the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Altice considered that in order to assess the manner in which a contract was implemented, account must be taken of the interpretation of each of the parties to the contract: in the present case, this would appear all the more relevant since Oi was in charge of the implementation of Article 6.1 of the Transaction Agreement.
- (497) Second, according to Altice by imputing the alleged infringement to Altice and taking no account of the role played by Oi, the Commission breached the fundamental principle of personal liability according to which a natural or legal person may be penalized only for acts imputed to it individually<sup>264</sup>. Altice considered that Oi was in charge of the implementation of pre-closing covenants of the Transaction Agreement and the decision to consult Altice resulted from Oi's interpretation of the Transaction Agreement. Altice reiterated that it was passive and simply responded to Oi's solicitations. Altice therefore submitted that it cannot be held liable for having been informed of or consulted on matters pertaining to PT Portugal as it was not involved in Oi's decision to consult Altice on matters pertaining to PT Portugal<sup>265</sup>. Essentially, Altice stated that by imposing fines on Altice, the Commission would be imputing to Altice the liability of Oi's consultations which would constitute an infringement of the principle of personal liability<sup>266</sup>.

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<sup>261</sup> RFI of 27 September 2016 under Article 11(2) of the Merger Regulation, question No 2 requesting Altice to explain how the provisions of Article 6.1(b) point vii and point xxvii of the Transaction Agreement relate to each other, how each of these provisions was applied, and what the difference between them is.

<sup>262</sup> SO Response, paragraph 92.

<sup>263</sup> SO Response, paragraph 99.

<sup>264</sup> SO Response, paragraphs 100-103.

<sup>265</sup> SO Response, paragraph 102.

<sup>266</sup> SO Response, paragraph 103.

- (498) Therefore, Altice formally requested the Commission to consult Oi on its interpretation of the Transaction Agreement and to open proceedings against Oi<sup>267</sup>.
- (499) In the reply to the Letter of Facts, that is after the Commission had shared Oi's Reply with Altice, Altice criticised the Commission's RFI to Oi and claimed that the procedural breaches identified in the SO Response and at the Hearing were not solved by the RFI to Oi. In particular, Altice's criticism is that a breach of the fundamental right to good administration occurred. According to Altice, Oi gave an extensive interpretation of the Transaction Agreement. Given that the consultations of Altice resulted from Oi's decisions, Oi's Reply would need to be verified and supported by documentary evidence dating from the time of the alleged facts, in particular given the amount of information the Commission requested from and provided by Altice. In addition, Altice claims that the Commission failed to take into account all incriminating and exculpatory elements in the case, which amounts to a violation of the obligation to investigate the case carefully and impartially. Finally, Altice submits that pursuant to the principles of equal treatment and personal liability, Oi should have been involved in the proceedings and should have been an addressee of the SO.
- (500) Third, the Commission allegedly infringed the principles of necessity and proportionality because several RFIs represented an excessive burden for Altice<sup>268</sup>: (i) the Commission fixed the time-limits to answer the RFIs of 8 July 2015, 5 August 2015, 11 March 2016<sup>269</sup>, 20 July 2016 and 21 December 2016 that were excessively short and disproportionate to the needs of the investigation<sup>270</sup>; and, (ii) the Commission requested that Altice provide a number of documents in the RFI of 20 July 2016, most of which, however, had already been included in the email data provided by Altice in its 6 April 2016 response to the RFI of 11 March 2016 and/or among documents provided in Altice's responses to previous RFIs<sup>271</sup>.

## 6.2. The Commission's assessment

- (501) The Commission does not share Altice's view that the Commission committed a breach of the fundamental principles of due process. Altice's arguments will be addressed in Sections 6.2.1 and 6.2.2.

### 6.2.1. *Oi's role in the implementation of the pre-closing covenants and Altice's liability for early implementation of the Transaction*

- (502) In this Section, the Commission will set out that, contrary to Altice's claims, the Commission has respected (i) Altice's right to be heard and its right to a good administration; and, (ii) the fundamental principle of personal liability.

#### 6.2.1.1. Altice's claim that a failure to take into account of Oi's view amounts to a violation of Altice's right to be heard and its right to a good administration

- (a) The infringement by Altice is based on Altice's conduct

- (503) According to Article 14(2) of the Merger Regulation, the Commission may impose fines when companies infringe Article 4(1) and Article 7(1) of the Merger Regulation. Altice, as the "*undertaking acquiring control*" within the meaning of

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<sup>267</sup> SO Response, paragraph 104.

<sup>268</sup> SO Response, paragraphs 105-141.

<sup>269</sup> See footnote 20.

<sup>270</sup> SO Response, paragraphs 111-133.

<sup>271</sup> SO Response, paragraphs 134-141.

Article 4(2) of the Merger Regulation was the Notifying Party<sup>272</sup> and, as such, was responsible for notifying the Transaction prior to its implementation pursuant to Article 4(1) of the Merger Regulation. Further, Altice, as the party acquiring control, may be subjected to fines on the basis of Article 14(2) of the Merger Regulation since the Transaction was implemented before notification and before the Clearance Decision in accordance with Article 7(1) of the Merger Regulation.

- (504) As described in Sections 4 and 5 of this decision, the infringements of Articles 4(1) and of Article 7(1) of the Merger Regulation are based, not only on the rights granted to Altice by virtue of the Transaction Agreement which Altice entered into, but also on Altice's actual conduct between the Signing Date and the Clearance Decision. In fact, Altice had an active role also in the implementation of the pre-closing covenants, as further described in Section (b).
- (505) It is irrelevant in the present case that Oi was in charge of the implementation of Article 6.1 of the Transaction Agreement since neither Oi's interpretation of the Transaction Agreement nor Oi's behaviour, can excuse Altice's conduct.
- (506) Therefore, the interpretation that Oi gave to the Transaction Agreement and the reasons for which Oi decided to seek the consent of Altice have no bearing on the existence of the infringement, which is based on Altice's conduct<sup>273</sup>.
- (507) It follows that in the present case, the Commission could validly establish the existence of the infringement without it being necessary to obtain the interpretation that Oi gave to the Transaction Agreement and the reasons for which Oi decided to seek the consent of Altice on certain matters between the Signing Date and the Clearance Decision.
- (b) Altice had an active role in the drafting and implementation of the Transaction Agreement
- (508) Contrary to Altice's claim, based on the elements on file, the Commission considers that Altice played an active role in the drafting and implementation of the Transaction Agreement and had knowledge of the subject-matters on which its consent was requested. Therefore, the existence of the infringement could be established without seeking the views of Oi.
- (509) At the outset, it is recalled that Altice negotiated the Transaction Agreement with Oi, including Article 6.1(b) thereof, stipulating that Oi shall cause PT Portugal not to take certain actions except with Altice's written consent. Altice also had the role of signatory of the final Transaction Agreement on 9 December 2014, which granted a legal right for Altice to deny its consent for Oi and PT Portugal to perform certain decisions. Therefore, Altice had the power to decide on the subject-matters for which its consent was to be requested.

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<sup>272</sup> See the Clearance Decision, paragraph 1.

<sup>273</sup> In addition, the Commission notes that Altice's infringement of Articles 4(1) and 7(1) of the Merger Regulation is based also on conduct that did not involve Oi (see for example Sections 0, 0 and 0). With regard to the Post-paid Campaign, the RAN selection process and the VOD / EST contract, this is confirmed by Oi's Reply stating that Oi had not been able to find information on these issues and that PT Portugal's CEO and CTO did not and had no powers to represent Oi (see Sections 0, 0 and 0). Therefore Altice's claim that it would be necessary to consult with Oi to assess the existence of an infringement is, in any event, not relevant for the conduct that did not involve Oi.

- (510) With regard to Altice's argument that the Transaction Agreement did not grant it the same corporate or legal rights as a controlling minority shareholder, the Commission refers to recital (126).
- (511) In practice, Altice reacted to Oi's and PT Portugal's approaches *inter alia* by: (i) accepting commercially sensitive information (rather than distancing itself from it); (ii) asking for further information where necessary; (iii) giving instructions to Oi and/or PT Portugal on how they should proceed; and (iv) monitoring implementation of matters brought to Altice's attention. Altice's role was therefore not "*purely passive*", as claimed by Altice.
- (512) The Commission cannot accept Altice's claim that most of the time it did not know the value of the contract on which it was consulted, whether by Oi or PT Portugal<sup>274</sup>. The requests for consent addressed to Altice by Oi or PT Portugal described in Sections 4 and 5 of this decision mentioned the value of the topics concerned and / or detailed information on those topics, and where it deemed it necessary, Altice requested Oi or PT Portugal to provide additional details<sup>275</sup>. Altice's conduct therefore indicates that it had sufficient knowledge of the subject-matters on which its consent was requested. Altice also had a general understanding of PT Portugal's business since, as the Acquirer, Altice had gone through the due diligence process. Altice was also active in Portugal through its subsidiaries Cabovisão and Oni and therefore had knowledge of the market for the retail supply of pay TV services<sup>276</sup>. Altice therefore was able to assess whether the subject-matters on which its consent was requested affected the value of PT Portugal.
- (513) Altice claims that it approved certain contemplated courses of action or asked for their postponement within a relatively limited time scope. However, this does not constitute evidence that Altice was not actively involved in the implementation of the Transaction Agreement. The time that it took Altice to react to PT Portugal's and Oi's requests for consent merely indicates the point in time that Altice was satisfied that it could respond to those requests.
- (514) Finally, as to Altice's argument that it assumed that certain courses of action or contracts below the monetary thresholds of the Transaction Agreement, were outside of PT Portugal's normal and ordinary course of business or were inconsistent with PT Portugal's past practice, the Commission notes that Altice incurred a risk by making such assumptions as such courses of action or contracts could not, even under the Parties' own definition, have an impact on the value of the Target.
- (c) The Commission has sought Oi's views on the Transaction Agreement and its implementation
- (515) The Commission has established that in order to establish the existence of the infringement of Articles 4(1) and 7(1) of the Merger Regulation, the Commission

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<sup>274</sup> As to Altice's claim that it was unable to assess whether the contract was outside of the scope of the normal course of business, the Commission refers to recital (99).

<sup>275</sup> See, for example, Sections 0 and 0 of this decision showing that Altice received information on the value of, respectively, the Porto Canal and DOG TV contracts, and Sections 0, 0, 0, 0 and 0 showing that Altice received detailed information about the Post-paid Campaign, the RAN selection process, the VOD / EST contract, the SIRESP shares and the [...] contract.

<sup>276</sup> For example, in relation to the TV channel Porto Canal, an internal Altice e-mail notes that: "[...]." E-mail from [Mr. I] (Altice Head of Group Purchasing), sent from the e-mail address [...] dated 11 April 2015 ID[AL-00025245] in response to an e-mail from [Mr. F] (Altice COO) dated 10 April 2015 asking for an update on the Porto Canal negotiation. Translation by the Commission.

was not required to seek Oi's interpretation of the Transaction Agreement since the infringement was based on Altice's conduct (see Sections (a) and (b) of this Decision).

- (516) In light of Altice's claims in the SO Response, and for the sake of completeness, the Commission sent Oi an RFI on 6 October 2017 seeking Oi's views on how it interpreted and implemented the Transaction Agreement between the Signing Date and adoption of the Clearance Decision. Oi replied on 20 October 2017 ("Oi's Reply"). Oi's Reply was shared with Altice by the Commission in the Letter of Facts. Altice also had the opportunity to make known its views on Oi's Reply. Therefore, even if Altice were correct that, in order to respect the rights of the defense it was incumbent upon the Commission to take account of Oi's interpretation and implementation of the Transaction Agreement, the actions taken as described in this recital demonstrate that such rights have been respected.
- (517) In addition, since the Commission has involved Oi and investigated the reasons for which Oi would seek Altice's consent, Altice's claim that the Commission has examined the case on the basis of partial and incomplete elements, thereby allegedly breaching Altice's rights of the defense, as well as the principle of good administration, is unfounded.
- (518) As to Altice's claims in the reply to the Letter of Facts, that (i) the principle of good administration would impose a duty on the Commission to verify Oi's interpretation of the Transaction Agreement and require Oi to support its reply by documentary evidence and (ii) that the Commission violated the obligation to investigate the case carefully and impartially since Oi might be in possession of exculpatory evidence, the Commission recalls the following: the Commission's obligation in this case is to produce sufficiently precise and coherent evidence to establish that the alleged infringement took place<sup>277</sup>. Indeed, the existence of an infringement must be assessed by reference solely to the evidence gathered by the Commission in the decision finding the infringement and the only relevant question is therefore whether, in substance, proof of the infringement has or has not been adduced on that evidence. The Commission considers that, on the basis of the documentary evidence presented in this decision, which is supported by the confirmations provided by Oi, the evidence is sufficiently precise and coherent to establish to the requisite legal standard that the infringement by Altice took place. Furthermore, despite the investigatory steps that it has taken, the Commission has not identified and Altice has not provided any indication of the existence of any exculpatory evidence that would contradict the Commission's conclusions.
- 6.2.1.2. Altice's claim that imputing the alleged infringement to Altice constitutes a breach of the fundamental principle of personal liability
- (519) The infringement that is the subject of this decision is based on: (i) the rights granted to Altice by virtue of the Transaction Agreement which Altice entered into; and/or (ii) Altice's actual conduct between the Signing Date and the Clearance Decision. In fact, Altice had an active role in the drafting and the implementation of the Transaction Agreement.

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<sup>277</sup> Case T-332/09, *Electrabel v. Commission*, 12 December 2012, EU:T:2012:672, paragraph 106.

- (520) The Commission is not penalising Altice for acts imputed to Oi in this case. Rather, in respect of the fundamental principle of personal liability, the Commission is penalising Altice for acts imputed to it individually.
- (521) As to Altice's request that the Commission open proceedings against Oi, the Commission recalls that, even if an infringement were committed by Oi, the Commission has no obligation to pursue an infringement against Oi<sup>278</sup>.
- (522) Finally, as to the claim made by Altice in the reply to the Letter of Facts, that by not opening proceedings against Oi, the Commission would have violated the principle of equal treatment, the Commission notes that the General Court held that the principle of equal treatment must be reconciled with the principle of legality and therefore a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party<sup>279</sup>.

#### 6.2.2. *The Commission's requests for information*

- (523) The Commission does not share Altice's view according to which the Commission infringed the principles of necessity and proportionality due to (i) the time limits fixed to answer certain RFIs and (ii) the alleged disproportionate nature of the RFI of 20 July 2016. The Commission will address Altice's claims with respect to each RFI in Sections 6.2.2.1, 6.2.2.2, 6.2.2.3, 6.2.2.4 and 6.2.2.5.

##### 6.2.2.1. The RFI of 8 July 2015

- (524) With respect to RFI of 8 July 2015, Altice stated that responding to this RFI – in response of which it provided 351 documents (more than 2 000 pages) and a memorandum commenting on the documents uncovered in PT Portugal mailboxes – in 15 business days in the middle of the month of July constituted an excessive burden imposed on Altice, which was disproportionate to the needs of the investigation. Altice claims that to answer this RFI, it conducted a review of mailboxes of nine former employees of PT Portugal and of 12 Altice managers and interviewed ten PT Portugal employees. In addition, according to Altice the burden imposed on Altice appeared all the more disproportionate since (i) the Commission did not justify why such a tight time-limit was required and (ii) the Commission decided to impose, in case of delay in submitting the requested information, a periodic penalty (because of which Altice claims it could not request an extension). Altice further claims it did not have sufficient time to ensure that its response did not include self-incriminatory or misleading elements.
- (525) The Commission does not share Altice's view regarding the RFI of 8 July 2015, for the following reasons:
- (526) First, Altice did not even explore the possibility of seeking an extension of the deadline imposed by the RFI of 8 July 2015. In this regard, the Commission notes that the fact that a request for information is adopted by way of decision does not automatically exclude the possibility for the deadline set out therein to be extended<sup>280</sup>.

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<sup>278</sup> Case T-704/14, *Marine Harvest v. European Commission* ECLI:EU:T:2017:753, paragraph 566.

<sup>279</sup> Case T-120/04, *Peróxidos Orgánicos v. Commission* [2006] ECR II-04441, paragraph 77.

<sup>280</sup> See for an example of an extension of the deadline to respond to a decision requesting information adopted on the basis of Article 18(3) of Regulation (EC) No 1/2003: Order of the President of the General Court of 12 July 2017 in Case T-371/17 R, *Qualcomm v. Commission* ECLI:EU:T:2017:485, paragraph 9.

- (527) Second, Altice did not challenge this RFI, which was a request for information by decision adopted on the basis of Article 11(3) of the Merger Regulation, before the EU Courts. Such decisions can be the object of an appeal<sup>281</sup>, as also mentioned in the decision of 8 July 2015: *"This decision can be the object of an appeal before the General Court in Luxembourg pursuant to Article 263 of the TFEU. In accordance with Article 278 of the TFEU, the appeal shall not have suspensory effect."* Had Altice considered that the request for information contravened principles of EU law, Altice had an opportunity to challenge that decision. Accordingly, that decision has become definitive<sup>282</sup>.
- (528) In any event, the Commission granted Altice sufficient time to provide its response to the RFI of 8 July 2015 considering that Altice is a large European company with significant resources<sup>283</sup> and previous experience in merger transactions, as well as the scope of this RFI: Altice was requested to provide documents (i) of three meetings held on 3 February, 19 to 20 March and 25 to 27 March 2015; and (ii) of PT Portugal, but not of Altice.
- (529) Altice cannot rely on the fact that it provided 351 documents or more than 2 000 pages in response to this RFI, as Altice by its own initiative provided more documents than requested by this RFI, including: (i) documents pertaining to Altice which Altice had failed to provide in reply to the earlier RFI of 12 May 2015<sup>284</sup>; (ii) all documents evidencing contacts with Altice prior to the Closing Date<sup>285</sup>, besides the documents relating to the three visits of Altice to PT Portugal; and, (iii) comments on PT Portugal's documents<sup>286</sup>.
- (530) In this regard, the Commission recalls that, as follows from recitals 15 to 23 to the RFI of 8 July 2015, the Commission issued that RFI because it had already requested

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<sup>281</sup> See Case T-145/06, *Omya AG v. Commission* [2009] ECR II-00145.

<sup>282</sup> See Case C-299/05, *Commission v. Parliament and Council*, [2007] ECR I-08695, paragraphs 28 to 30.

<sup>283</sup> Altice N.V.'s consolidated turnover for 2015 amounted to EUR 14 550.3 million.

<sup>284</sup> Altice provided 206 documents (1 227 pages) pertaining to Altice, which were therefore not covered by this RFI. In fact, Altice had uncovered and provided additional documents pertaining to Altice which it had failed to provide in reply to the earlier RFI of 12 May 2015 (the "Third set of documents").

As stated by Altice in its response to the Commission's RFI of 8 July 2015: *"Noting that a number of documents uncovered at PT Portugal had not been uncovered following the first requests for information of the Commission, and with a mind of full cooperation with the Commission, Altice requested its external lawyers to proceed to an in-depth review of the mailboxes of its own employees who had participated in the three Altice's visits to PT Portugal."* In the same reply Altice explained: *"Within the context of the internal investigation conducted at Altice, a number of relevant documents were identified, and are provided as attachments to the present memorandum. Altice would like to express its sincerest and most respectful apologies for not having submitted these documents in due time."*

<sup>285</sup> As Altice noted in its response to the Commission's RFI of 8 July 2015: *"For the sake of completeness, the scope of the review undertaken by Altice was extended to all documents evidencing contacts with Altice prior to the June 2 closing, besides the documents relating to the three Altice's visits to PT Portugal listed in the Commission's decision."* Altice similarly extended the scope of its review of the mailboxes of Altice managers to cover all discussions between Altice and PT Portugal between 1 January 2015 and the Closing Date.

<sup>286</sup> Altice provided a memorandum of 17 pages, only three pages of which contained information that was actually requested, namely the methodology used to extract and gather the documents. On pages 4 to 17 of that memorandum, Altice provided by its own initiative comments on the documents provided. In its reply to the SO, Altice admits: *"in its RFI of July 8, 2015, the Commission had requested Altice to provide certain documents but had not required Altice to comment on such documents. Altice nevertheless decided to provide comments on such documents in order to show to the Commission its willingness to cooperate."*

Altice to provide PT Portugal's documents by RFI of 12 May 2015 but Altice had failed to provide them within the deadline of 12 June 2015 – despite having been granted several extensions thereof – and even after the expiry of the deadline<sup>287</sup>. As such, Altice cannot have been unaware that, in the absence of a response to the RFI of 12 May 2015, the Commission would issue a decision on the basis of Article 11(3) of the Merger Regulation. As such, on 8 July 2015 Altice had, in reality, already had in excess of 8 weeks to respond to the questions raised in the RFI. Against that background, and in accordance with Article 11(3) of the Merger Regulation, the Commission fixed in the RFI of 8 July 2015 a time limit within which the information was to be provided by Altice, bringing the total time given to Altice to respond to these questions (that is, from 12 May to 30 July 2015) to more than 11 weeks.

- (531) There is also no factual basis for Altice's claim that the Commission did not justify why the time-limit of 30 July 2015 was required. In fact, the recitals to the Commission's RFI of 8 July 2015 explain in detail the reasons for the adoption of the decision addressed to Altice, including the deadline imposed on Altice, which included in particular, the following reasons: the Commission's RFI to Altice of 12 May 2015 under Article 11 of the Merger Regulation, requesting by 2 June 2015 all documents related to the meetings held between Altice and PT Portugal<sup>288</sup>; the extensions that were granted to Altice to provide the requested information<sup>289</sup>; the provision by Altice on 12 June 2015, of documents solely on Altice's side but not from PT Portugal's side<sup>290</sup>; Altice's consequent failure to supply complete full information to the Commission in reply to the RFI of 12 May 2015<sup>291</sup>; the requirement under Article 11(3) of the Merger Regulation for the Commission to fix the time limit within which information is to be provided when the Commission requires an undertaking to supply information by decision<sup>292</sup>; the fact that the information was essential in order for the Commission to carry out the necessary assessment<sup>293</sup>; the nature of the information requested by that RFI and the procedural deadlines imposed by the Merger Regulation<sup>294</sup>; finally, the fact that any further

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<sup>287</sup> By RFI of 12 May 2015 the Commission had requested Altice to provide, by 2 June 2015 close of business ("COB"), documents held by both Altice and PT Portugal related to meetings held on 3 February, 19 to 20 March and 25 to 27 March 2015. By e-mail of 21 May 2015 Altice requested a one-week extension to provide these documents due to the conclusion of "*an important transaction in the United States*". The Commission granted this extension. On 9 June 2015, Altice requested three additional days to submit the reply because "*the Altice management has been extremely busy over the last couple of weeks and has not yet been able to gather the PT Portugal employees' documents*". The Commission also granted this second extension, *i.e.* until close of business on 12 June 2015. On 12 June 2015, Altice submitted its reply to the RFI of 12 May 2015 which included documents from participants to the visits of Altice to PT Portugal, but only from Altice's side and not from PT Portugal's side. In its reply, Altice stated: "*Altice is making all possible efforts to collect any additional relevant [document] which may exist at PT Portugal as soon as possible.*" However, on 8 July 2015 Altice had still not provided any of the information or documents requested as regards PT Portugal.

<sup>288</sup> Recitals 15 to 16 to the RFI of 8 July 2015.

<sup>289</sup> Recitals 17 to 19 to the RFI of 8 July 2015.

<sup>290</sup> Recitals 19 to 22 to the RFI of 8 July 2015.

<sup>291</sup> Recital 23 to the RFI of 8 July 2015.

<sup>292</sup> Recital 27 to the RFI of 8 July 2015.

<sup>293</sup> Recital 31 to the RFI of 8 July 2015.

<sup>294</sup> Recital 33 to the RFI of 8 July 2015.

waiting would unreasonably delay and risk jeopardizing the Commission's investigation<sup>295</sup>.

- (532) In addition, as stated in recital 29 to the RFI of 8 July 2015, according to Article 15(1) of the Merger Regulation, the Commission *may* impose on undertakings periodic penalty payments in order to compel them to supply complete and correct information which the Commission has requested by decision taken pursuant to Article 11(3) of the Merger Regulation. In light of the failure of Altice to supply the information originally requested with regard to PT Portugal by 12 June 2015 and the fact that any further waiting would unreasonably delay and risk jeopardizing the Commission's investigation, the Commission decided that it was necessary to impose a periodic penalty in case Altice should fail to supply the information requested within the deadline of 30 July 2015. Given the existence of a margin of discretion for the Commission to impose a periodic penalty, the Commission does not share Altice's view that by indicating the periodic penalty the Commission would have increased the burden imposed on Altice. Neither did the indication that Altice would have incurred a periodic penalty in case Altice would have failed to supply the information requested, make it impossible for Altice to receive an extension of the deadline, which in any event, Altice failed to request (see recital (526)).
- (533) Finally, as to Altice's claim that it did not have sufficient time to ensure that its response did not include self-incriminatory or misleading elements, the Commission granted sufficient time to Altice to provide its response to the RFI as stated in recital (528). In addition, it follows from recital (41) of the Merger Regulation that while undertakings concerned cannot be forced, when complying with decisions of the Commission, to admit that they have committed infringements, they are nevertheless obliged to answer factual questions and to provide documents, even if this information may be used to establish the existence of such infringements against them. Since in the RFI of 8 July 2015, the Commission has requested Altice to provide documents, the questions in the RFI were legitimate and Altice's responses may be used to establish the existence of an infringement against Altice.

#### 6.2.2.2. The RFI of 5 August 2015

- (534) Concerning the RFI of 5 August 2015, Altice claimed that the Commission's request to provide comments on the Third set of documents in August and its refusal to wait until the beginning of September constituted an excessive burden imposed on Altice, which was disproportionate to the needs of the investigation. This burden appeared all the more excessive and disproportionate, according to Altice, as the Commission did not justify why such a tight time-limit was required and the Commission took more than three months to review the documents and memoranda provided by Altice. Altice claims it did not have sufficient time to ensure that its response did not include self-incriminatory or misleading elements.
- (535) The Commission does not share Altice's view for the following reasons:
- (536) At the outset, the Commission notes that it did not issue an RFI within the meaning of either Article 11(2) or 11(3) of the Merger Regulation on 5 August 2015, nor did it set a deadline for Altice to submit comments on the Third set of documents that Altice had submitted on 30 July 2015.

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<sup>295</sup> Recital 34 to the RFI of 8 July 2015.

- (537) Rather, having uncovered the documents contained in the Third set of documents at a late stage<sup>296</sup>, Altice on its own initiative approached the Commission and stated that it wanted to continue its internal investigation after 30 July 2015 (the date of expiry of the deadline to provide the response to the Commission's RFI of 8 July 2015). This is reflected in Altice's Memorandum of 30 July 2015: "*In order to avoid any further delay in the Commission's investigation, Altice immediately shares these new documents with the Commission, despite the fact that it has not been able to provide comments on these documents in the time-frame of the Commission's decision. Altice will continue its internal investigation in the coming weeks in order to provide the Commission with any additional document and/or any comment that may be useful.*"<sup>297</sup> The Commission notes that there is nothing that prevents Altice from voluntarily continuing its internal investigation and submitting additional documents or comments to the Commission, even after the expiry of the deadline.
- (538) In response to Altice's Memorandum of 30 July 2015, the Commission suggested that Altice should submit any further comments as quickly as possible following the expiry of the deadline. Given the underlying context, that communication by the Commission does not qualify as an RFI within the meaning of Article 11(2) or Article 11(3) of the Merger Regulation; nor can the Commission be held to have imposed a deadline that was too short for Altice or to have refused an extension of such deadline. Rather, the Commission simply suggested that, in the interests of it being able to progress with the investigation, and in light of the deadlines of previous RFIs having already expired, any further comments that Altice wished to submit should be done as quickly as possible.
- (539) Finally, the period between Altice's submission of 27 August 2015 and the RFI of 4 December 2015 is not relevant. The Commission needs to ensure that it has all the necessary information to conduct its investigation. On 4 December 2015, the Commission asked Altice to provide documents that were missing from Altice's response or that were necessary in order to understand the documents provided, including attachments to e-mails provided and follow-up communications. No conclusion should be drawn from this fact other than that the Commission needed further information to make a proper assessment of the documents provided by Altice.

#### 6.2.2.3. The RFI of 11 March 2016

- (540) With regard to the RFI of 11 March 2016, Altice claims that responding to questions (2) and (3) therein within 17 business days constituted an excessive and disproportionate burden on Altice. In addition, such a burden appeared all the more disproportionate since, according to Altice, the Commission did not justify why such a time-limit was required and decided to impose, in case of delay in submitting the requested information, a periodic penalty (because of which Altice claims it could not request an extension).
- (541) The Commission does not share Altice's view.
- (542) First, Altice did not request an extension of the deadline imposed (see in this regard also recital (526)).

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<sup>296</sup> The Third set of documents included additional documents pertaining to Altice which it had failed to provide in reply to the earlier RFI of 12 May 2015.

<sup>297</sup> ID[105], page 3.

- (543) Second, Altice did not challenge the RFI of 11 March 2016 before the Union Courts. That RFI was a request for information by decision adopted pursuant to Article 11(3) of the Merger Regulation (see in this regard also recital (527)).
- (544) In any event, the Commission granted sufficient time to Altice to provide its response to the RFI of 11 March 2016 considering that Altice is a large European company with significant resources and previous experience in merger transactions, the nature of the Commission's investigation and the scope of this RFI: Altice was requested to provide e-mails of 13 individuals covering a period of less than 5 months.
- (545) There is also no factual basis for Altice's claim that the Commission did not justify why that time-limit of 6 April 2016 was required. In fact, as stated in recital 19 of the RFI of 11 March 2016, the Commission considered it appropriate to require Altice to supply the requested information no later than 6 April 2016, in view of the nature of the Commission's investigation and of the information requested by the RFI of 11 March 2016.
- (546) Finally, given the existence of a margin of discretion for the Commission to impose a periodic penalty (see in this regard, recital (532)), the Commission does not share Altice's view that by informing Altice that it shall incur a periodic penalty the Commission would have increased the burden imposed on Altice. Neither did the indication that Altice would have incurred a periodic penalty in case Altice would have failed to supply the information requested, make it impossible for Altice to receive an extension of the deadline, which in any event, Altice failed to request.

#### 6.2.2.4. The RFI of 20 July 2016

- (547) With regard to the RFI of 20 July 2016, Altice claims that providing a response within 23 business days to questions 1 to 6, by which the Commission asked Altice to provide information on five specific matters as well as exchanges between Altice and PT Portugal under Article 6.1(b) of the Transaction Agreement, without any justification for the deadline, constituted an excessive and disproportionate burden imposed on Altice, requiring considerable effort from Altice. In addition, Altice claims that it did not have sufficient time to ensure that its response did not include self-incriminatory or misleading elements.
- (548) Altice further claims that this RFI was disproportionate since the Commission requested Altice to provide a number of documents on five subject matters, that, for most of them, were already included in the e-mail data provided by Altice in its 6 April 2016 response and/or among documents provided in response to previous RFIs, as confirmed by the appendix attached to Altice's response of 23 August 2016. Therefore, the Commission should have already obtained these.
- (549) The Commission does not share Altice's view for the following reasons:
- (550) First, the Commission granted sufficient time to Altice to provide its response to the RFI of 20 July 2016 considering the nature of the Commission's investigation, the fact that Altice is a large European company with significant resources and previous experience in merger transactions, as well as the scope of this RFI: Altice was requested to provide, in reply to questions 1 to 6 information on very specific matters, namely the renewal of PT Portugal's contract for MEO Music (question 1), outsourcing of certain IT services [...] (question 2); the renewal of PT Portugal's contracts [...] and [...] (question 3); a distribution agreement between PT Portugal and World Channel for the television channel "DOG TV" (question 4); the disposal of a stake in SIRESP (question 5), and; the requests for consent and replies between

Altice and PT Portugal in implementation of clause 6.1(b) of the Transaction Agreement (question 6). In addition, the Commission granted Altice an extension to allow Altice more time to collect the information requested<sup>298</sup>.

- (551) Concerning Altice's statement as to the absence of a justification for the deadline, the Commission notes that the RFI of 20 July 2016 was an RFI under Article 11(2) of the Merger Regulation. That Article does not impose an obligation on the Commission to justify why this time-limit was required. In view of the nature of RFIs adopted on the basis of Article 11(2) of the Merger Regulation (as contrasted to the nature of decisions adopted on the basis of Article 11(3) of the Merger Regulation) Altice also does not explain how that absence would constitute an excessive and disproportionate burden on Altice.
- (552) As to Altice's claim that it did not have sufficient time to ensure that its response did not include self-incriminatory or misleading elements, the Commission granted sufficient time to Altice to provide its response to the RFI as stated in recital (550). In addition, the Commission requested Altice to provide factual information or documents, and therefore the questions in the RFI were legitimate (see also recital (533)) and Altice's responses may be used to establish the existence of an infringement against Altice.
- (553) Second, as to the Altice's claim that the RFI of 20 July 2016 was disproportionate because it allegedly requested information which had already been provided, the Commission notes that the scope of this RFI was different than the previous RFIs.
- (554) The Commission did not ask Altice to provide the same documents already provided by Altice, but instead the Commission requested Altice to provide explanations of the contents of some of the documents provided by Altice. Indeed, by questions 1 to 5 of the RFI of 20 July 2016 the Commission requested Altice to provide clarifications regarding five subject matters which the Commission had identified while reviewing the e-mail data that Altice had provided in response to the Commission's RFI of 11 March 2016<sup>299</sup>: namely a detailed chronology of the commercial negotiations, including details on the outcome of the negotiations and on Altice's input in the negotiations.
- (555) Furthermore, in support of its reply, Altice submitted new documents<sup>300</sup>. To the extent that Altice considered that the relevant answer was in a document already provided, Altice could simply have referred to that document already provided as the Commission allowed Altice, if it wished to refer to documents already in the Commission's possession, to make reference to these documents<sup>301</sup>. Therefore, there was no obligation on Altice to submit documents already submitted.

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<sup>298</sup> The original deadline expired on 2 August 2016. The Commission granted Altice an extension until 23 August 2016.

<sup>299</sup> The Commission's RFI of 11 March 2016 covered a complete set of e-mail data for 13 individuals (7 at Altice and 6 at PT Portugal) from 1 December 2014 to 20 April 2015 inclusive.

<sup>300</sup> Namely, Annexes 1.1 to 1.5, 1.11 to 1.12, 1.18, 2.1, 2.3, 2.7 to 2.12, 3.1 to 3.3, 3.13 to 3.20, 3.27 to 3.28, 4.2 to 4.9 and 4.14 to 4.20.

<sup>301</sup> Since the Commission was conscious that in its response Altice might want to make reference to documents already submitted and to avoid imposing a burden on Altice to resubmit these documents, the Commission asked Altice to "*provide references for relevant documents already submitted*". The latter provision left Altice the option not to submit new documents.

#### 6.2.2.5. The RFI of 21 December 2016

- (556) With regard to the RFI of 21 December 2016, Altice claims that, while Altice could reasonably provide the responses to questions 4 to 7 in the fixed time-limit (that is to say, by 13 January 2017) it was not possible for Altice to provide answers to questions 1 to 3 within that deadline: Altice states that given the amount of work required to provide answers to questions 1 to 3 and taking into account the organizational and staffing constraints of the Christmas holidays, Altice requested a four-week extension to the Commission but received only two weeks and two days. According to Altice, to provide answers to questions 1 to 3 without a justification for the deadline, constituted an excessive and disproportionate burden imposed on Altice, requiring considerable effort from Altice to provide its response in the time-limit fixed by the Commission. In addition, Altice claims that it did not have sufficient time to ensure that its response did not include self-incriminatory or misleading elements.
- (557) The Commission does not share Altice's view for the following reasons:
- (558) The Commission granted sufficient time to Altice to provide its response to the RFI of 21 December 2016 considering the nature of the Commission's investigation, the fact that Altice is a large European company with significant resources and previous experience in merger transactions (see for example footnote 307), as well as the scope of this RFI: questions 1 to 3 concerned clarifications relating to the Transaction Agreement (question 1), PT Portugal's contracts falling into the category of "Material Contracts" under the Transaction Agreement (question 2) and PT Portugal's contracts which Altice had examined during the due diligence process leading to the signature of the Transaction Agreement (question 3). The Commission also granted an extension until 31 January 2017.
- (559) Concerning Altice's statement as to the absence of a justification for the deadline, the Commission notes that the RFI of 21 December 2016 was an RFI under Article 11(2) of the Merger Regulation. In this regard, Altice's argument has already been addressed in the context of the RFI of 20 July 2016 (see recital (551)).
- (560) Finally, as to Altice's claim that it did not have sufficient time to ensure that its response did not include self-incriminatory or misleading elements, the Commission granted sufficient time to Altice to provide its response to the RFI as stated in recital (558). In addition, in questions 1 to 3 of the RFI of 21 December 2016 the Commission requested Altice to provide factual information about the thresholds of Article 6.1(b) of the Transaction Agreement and lists of contracts, and therefore the questions in the RFI were legitimate (see in this regard also recital (533)) and Altice's responses may be used to establish the existence of an infringement against Altice.

## 7. FINES

- (561) Article 14(2)(a) and (b) of the Merger Regulation state that “*The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)b or the undertakings concerned where, either intentionally or negligently, they:*
- (a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3).*
- (b) implement a concentration in breach of Article 7”.*

- (562) According to Article 14(3) of the Merger Regulation “*In fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement*”.
- (563) Having established that Altice has infringed both Article 4(1) and Article 7(1) of the Merger Regulation, the Commission will outline the factors that it considers relevant for the purposes of fixing the amount of the fine for these two infringements.
- (564) Given that the conduct giving rise to these two infringements is one and the same (implementation of a concentration with Union dimension before notification and clearance), the Commission will present its assessment referring to both infringements at the same time.
- (565) The Commission will, however, assess the duration of the two infringements separately. On the one hand, an infringement of Article 4(1) is an instantaneous infringement which is committed by failing to notify a concentration before notification. As such, Altice infringed Article 4(1) on the Signing Date, 9 December 2014. On the other hand, an infringement of Article 7(1) is a continuous infringement that remains on-going for as long as the transaction is not declared compatible with the internal market by the Commission in accordance with the Merger Regulation. Given that an infringement of Article 7(1) ends only when the Commission adopts a decision declaring the proposed transaction compatible with the internal market, Altice's infringement ended on the date of adoption of the Clearance Decision, on 20 April 2015.
- (566) Pursuant to Article 1 of Council Regulation No 2988/74<sup>302</sup>, the limitation period for the Commission to pursue an infringement is (i) three years in the case of infringements of provisions concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying out of investigations, and (ii) five years in the case of all other infringements. According to Article 2 of Council Regulation No 2988/74, any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period in proceedings.
- (567) It follows from these provisions that the limitation period is three years for an infringement of Article 4(1) of the Merger Regulation and it is five years for an infringement of Article 7(1) of Merger Regulation. As a result, in light of the steps taken by the Commission for the purpose of the investigation (including the notification of the SO), these two infringements are not prescribed in the present case.

### **7.1. The nature of the infringement**

- (568) With respect to the nature of the infringement, Altice argues that it only closed the Transaction (that is it transferred of the totality of PT Portugal's shares took place) after the adoption of the Clearance Decision and therefore its actions cannot be considered as serious as an absolute failure to notify. Furthermore, Altice submits that an infringement of Article 4(1) and 7(1) of the Merger Regulation does not entail the same degree of gravity as violations of Article 101 or 102 TFEU because, at some point, the acquirer will gain control over the target and, as a result, any information obtained before closing would later be obtained and any instruction

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<sup>302</sup> Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1).

given before closing would later be provided after the closing. This should be distinguished from cases where competitors who breach Article 101 or 102 TFEU remain independent companies. In addition, in the absence of precedents regarding infringements of Article 7(1) of the Merger Regulation, companies cannot assess the scope of their obligations before closing and their conduct should be considered as less serious than a violation of Articles 101 or 102 TFEU. Furthermore, infringements of Article 7(1) of the Merger Regulation should be considered less serious if the merger is ultimately cleared by the Commission, compared to cases in which the merger is blocked.

- (569) In this respect, the Commission considers the following.
- (570) First, Altice implemented a concentration with a Union dimension as of 9 December 2014 in contravention of Articles 4(1) and 7(1) of the Merger Regulation.
- (571) Recital (34) of the Merger Regulation states: "*[t]o ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest*".
- (572) By making concentrations with a Union dimension conditional upon notification and prior authorisation, the Union legislator wanted European merger control to be able to prevent undertakings from implementing such transactions before it has taken a final decision, with a view to avoiding any permanent and irreparable damage to effective competition.
- (573) In line with its decisional practice<sup>303</sup>, the Commission therefore regards the infringements committed by Altice as serious in that they can undermine the effectiveness of the Merger Regulation.
- (574) As to Altice's arguments, the fact that it notified the Transaction and closed it after the Clearance Decision does not make its conduct less serious. Altice was obliged to notify the concentration at issue, which was a concentration with a Union dimension. Article 4(1) of the Merger Regulation requires concentrations to be notified prior to their implementation and, in case of a violation, the fact that a company waits until after clearance to formally close the transaction does not have any bearing on the seriousness of the infringement and its capacity to undermine the effectiveness of the notification system of the Merger Regulation. Similarly, a transaction can be implemented in violation of Article 7(1) of the Merger Regulation by acquiring or exercising control over the target irrespective of the date of the formal transfer of the shares to the acquirer. In the present case, Altice acquired the possibility to exercise decisive influence upon signing of the Transaction Agreement and, in addition, a number of instances of actual exercise of decisive influence occurred before the Clearance Decision. Thus, Altice's infringement is not less serious because it formally acquired the shares only after the Clearance Decision.
- (575) Second, violations of Articles 4(1) and 7(1) of the Merger Regulation occur irrespective of the positive outcome of the merger review procedure carried out by the Commission. The fact that the transaction is ultimately authorised and the parties later cease to be independent companies has no bearing on the existence of the violation or its nature (as distinct from the gravity of the infringement, which is addressed in Section 7.2). In fact, even after the notification to the Commission, the

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<sup>303</sup> Case COMP/M.7184 – *Marine Harvest/ Morpol*, para. 136.

acquirer and target are (and should continue to be) independent companies not least because the outcome of the review is uncertain and for example could, as in the case of Transaction, require the divestment of some assets or subsidiaries.

- (576) Third, the legislator has determined that breaches of Articles 4(1) and 7(1) of the Merger Regulation may be as serious as breaches of Articles 101 and 102 TFEU by having set the same maximum fine thresholds in each of the applicable regulations (the Merger Regulation and Regulation No. 1/2003).
- (577) In conclusion, in line with EU case-law<sup>304</sup>, the Commission considers that any infringement of Article 4(1) and Article 7(1) of the Merger Regulation is, by nature, a serious infringement.

## **7.2. The gravity of the infringement**

### *7.2.1. Altice's infringement was committed at the very least negligently*

- (578) As to whether Altice has intentionally or negligently infringed Articles 4(1) and 7(1) of the Merger Regulation, the Commission considered in the SO that Altice's infringement was intentional or at the very least negligent.
- (579) In its reply to the SO, Altice submitted that the absence of any Commission precedents relating to Article 4(1) or 7(1) of the Merger Regulation resulting from pre-closing covenants in the Transaction Agreement and their implementation did not enable Altice to assess precisely the scope of its rights and obligations, also considering that the covenants in the Transaction Agreement reflected a well-established market practice.
- (580) The Commission considers the following.
- (581) First, as mentioned at recitals 534, 550, 556 and 564, Altice is a large European company with significant previous experience in merger transactions and, prior to the Transaction, had been involved in merger control proceedings at national level<sup>305</sup>.
- (582) In particular, an internal document of Altice from April 2015, clearly indicates demonstrates that Altice was aware that, during the time before the Clearance Decision, it was important not to engage in "gun jumping".<sup>306</sup> In that document, such "gun-jumping" is described as "*pre-empting a decision of the Competition Authority and acting in a way as if the clearance had been given*". The same document demonstrates awareness that such "gun-jumping" practices are "*sometimes subject to very heavy fines*". Indeed, the same document reflects Altice's awareness of prohibited "gun-jumping" behaviour, including the exchange of certain commercially sensitive information: "*no action whatsoever can be undertaken insofar as such action could be seen as an acquisition of control of one of the parties over the other*" and that "*[c]ertain exchanges of information are obviously strictly forbidden: exchanges of information on clients, on network specificities, exchange of information in the framework of invitations to tender, exchanges on commercial conditions, on prices or rebates eventually granted, on purchase conditions, on on-going negotiations in particular, on agreements with third parties. Any exchange on*

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<sup>304</sup> Case T-704/14, *Marine Harvest v. European Commission* ECLI:EU:T:2017:753, paragraph 480; case Case T-332/09, *Electrabel v European Commission* ECLI:EU:T:2012:672, paragraph 235.

<sup>305</sup> By way of example, Altice notified to the Portuguese Competition Authority the acquisition of control over Cabovisão – Televisão por Cabo S.A. on 10 August 2012 and, through the acquisition of Winreason, S.A., the acquisition of control over Onitelecom—Infomunicações, S.A on 3 March 2013.

<sup>306</sup> See footnote 8. Translation by the Commission.

*financial issues is to be banned insofar as it does not concern elements available to the public (standard price list...). No consultation is possible in the context of offers to clients or agreements with third parties".*

- (583) Second, Altice carefully negotiated the Transaction Agreement with Oi and, according to Altice itself, it included the contested provisions in the Transaction Agreement specifically to safeguard its own financial interests. The Commission considers that a diligent acquirer would have assessed the risks carried by such provisions in terms of potential violation of Articles 4(1) and 7(1) of the Merger Regulation, especially since – as explained in Section 4.1 – the clauses go well beyond what would be considered necessary to maintain the value of the Target.
- (584) Third, as to the absence of Commission's precedents, the Commission refers to recitals 618 and 619 and considers that it has no bearing on the gravity of the infringement.
- (585) Fourth, as explained in Section 7.4.1, the Commission considers that Altice knew or should have known that the behaviour described in Sections 4 and 5 would constitute an infringement of the notification requirement and/or the standstill obligation.
- (586) Therefore, the Commission concludes that Altice acted at least negligently in committing the infringements of Article 4(1) and Article 7(1) of the Merger Regulation.

#### 7.2.2. *Altice's acquisition of PT Portugal raised serious doubts as to its compatibility with the internal market*

- (587) In its reply to the SO, Altice considers that its behaviour did not have any impact in the Portuguese wholesale and retail telecommunications market, in light of its limited role when consulted by Oi. Furthermore, it offered from the beginning the divestiture of its Portuguese subsidiaries, which was ultimately considered by the Commission to solve all competition concerns potentially raised by the Transaction. Since there was no doubt that Altice would not retain control of its subsidiaries following the acquisition of PT Portugal, the serious doubts as to the compatibility of the Transaction with the internal market were purely hypothetical and posed no serious harm to competition.
- (588) Altice's acquisition of PT Portugal was cleared following the submission of wide-ranging remedies to remove the serious doubts raised by the Transaction. In the Commission's decisional practice and the EU case-law, this circumstance has been considered as a factor contributing to the gravity of the violation.<sup>307</sup>
- (589) In particular, according to the General Court, it would be "*inappropriate to treat the early implementation of concentrations which raise serious doubts as to their compatibility with the internal market, and the early implementation of concentrations which do not raise any competition concerns, in the same way*".<sup>308</sup> This is because the aim of Article 4(1) and of Article 7(1) of the Merger Regulation is to ensure the effectiveness of the system of *ex ante* control of the effects of concentrations with a Union dimension. Moreover, the objective of the EU rules on the control of concentrations is the prevention of irreparable and permanent damage to competition. The system for the control of concentrations is intended to enable the

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<sup>307</sup> Case T-704/14, *Marine Harvest v. European Commission* ECLI:EU:T:2017:753, paragraphs 490 et seq.  
<sup>308</sup> Case T-704/14, *Marine Harvest v. European Commission* ECLI:EU:T:2017:753, paragraph 497.

Commission to exercise "effective control of all concentrations in terms of their effect on the structure of competition" (recital 6 of the Merger Regulation).

- (590) The anticompetitive risks associated with the early implementation of a transaction which raises serious doubts as to its compatibility with the internal market makes such early implementation more serious than the early implementation of a concentration which does not raise competition concerns. This is the case unless, as stated by the General Court in *Marine Harvest*, "*notwithstanding the fact that it raises such serious doubts, the possibility that its implementation in the form initially envisaged and not cleared by the Commission may have had damaging effects on competition can be ruled out in a particular case*".<sup>309</sup>
- (591) Therefore, as such the mere fact that the Transaction gave rise to serious doubts as to its compatibility with the internal market is in itself a factor which makes the infringement more serious. In these cases, ensuring legal certainty and a high level of deterrence is important regardless of the merits of an *ex post* assessment.
- (592) Moreover, the Commission considers that damaging effects on competition cannot be ruled out in the present case. In particular, Altice's actions put in danger competition in the wholesale and retail telecoms market in Portugal. As discussed in Section 4.1, under the Transaction Agreement, Altice had the possibility to control the conclusion, modification and termination of the Target's contracts, many of which fell into the commercial policy of the Target. However, Altice went further and was involved in the decision making processes at PT Portugal between the Signing Date and adoption of the Clearance Decision as discussed in Section 4.2. Altice exercised operational control over aspects of the Target's business while being an actual competitor of the Target. Furthermore, as discussed in Sections 4.2.2, Altice requested and received strategic, confidential information from PT Portugal, which was at the time its direct competitor. The damaging effects on competition of such pervasive conduct cannot be ruled out and neither can they be rectified by way of the commitments offered by Altice (i.e., the divestiture of its Portuguese subsidiaries), because the damage had already occurred. Similarly, for the exchange of commercially sensitive information, once shared there is no possibility to rectify the situation by recovering the information.
- (593) In this respect, the objective of the EU rules on the control of concentrations is the prevention of irreparable and permanent damage to competition. The introduction of an *ex ante* control of the effects of concentrations with a Union dimension is meant to ensure the effectiveness of the system, which is designed to allow the Commission to assess these effects on the structure of competition. Therefore, the system of *ex ante* control is meant to avoid precisely the kind of conduct which Altice put in place (including its involvement in the decision-making processes at PT Portugal and the exchange of commercially sensitive information), which therefore directly influence the gravity of the infringement.
- (594) In addition, the fact that Altice offered commitments at the beginning of the procedure, far from making the serious doubts raised by the Transaction "*purely hypothetical*", further confirms how serious and obvious these concerns were. In any event, the proposal of these commitments in itself could not remedy (or make less critical) the concerns raised by the Transaction since they only entered into force with the Clearance Decision (and only following a specific assessment and a market

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<sup>309</sup> Case T-704/14, *Marine Harvest v. European Commission* ECLI:EU:T:2017:753, paragraph 500.

test) and Altice and PT Portugal were direct competitors throughout the merger review procedure. Moreover, it was in Altice's own commercial interest to offer a remedy package early on. Had Altice not offered such remedies in a timely manner the Commission would have opened an in-depth review of the concentration, which would have prolonged the infringement and could ultimately have led to the prohibition of the Transaction. Therefore, the fact that Altice offered a remedy package does not render the infringements of Articles 4(1) and 7(1) of the Merger Regulation less serious<sup>310</sup>.

### **7.3. The duration of the infringement**

- (595) In the SO, the Commission considered the start of the infringements to be 9 December 2014, that is to say the date of signing of the Transaction Agreement, the earliest conduct implementing the Transaction. With regard to the infringement of Article 4(1), such an infringement is an instantaneous infringement, which is committed by failing to notify a concentration. Therefore, such infringement was committed on 9 December 2014. With regard to the infringement of Article 7(1) of the Merger Regulation, this is a continuous infringement lasting for as long as the Commission does not clear the transaction. Therefore the infringement lasted from the signing of the Transaction Agreement on 9 December 2014 until clearance on 20 April 2015 (that is 4 months and 11 days).
- (596) In its reply to the SO, Altice submitted that the mere signing of the Transaction Agreement cannot be considered as the start of the infringement of Article 7(1) of the Merger Regulation. Only actions whereby Altice would have allegedly exercised decisive control over PT Portugal can have constituted a violation of Article 7(1). On this basis, the first act implementing the Transaction Agreement would be the notice sent by Oi on 2 February 2015.
- (597) In this respect, the Commission considers that the Transaction Agreement gave Altice the possibility to exercise decisive influence over PT Portugal, which – as explained in detail in Section 4.1 - is in itself prohibited by the Merger Regulation regardless of any subsequent conduct. Therefore, signing the Transaction Agreement on 9 December 2014 constitutes the point at which Altice infringed Article 4(1) of the Merger Regulation and the start of the infringement of Article 7(1) of the Merger Regulation.
- (598) Regarding the duration of Altice's infringement of Article 7(1) of the Merger Regulation, the Transaction was formally notified on 25 February 2015 and authorised on 20 April 2015. The Commission considers 20 April 2015 as the date of the end of the infringement of Article 7(1) of the Merger Regulation, as it was only with the clearance of the Transaction that the Altice's unlawful behaviour came to an end.
- (599) The Commission therefore considers that the infringement of Article 7(1) of the Merger Regulation lasted from the signing of the Transaction Agreement on 9 December 2014 until clearance on 20 April 2015 (4 months and 11 days).

### **7.4. Mitigating and aggravating circumstances**

- (600) In the SO, the Commission stated that it would be considering the existence of any mitigating and/or aggravating factors that could impact on the magnitude of the fine.

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<sup>310</sup> Case T-704/14, *Marine Harvest v. European Commission* ECLI:EU:T:2017:753, paragraph 602.

#### 7.4.1. *Mitigating circumstances*

- (601) In its reply to the SO, Altice outlines a number of mitigating factors that it argues should be taken into consideration for the purposes of calculating any applicable fine. These factors include (i) the amount of any fine imposed by the Commission should reflect the difficult financial and economic situation of PT Portugal at the time of the Transaction and the benefits for PT Portugal resulting from the Transaction; (ii) the fact that Altice did nothing more than replying to Oi and PT Portugal's solicitations; (iii) Altice's cooperation with the Commission and (iv) the absence of a similar precedent in the Commission's decisional practice. Moreover, Altice argues that, if the Commission were to impose a fine, such fine should be of a symbolic amount considering the situation of legal uncertainty faced by Altice at the time of the infringement.
- (602) First, as to Altice's argument that the fine should be reduced to take into account the difficulties of PT Portugal's situation, the Commission refers to Section 4.1.3.1 with respect to the fact that Altice has not provided sufficient justification as to why the contested provisions would be relevant to minimising the specific risks identified by Altice.
- (603) Second, with regard to Altice's allegedly limited role in the infringements, the Commission points out that evidence in the file shows that Altice was heavily involved in the decision-making processes at PT Portugal. Various commercial decisions were taken only after Altice had consented (see Section 4.2.1 for more details). Furthermore, Altice received commercially sensitive information about PT Portugal, which was a competitor at the time (see Section 4.2.2 for more details).
- (604) Third, as to Altice's cooperation, the Commission notes that – in line with its obligations under the Merger Regulation – Altice replied to requests for information addressed to it by the Commission and exercised its right of defence, by submitting documents and a reply to the SO, but did not actively assist the Commission in establishing the infringement. Therefore, the Commission does not consider Altice's alleged cooperation as a mitigating circumstance in this case.
- (605) Fourth, as to the lack of precedents, Altice claims that the lack of precedents of violations of Articles 4(1) and 7(1) of the Merger Regulation stemming from pre-closing covenants (or their implementation) results in legal uncertainty. Altice considers that the lack of precedents means that companies are unable to properly assess the scope of their rights and obligations during the pre-closing period of an acquisition transaction.
- (606) In addition, Altice points out that there are no guidelines available regarding the calculation of fines for violations of Articles 4(1) and 7(1) of the Merger Regulation. This lack of transparency constitutes a serious breach of the principle of legal certainty since Union courts consider the existence of guidelines as "*being necessary for the purposes of preserving the principle of legal certainty*" (para 568 of the Reply to the SO). As a consequence, no fine (or only a symbolic fine) should be imposed on Altice.
- (607) First, the Commission notes that, according to EU case-law, "*there is no obligation for the Commission to take into consideration as a mitigating circumstance the fact*

*that conduct with exactly the same characteristics as that at issue has not yet given rise to the imposition of a fine*"<sup>311</sup>.

- (608) Second, the Commission considers that Altice is a large European company with significant previous experience in merger transactions and the corresponding regulatory scrutiny.
- (609) Third, as mentioned at recital 68, the Consolidated Jurisdictional Notice clarified that control can be acquired through several means and may be either positive or negative (the power to block actions). For example, when considering whether a minority shareholder has a controlling interest, the Commission considers the types of decisions over which it has a veto right<sup>312</sup>. In this context, Altice knew (or should have known) that even the mere possibility of exercising decisive influence over a target prior to notification and/or clearance, for example through veto rights, constitutes a violation of Articles 4(1) and 7(1) of the Merger Regulation. Similarly, Altice knew (or should have known) that such possibility may result from a transaction agreement, especially one including provisions specifically providing for the acquirer involvement in the target's conduct prior to the closing.
- (610) Through the contested provisions, Altice acquired the legal right to veto decisions regarding PT Portugal's commercial policy, affording Altice the right to exercise decisive influence over the Target (which it actually did exercise on multiple occasions).
- (611) In addition, at the time of the contested conducts, the Merger Regulation had already been in force for more than twelve years. Similar provisions as regards the obligation to notify and the standstill obligation existed in the preceding Merger Regulation, Council Regulation (EEC) No. 4064/89<sup>313</sup>, which had been in force for more than thirteen years. The Commission had already taken action against other companies and imposed substantial fines for breaching Article 4(1) and Article 7(1) of the Merger Regulation.<sup>314</sup> The Commission had also adopted a number of other decisions on the basis of Article 14 of the Merger Regulation.<sup>315</sup> Thus, Altice should have been fully aware of the legal framework and the application of these rules by the Commission.
- (612) Furthermore, the absence of any specific precedent concerning a transaction agreement did not prevent (or make it more difficult for) Altice to properly assess the scope of its rights and obligations in the pre-closing period. The same applies to the specific instances of exercise of decisive influence which would be prohibited conducts under Article 4(1) and Article 7(1), irrespective of the existence of a transaction agreement or the fact that they constitute implementation thereof.
- (613) In any event, as clarified by the EU case-law, *"the mere fact that, at the time when an infringement is committed, the Courts of the European Union have not yet had the*

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<sup>311</sup> Case T-704/14, *Marine Harvest v. European Commission* ECLI:EU:T:2017:753, paragraph 640.

<sup>312</sup> For example, Consolidated Jurisdictional Notice, paragraph 68.

<sup>313</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentration between undertakings, OJ L 395, 30.12.1989, pages 1 – 12.

<sup>314</sup> See decisions in cases IV/M.920 *Samsung/AST* of 26 May 1997, IV/M.969 *AP Moller* of 10 February 1999, COMP/M.4994 *Electrabel/CNR* of 10 June 2009, COMP/M.7184 *Marine Harvest/Morpol* of 23 July 2014.

<sup>315</sup> See decisions in cases COMP/M.1543 *Sanofi/Synthelabo* of 28 July 1999; COMP/M.1608 *KLM/Martinair* of 14 December 1999; COMP/M.1610 *Deutsche Post/Trans-O-Flex* of 14 December 1999; COMP/M.1634 *Mitsubishi Heavy Industries* of 14 July 2000; COMP/M.2624 *BP/Erdölchemie* of 19 June 2002; COMP/M.3255 *Tetra Laval/Sidel* of 7 July 2004.

*opportunity to rule specifically on particular conduct does not preclude, as such, the possibility that an undertaking may have to expect its conduct to be declared incompatible with the EU competition rules*<sup>316</sup>. Moreover the Courts confirmed that there is no established practice for the Commission to refrain from imposing any fine or to impose only a symbolic fine in the absence of relevant precedents. On the contrary, "[i]t is apparent from the case-law that the fact that conduct with the same features has not been examined in past decisions does not exonerate an undertaking (judgments of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission*, 322/81, EU:C:1983:313, paragraph 107, and of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, paragraph 901). In the cases giving rise to those judgments, the Commission imposed fines in an amount that was not symbolic"<sup>317</sup>. Similarly, according to EU case-law, "there is no obligation for the Commission to take into consideration as a mitigating circumstance the fact that conduct with exactly the same characteristics as that at issue has not yet given rise to the imposition of a fine"<sup>318</sup>.

- (614) In addition, the absence of guidelines for the calculation of fine for violations of Articles 4(1) and 7(1) of the Merger Regulation does not prevent the imposition of fines by the Commission. Contrary to Altice's claims, guidelines are not a necessary precondition for the exercise of the power to impose a sanction, since the legal basis for such power is the Merger Regulation, as confirmed by the Union Court judgments cited by Altice. Those court judgments do not create any additional requirement. Quite differently, they state that, although fining guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found in breach of general principles of law, such as equal treatment and the protection of legitimate expectations<sup>319</sup>. In addition, the General Court has clarified that the wording of the provisions providing for fines in case of violations of Articles 4(1) and 7(1) of the Merger Regulation is "*clear. None of those provisions contains broad notions or vague criteria*"<sup>320</sup> and that "*in the absence of such guidelines, the framework for the Commission's analysis must be that set out in Article 14(3)*" of the Merger Regulation<sup>321</sup>.
- (615) Therefore, the lack of specific guidelines for violation of Article 4(1) and 7(1) of the Merger Regulation do not preclude the Commission from imposing a fine and that the imposition of a symbolic fine is not warranted in the present case. This is, in any event, confirmed by the fact that the Commission has already exercised its power in previous gun-jumping cases, which has been upheld by the EU Courts

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<sup>316</sup> Case T-704/14, *Marine Harvest v. European Commission* ECLI:EU:T:2017:753, paragraph 389; CASE C-194/14 P, *AC-Treuhand v Commission*, EU:C:2015:717, paragraph 43.

<sup>317</sup> Case T-704/14, *Marine Harvest v. European Commission* ECLI:EU:T:2017:753, paragraphs 392 and 393.

<sup>318</sup> Case T-704/14, *Marine Harvest v. European Commission* ECLI:EU:T:2017:753, paragraph 640.

<sup>319</sup> See, for example, case C-167/04 P *JCB Service v Commission* §§207 et seq (and cited case-law).

<sup>320</sup> Case T-704/14, *Marine Harvest v. European Commission* ECLI:EU:T:2017:753, paragraph 379.

<sup>321</sup> Case T-704/14, *Marine Harvest v. European Commission* ECLI:EU:T:2017:753, paragraph 450.

#### 7.4.2. *Aggravating circumstances*

(616) Finally, the Commission notes that there are no aggravating circumstances in this case. The fact that the transaction raised serious doubts as to its compatibility with the internal market has been taken into account for the purposes of assessing the gravity of the infringement.

#### 7.5. **Conclusion**

(617) The Commission therefore considers that Altice has, at least through negligence, infringed Articles 4(1) and 7(1) of the Merger Regulation. Both infringements are serious in nature, in particular in view of the fact that the Transaction raised serious doubts as to its compatibility with the internal market.

(618) The infringement of Article 4(1) of the Merger Regulation is an instantaneous infringement whereas the infringement of Article 7(1) of the Merger Regulation lasted 4 months and 11 days.

(619) Finally, the Commission considers that there are no aggravating or mitigating circumstances in this case.

#### 8. **AMOUNT OF THE FINES**

(620) When imposing penalties, the Commission takes into account the need to ensure that fines have a sufficiently deterrent effect. In the case of an undertaking of the size of Altice, the amount of the penalty must be significant in order to have a deterrent effect. This is even more the case when the transaction which has been implemented before clearance raised serious doubts as to its compatibility with the internal market.

(621) In order to impose a penalty for the infringement and prevent it from recurring, therefore, and given the specific circumstances of the case at hand and, in particular, the nature, the gravity and the duration of the infringements discussed in Section 6, the Commission considers it appropriate to impose fines under Article 14(2) of the Merger Regulation of EUR 62 250 000 for the infringement of Article 4(1) of the Merger Regulation and of EUR 62 250 000 for the infringement of Article 7(1) of the Merger Regulation,

HAS ADOPTED THIS DECISION:

#### *Article 1*

Altice N.V. has, at least negligently, implemented a concentration prior to its clearance in breach of Article 7(1) of Regulation (EC) No 139/2004 in the context of Case No. M.7499 – Altice / PT Portugal.

#### *Article 2*

Altice N.V. has, at least negligently, implemented a concentration prior to its notification in breach of Article 4(1) of Regulation (EC) No 139/2004 in the context of Case No. M.7499 – Altice / PT Portugal.

#### *Article 3*

A fine of EUR 62 250 000 is hereby imposed on Altice N.V. pursuant to Article 14(2) of Regulation (EC) No 139/2004 for the breach referred to in Article 1 of this decision.

#### *Article 4*

A fine of EUR 62 250 000 is hereby imposed on Altice N.V. pursuant to Article 14(2) of Regulation (EC) No 139/2004 for the breach referred to in Article 2 of this decision.

#### *Article 5*

The fines imposed by Article 3 and 4 shall be credited in euro within a period of three months from the date of notification of this decision to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT

1-2, Place de Metz

L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000

BIC: BCEELULL

Ref.: European Commission – BUFI/M.7993

After the expiry of this period, interest will automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this decision is adopted, plus 3.5 percentage points.

Where Altice, N.V. lodges an appeal, it must cover the fines by the due date either by providing an acceptable financial guarantee, or by making a provisional payment of the fines in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012.<sup>322</sup>

#### *Article 6*

This decision is addressed to:

Altice N.V.

Prins Bernhardplein 200

1097 JB Amsterdam

The Netherlands

This decision shall be enforceable pursuant to Article 299 of the Treaty.

Done at Brussels, 24.4.2018

*For the Commission*

*signed*

*Margrethe VESTAGER*

*Member of the Commission*

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<sup>322</sup> OJ L 362, 31.12.2012, p. 1.