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Qualcomm/NXP - Analysing IP and conglomerate issues in the semi-conductors industry

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Introduction

On 18 January 2018, the Commission conditionally cleared Qualcomm's acquisition of NXP, following an in-depth investigation. The transaction, which concerned two companies both active in the semiconductors industry, raised non-horizontal conglomerate competition issues in particular with respect to semiconductors for mobile devices. Qualcomm is a leading provider of semiconductors which enable mobile devices to communicate with the mobile network (so-called "baseband chipsets"). Qualcomm also operates an intellectual property ("IP") licensing programme. Qualcomm's IP portfolio includes notably standard essential patents ("SEPs") related to cellular technology, as well as other technologies. NXP is also a provider of semiconductors for mobile devices, specifically in relation to chips for Near Field Communication ("NFC"), a wireless communication standard that enables communication between devices when brought in close proximity, and Secure Element ("SE") chips, which ensure secure transactions in combination with NFC chips. NXP also holds a significant number of SEPs for NFC technology. Finally, NXP also provides NFC-related applications – MIFARE - used for ticketing and fare collection.

The transaction was the latest of a series of semiconductor mergers in the past few years (see, e.g., cases M.7686 Avago/Broadcom, M.7688 Intel/Altera, M.7585 NXP/Freescale, M.8314 Broadcom/Brocade) that have been part of a consolidation trend in the semiconductors industry. When reviewing these transactions, the Commission not only investigated traditional horizontal concerns, but also carried out a thorough non-horizontal assessment, focusing on possible vertical and conglomerate effects. In particular, the Commission analysed whether the combination of suppliers of complementary or closely related semiconductor components raised concerns that the merged entity would have the ability and incentive to foreclose competitors by engaging in bundling or tying strategies, or by degrading the interoperability of its components with those sold by competitors.

Accordingly, when reviewing Qualcomm's acquisition of NXP, the Commission investigated whether the combination of the Parties' products, in particular in the mobile sector, could lead to conglomerate concerns. Following the in-depth investigation, the Commission found that the transaction gave rise to conglomerate effects in relation to Qualcomm's baseband chipsets and NXP's NFC and SE chips and MIFARE.[1]

In addition, in light of the importance of the IP (including SEPs) held by the Parties in relation to NFC technology as well as Qualcomm's licensing practices,[2] the Commission found that the transaction also gave rise to certain novel IP-related competition concerns.[3]

In a nutshell

The merger combined two major semi-conductor manufacturers active worldwide.

The case raised conglomerate concerns in relation to baseband chipsets and Nearfield communication ("NFC"), as well as novel issues in relation to cellular and non-cellular IP.

The Commission carefully analysed conglomerate issues raised by the trans-action, which required tailored-made remedies.

Conglomerate effects in relation to Qualcomm's baseband chipsets and NXP's NFC and SE chips and MIFARE

The transaction would combine Qualcomm's baseband chipsets with NXP's NFC and SE chips and MIFARE. Baseband chipsets are an essential component of any mobile device today. However, smartphones are not used only for cellular voice and data

[1] The Commission also examined horizontal effects in semiconductors for automotive and "internet of things" applications, as well as mobile audio, where the Parties activities overlapped. However, the transaction did not raise competition concerns in those markets.

[2] In particular, Qualcomm's practice of bundling together various patents for licensing purposes.

[3] The commission also examined whether Qualcomm may extend its policy to sell certain chips exclusively to its IP licensees in relation to NFC and SE chips, but concluded that this risk could not be established in the context of the merger.

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communications, but increasingly also to make secure mobile payments and mobile ticketing for public transport: in these cases, the smartphone is used instead of a physical payment or transit card, by means of NFC and SE chips, such as those provided by NXP. Moreover, for the purpose of mobile transit services specifically, NXP's MIFARE technology plays a prominent role, as it is the most widespread and installed transit service technology worldwide. The Commission thus found that the importance of NFC, SE and MIFARE is growing, as consumers increasingly use their smartphones for mobile payments and for public transit purposes. The Commission also found that baseband chipsets, NFC and SE chips products and MIFARE are complementary, as they are purchased by the same customers, the mobile device manufacturers (mobile "OEMs") such as Apple, Samsung or Huawei.

The Commission therefore focused its conglomerate analysis on these products for smartphones.

The theory of harm

At the outset, the Commission found that the merged entity would hold a dominant market position within LTE baseband chipsets (which are the most widespread baseband chipsets today)[4] and also hold a certain degree of market power in relation to NFC chips and SE chips. The Commission also found that MIFARE is the dominant public transit technology in Europe, with other rival technologies such as Calypso lagging far behind MIFARE and being present only in a few cities across Europe.

The Commission first examined whether the merged entity would have the ability and incentive to engage in practices such as tying and/or bundling of its LTE baseband chipsets with NXP's NFC and SE chips and, in the affirmative, if such practices would have the effect of foreclosing rival baseband chipsets makers (such as Intel, Samsung LSI or MediaTek) and NFC and SE chips suppliers (such as ST Microelectronics, Infineon or Gemalto).

The Commission dismissed concerns that the merged entity would engage into tying or pure bundling practices (that is to say, it would no longer offer the relevant components standalone), as it found that, based on the Parties' internal documents, the merged entity would lack the incentive to pursue such conduct.

Conversely, the Commission found evidence that the merged entity would have both the ability and incentive to engage in a mixed bundling strategy, that is to say offer baseband chipsets and NFC/SE chips at a discount as compared to the sum of the prices of the standalone products. In this context, the Commission also analysed whether the merged entity, as part of its mixed bundling strategy would also have the ability and incentive to raise royalties of MIFARE to rival suppliers or cease licensing MIFARE altogether.

Assessment of effects of mixed bundling

The Commission found that a mixed bundling strategy on the part of the merged entity involving only LTE baseband chipsets and NFC and SE chips was unlikely to lead to foreclosure effects in the markets for these semiconductors.

The Commission considered that should the merged entity engage in such a strategy, mobile OEM customers would not automatically go for the merged entity's offering and would still consider alternative suppliers, as mobile OEM customers like to mix and match chipsets from several suppliers, and some of them have in-house manufacturing options (for example Samsung with Samsung LSI, and Huawei with HiSilicon). Alternative options for these products would thus remain available to device OEMs, and competitors would be able to react to the merged entity's bundling strategy.

However, the Commission found that if the merged entity would add MIFARE to the bundle and raise royalties for MIFARE to competing NFC and SE suppliers or cease licensing of MIFARE altogether, this would change the competitive conditions in the market. Pre-merger NXP had licensing agreements for MIFARE with a number of rival NFC and SE suppliers. As MIFARE is NXP's proprietary technology, the merged entity would have no obligation to continue licensing it once the ongoing agreements expired.

The Commission found evidence that the merged entity had the ability and incentive to raise the royalties for MIFARE or cease the licensing of MIFARE to other suppliers of NFC and SE altogether. Through such conduct the merged entity would be likely to (i) directly raise rivals' costs in the NFC/SE segment because a crucial input for these rivals, namely the MIFARE license, would become more expensive; and (ii) indirectly raise costs for rival baseband chipset suppliers, because the complementary components to these basebands, i.e. the standalone NFC/SE chips, would become more expensive. Competitors of the merged entity would not be able to react to the merged entity by offering a bundle comprising MIFARE-enabled SE or would only be able to offer it at unattractive prices compared to those of the merged entity.

Interoperability concerns

Furthermore, the Commission found that the merged entity would also have the ability and incentive to engage in degrading the interoperability of Qualcomm's LTE baseband chipsets and NXP's NFC and SE chips with rival suppliers' standalone components. The effect of such strategy would be that customers would prefer the merged entity's products over those of rival suppliers.

[4] Specifically, the Commission found that Qualcomm held a dominant position as regards the separate product market for so called multi-mode LTE baseband chipsets, that is to say baseband chipsets compliant with the LTE, UMTS and GSM cellular standards, which may or may not be compliant also with the CDMA cellular technology. The Commission found that so-called single-mode LTE baseband chipsets do not exert a constraint on multi-mode LTE chipsets and that non-cellular wireless connectivity standards such as Wi-Fi and WiMAX do not constitute a competitive constraint on cellular baseband chipsets. In the following, "LTE baseband chipsets" refers to multi-mode LTE baseband chipsets.

This strategy would compound the effects of the merged entity's strategy of raising the licensing royalties or ceasing the licensing of MIFARE.

Conglomerate issues related to IP licensing

The transaction also combined the Parties' NFC patents in a single, sizable portfolio representing about a third of all worldwide patents related to that technology. This, alone, was capable of boosting the merged entity's ability to credibly negotiate better licensing fees than each of the Parties had respectively been able to obtain on a standalone basis prior to the merger.

The theory of harm

Prior to the merger, the Parties did not engage in patent-by-patent licensing. Rather, NXP licensed NFC patent portfolios and Qualcomm's own NFC patents were part of a larger portfolio which Qualcomm licensed. The Commission was therefore concerned that, by combining the Parties' complementary NFC patents in a single bundle, the transaction would enable the Parties to increase royalties *disproportionately*, that is to an amount significantly exceeding the mere sum of the Parties' pre-merger royalties.

The Commission found that the mere combination of patents for licensing purposes should not, in itself, raise competition concerns. The Commission was therefore not concerned with the merged entity raising royalties to reflect the sum of each Parties' pre-merger portfolio. Nonetheless, the Commission examined whether the circumstances of the merger lent themselves to enabling and giving the merged entity an incentive to increase post-merger royalties above levels which the Parties could have charged absent de transaction for the same patents. The Commission found that the transaction would result in giving the merged entity a "critical mass" of patents that would disproportionately strengthen Qualcomm's pre-merger bargaining position, allowing it to charge significantly higher royalties.

Assessment of the merged entity's bargaining position

The Commission relied on several factors to assess the merged entity's bargaining power. First, the Commission found that Qualcomm enjoyed a strong licensing position pre-merger. That position relied on several factors including a corporate structure designed to support its licensing business and litigation efforts, as well as significant resources to finance necessary litigation. As the bargaining position of a patent holder in licensing negotiations is a function of the chances that its patents be infringed, should litigation against an implementer/prospective licensee be initiated, the acquirer's pre-merger litigation capacity was a key factor in the assessment.

This factor compounded the royalty increasing effect that was expected as a result of the combination of the Parties' NFC patents. This was because holding a "critical mass" of patents already endowed the merged entity with an improved bargaining position. This was due to the fact that, vis-à-vis NFC implementers seeking a patent license, both the chances of finding an infringement and the likelihood of obtaining an injunction and high damages generally increase with the size and quality of a patent holder's portfolio. In the context of the Transaction, that effect would have been compounded by Qualcomm's litigation capacity.

Furthermore, the Commission found that the intrinsic value of the merged entity's NFC patent portfolio would increase in light of the forecasted growth of NFC technology's penetration rate in mobile devices. Although not a merger-specific effect, the prospective rise in NFC technology's prevalence nevertheless contributed to supporting the merger's impact on royalty increases.

The Commission's findings were supported by evidence obtained from the Parties' internal documents. The Parties' own assessment of the impact of a similar transaction showed that the present combination would be conducive of disproportionately higher royalties for NFC patents as a result of the Parties' combined portfolio and leveraging Qualcomm's litigation capacity. In other words, the Parties had already contemplated the present scenario and considered that they would be able to, and should, achieve royalties exceeding the mere sum of their standalone licensing program as a result of bundled licensing in the shadow of a more credible, combined litigation capacity.

Remedies to preserve competition

In order to remove the competition concerns identified by the Commission, Qualcomm offered commitments, consisting of four elements.

First, Qualcomm committed to license NXP’s MIFARE technology to mobile device OEMs and baseband and NFC/SE competitors, on the basis of commercial terms that are at least as advantageous as those offered by NXP in its existing MIFARE licenses. The remedy has a duration of eight years. Qualcomm committed to make available the key commercial terms of each equivalent NXP MIFARE license existing on the date of the Commission’s decision.

Second, Qualcomm committed to ensure the same level of interoperability between the merged entity’s baseband, NFC and SE products and the products of competitors for a period of eight years.

These remedies addressed the Commission’s competition concerns in relation to MIFARE and interoperability. The Commission did not require a specific remedy for mixed bundling as such, as it found that this conduct in itself was unlikely to lead to foreclosure effects.

Third, with respect to IP licensing, the Notifying Party committed to not acquire a number of NFC patents from NXP and to not assert those patents that it would acquire. Patents carved out of the transaction were those deemed unnecessary to support the new entity's NFC chip business. Other patents remained within the scope of Qualcomm's acquisition because they were embodied on NFC chips. Although the merged entity did commit to not assert these patents and, indeed, to grant worldwide royalty free licenses to third parties upon request, it retained the right to assert them for defensive purposes, that is in defense of litigation initiated by third parties alleging that Qualcomm's NFC products infringe third parties' patents.

Interestingly, the Commission did not require that the relevant NFC patents be divested. The Commission considered that the proposed remedy was appropriate because, in contrast with a divestiture remedy aiming at restoring a competitive constraint eliminated by a merger, its aim was to neutralise the merged entity's ability to leverage its newly acquired NFC patents in licensing negotiations in order to obtain disproportionate licensing terms. Therefore, contrary to a divestiture remedy, which calls upon the Commission to assess whether the purchaser of the divested assets will be suitable to replace the competitive constraint lost as a result of the transaction, as well as the viability of the divested business in the hands of such purchaser, the commitment needed in the present case did not require assessing the purchaser's ability to compete with the merged entity so long as Qualcomm could no longer rely on the relevant patents to extract disproportionate royalties from its licensees.

Conclusion

The *Qualcomm/NXP* merger is the latest of a series of mergers in the semiconductors industry that the Commission has reviewed in recent years.

The case illustrates that, when reviewing transactions combining complementary products in highly technological sectors, the Commission does not shy away from carrying out a conglomerate assessment. Conglomerate mergers may warrant careful scrutiny, particularly when the Parties hold significant market positions in relation to complementary products.

In *Qualcomm/*NXP, the Commission did not find concerns in relation to mixed bundling as such, as foreclosure effects were unlikely under the requisite legal standard. However, the Commission found concerns stemming from the licensing of MIFARE, which required a specific licensing remedy. Additionally, given the market positions of the Parties, an interoperability remedy was also required, to ensure the competitiveness of standalone competitors, whose products must interoperate with those of the Parties to function. While the latter type of remedy has been accepted by the Commission in previous semiconductor mergers involving a strong market player (for instance, Intel/McAfee, Intel/Altera and Broadcom/Brocade), the MIFARE remedy is somewhat novel, and was necessary due to the importance and relevance of MIFARE for the mobile transit sector.

As regards the competition concerns related to IP licensing, these issues emerged in large part because of the Parties' particular licensing practices. The concerns examined, and the remedies adopted, signal the Commission's attention to specific IP-related issues also in the context of merger control.

Competition *merger brief*

Essilor/Luxottica - vision and fashion - the first conglomerate in the optical industry

Johan Jonckheere, Silvia Modet and Guillaume Débarbat.

In a nutshell

The Essilor/Luxottica case dealt with the combination of two global leaders in the closely related industries of ophthalmic lenses and eyewear.

It offers an insight into how the Commission looks at complex conglomerate issues, in particular with regard to mixed bundling and commercial tying strategies.

The case shows that the Commission investigated concerns from market participants thoroughly but eventually dismissed them due to the evidence gathered during its in-depth investigation, notably on the likelihood of future competitive harm.

Introduction

On 1 March 2018 the Commission approved the merger between Essilor International S.A. (Essilor) and Luxottica Group S.p.A. (Luxottica).

This transformative deal in the optical industry resulted in the creation of the only large integrated supplier able to provide opticians with corrective lenses, prescription frames and sunglasses.

French-based Essilor produces corrective lenses along with ophthalmic optical equipment. The company introduced Varilux, the world's first progressive lens for the correction of presbyopia. Its portfolio includes other brands such as Crizal, Transitions, Eyezen, and Xperio.

Luxottica, headquartered in Italy, manufactures prescription frames and sunglasses. The company credits itself with having turned prescription frames from a necessary medical device into a fashion accessory. Luxottica has over the years developed a very broad portfolio which includes proprietary brands such as Ray-Ban, Oakley and Persol as well as more than 15 licensed fashion brands including Armani, Chanel, Dolce & Gabbana, Prada and Versace.

Prior to the transaction, Essilor and Luxottica were respectively the world's largest suppliers of corrective lenses and branded eyewear. They entered into a combination agreement in January 2017 and notified the transaction to the Commission in August that year. After an in-depth investigation, the Commission cleared the operation unconditionally on 1 March 2018.

The eyewear value chain

Essilor and Luxottica share to a large extent the same customer base, namely optical retailers.

At present, optical retailers tend to procure lenses and frames separately, which are then mounted into a complete pair of spectacles to suit the preferences and visual needs of final customers.

Optical retailers generally fall into two different categories: independent opticians and optical retail chains. Independent opticians are individual shops run by qualified eye care professionals, who often glaze and mount lenses into the frames themselves. Some independent opticians are members of buying groups. Optical retail chains comprise several shops operating under the same banner, with a common commercial, sourcing and marketing policy. They may include owned or franchised stores and usually operate centrally run glazing facilities. Some also produce their own lenses.

When buying spectacles, consumers tend to focus on the frame and rely on opticians' advice for lenses. The choice of lenses is therefore typically driven by optical retailers. After the customer has selected the frame, the optician may suggest one or more types of lenses, usually in terms of price point or technical specifications. Consumers rarely ask for, or are even aware of, specific brands of lenses. There are, however, some exceptions, such as Essilor's Varilux brand of progressive lenses, which are very well-known in certain countries, such as France and Portugal.

The review of the transaction

Essilor and Luxottica mainly sell complementary optical products, which do not compete with each other but which are necessary inputs for the business of opticians. In their respective areas of expertise, the two companies are generally market leaders and Luxottica owns very well-known brands.

Against this background, the Commission opened an in-depth investigation to assess whether the merged company might be able to use its positioning vis-à-vis opticians to exclude competing suppliers from the markets, by linking sales of lenses and eyewear through practices such as bundling or tying. The assessment of these potential conglomerate effects following the transaction, which was also prompted by a number of complaints from market participants, formed the crux of the Commission's investigation in this case.

In addition, the Commission looked into whether the merger would remove important emerging competition from Luxottica in lenses and from Essilor in eyewear and whether the merger could generate input or customer foreclosure along the optical value chain.

Conglomerate effects

The Commission's investigation focused on the potential use of Luxottica's branded products to persuade opticians to purchase Essilor's lenses and thereby hurt competition in the markets for lenses in Europe.

This approach results from the fact that consumers value eyewear brands significantly more than lenses brands; lenses are a more commoditised product with only limited customer preference for specific brands. It is therefore unlikely that the Parties could use their position in lenses to impose or incentivise the sales of their eyewear brands via a leveraging strategy. Opticians would oppose such strategies, as they would be willing and able to switch to competing lens suppliers in order to avoid being pushed into purchasing Luxottica frames against their own better judgment.

The Commission's framework of assessment for conglomerate situations meant that significant competitive harm could only be expected if Luxottica held a significant degree of market power and the merged entity had economic incentives to engage in bundling or tying. In addition, the foreclosure would have to affect a sufficiently large part of the market, and weaken the ability or incentive of rivals to compete effectively in the lens markets, for instance because of reduced economies of scale or increased barriers.[1] The Phase II investigation provided evidence against the likelihood of conglomerate effects on each of those points.

During the investigation market participants alleged Luxottica branded products were a "must-have" for opticians, a characteristic from which, in their view, Luxottica derived market power in eyewear vis-à-vis its customers. To assess this claim, the Commission sent a short and targeted questionnaire to all of Luxottica's customers, which included all types of opticians from large chains to small independent opticians. The Commission received a substantial number of replies (almost 4000) which showed that even though Luxottica's brands are important for opticians' businesses Luxottica's market power does not go beyond what is indicated by its market share in optical frames (which stood at less than 20% at the EEA level). Moreover, replies to this questionnaire indicated Luxottica sunglasses are not "must-have" products in that they would be essential to generate traffic to their stores; other factors such as quality of service or price levels of lenses appeared to be at least as important to Luxottica customers as availability of Luxottica sunglasses.

The Commission further considered the number of stores selling Luxottica's eyewear. Some 40-50% of optical stores do not carry any of Luxottica's branded products in the EEA, either sunglasses or optical frames, which would limit Luxottica's ability to persuade a significant number of opticians to purchase Essilor's lenses by using Luxottica's products.

The in-depth investigation therefore showed that the success of a potential strategy to incite opticians to buy Essilor's lenses by using Luxottica's branded products would be limited by the number of stores selling Luxottica products as well as by the lack of a "must-have" nature of these products for opticians who do sell them.

In addition, the Commission analysed past market behaviour and the Parties' internal plans after the merger. The Commission concluded from that analysis that the merged entity's incentives to engage in tying practices would be limited while incentives to offer mixed bundles would be more likely, albeit most likely limited to offering pairs of eyewear and matching lenses together as "complete jobs".

Although limited in scope by the lack of sufficient market power of Luxottica, such a strategy could nevertheless result in somewhat lower sales for competing lens manufacturers. The Commission therefore looked at whether these potentially lower sales would affect the competitiveness of lens manufacturers.

Evidence gathered by the Commission on lens manufacturers' levels of profitability did not suggest that any possible economies of scale would be affected by the merger. Moreover, the Commission carried out a quantitative analysis on hypothetical loss of market shares resulting from increased sales of Essilor lenses through the use of Luxottica's branded products by offering "complete jobs". This analysis showed that such a strategy would have only a modest impact on Essilor's competitors manufacturing ophthalmic lenses.

The Commission therefore concluded that the potential leveraging of Luxottica's position in eyewear into lenses would not significantly impede effective competition in ophthalmic lenses manufacturing.

Loss of potential competition

While Essilor's and Luxottica's core activities are complementary, they had started to converge over the last few years by making entries into each other's specialised areas. They did this through

[1] Non-Horizontal Merger Guidelines, Section V.

acquisitions - Essilor acquiring suppliers of frames and sunglasses, as well as organically - Luxottica opening central labs to produce mainly Ray-Ban branded lenses.

The Commission sought to establish to what extent those recent activities would have grown in the foreseeable future in order to assess the likely future competitive constraints removed by the merger.

Under the Commission's framework of assessment, a merger with a potential competitor can have anti-competitive effects if such a competitor already exerts a significant constraining influence or is highly likely to grow into an effective competitive force and if there are not enough other potential competitors that could maintain sufficient competitive pressure after the merger.[2]

➢ Lenses

In ophthalmic lenses, Luxottica had hardly any activities in Europe until it opened a laboratory in Sedico (Italy) in 2016. This laboratory was mainly set up to produce Ray-Ban branded prescription lenses to be sold with Ray-Ban frames as complete pairs of prescription glasses or sunglasses. According to Luxottica, the aim is to give Ray-Ban customers the same experience as with standard Ray-Ban sunglasses by offering a complete Ray-Ban product with the brand logo on both the frame and the lenses.

The Commission concluded that, despite Luxottica's recent entry into the ophthalmic lenses markets, its current and planned activities in the wholesale supply of ophthalmic lenses would be insufficient to allow it to exert a strong competitive constraint on Essilor. This is because Ray-Ban lenses appear to be more of a niche product targeted at a limited audience of Ray-Ban customers rather than a full-blown attempt at capturing market share from other lens suppliers. Furthermore, neither the feedback received from market participants, nor the companies' internal plans and estimates indicated that Luxottica could have developed into a meaningful player in lenses in coming years.

Finally, rivals such as Hoya, Zeiss and Rodenstock, as well various local competitors and Asian suppliers, would be able to continue to exert competitive pressure on Essilor.

Those findings led the Commission to conclude that Luxottica's activities in lenses would not have been able to exert a strong competitive constraint on Essilor.

➢ Eyewear

Essilor has limited activities in the market for eyewear in Europe but has recently been developing its frames and sunglasses business through new offerings of both complete pairs and stand-alone frames.

The market investigation showed that Essilor is a distant competitor to Luxottica, as its products are typically positioned at lower price points, except for two mid-range to premium brands that it recently introduced to the European market: (i) In 2013 Essilor acquired the Chinese-based fashion brand Bolon, which it launched in Europe in 2017; and (ii) in 2014 it took over the US-based sports performance brand Costa, which it launched on the European market in 2016. Both brands are currently being rolled out in several EU countries.

Accordingly, Essilor faces the considerable challenge of not having any globally recognised brands. Bolon and Costa are not distributed globally, while worldwide branding is important in the premium segment.

Market feedback and the companies' internal plans and estimates did not indicate that Essilor could have become a meaningful competitor in frames or sunglasses in coming years, in particular in high-end eyewear. Furthermore, the merged entity will continue to face competition from other suppliers of frames and sunglasses such as Safilo and De Rigo, who offer a wide variety of brands.

Those findings led the Commission to conclude that Essilor's brands would not have been able to exert a strong competitive constraint on Luxottica.

Impacts on optical retail

Luxottica runs a large optical retail operation of nearly 8 000 stores worldwide, the vast majority of which are, however, located outside Europe. In the EEA Luxottica's retail activities mainly consist of Sunglass Hut and two optical retail chains in the UK and Italy. Essilor is not active in brick-and-mortar retail but has recently ventured into online retail, focusing on contact lenses.

The Commission concluded that the transaction would not have any horizontal anticompetitive effects in retail markets in view of the Parties' limited activities and different positioning.

Some market participants expressed concerns that the transaction would give the merged entity the financial power to acquire large retail chains in the future and thus consolidate its presence in the distribution market downstream, which could in turn lead to potential foreclosure concerns. The Commission considered that such concerns did not stem directly from the present merger, and would have to be assessed separately if those acquisitions eventually took place and provided they fell within the jurisdiction of the Commission.

Input and customer foreclosure along the optical value chain

As Essilor and Luxottica operate at different levels of the same supply chain in a number of markets, the merger would give rise to several vertical links, such as between their eyewear and lens

[2] Horizontal Merger Guidelines, paragraph 60.

production activities on the one hand and their retail operations on the other. Under the Commission's framework of assessment, while vertical mergers do not entail the loss of direct competition, they can have anticompetitive effects if they give rise to input or customer foreclosure.[3]

The Commission found that those vertical relationships would be unlikely to lead to any input or customer foreclosure, because of a limited market position of one of the Parties for each of those links, in particular in the retail markets, and the presence of sufficient alternative suppliers in the EEA.

Conclusion

The Commission's assessment dealt primarily with concerns raised by competitors and customers on conglomerate effects, namely that the merged entity could bundle or tie offers of Luxottica's branded eyewear and Essilor's lenses and thus reduce competition in the market for lenses. The extensive investigation included the review of questionnaire replies from almost 4 000 opticians and opticians' associations and from lens and frames competitors. The Commission decided to clear the case based on the findings of its in-depth investigation.

In particular, the evidence gathered did not indicate that Luxottica holds sufficient market power in spectacle frames or sunglasses to foreclose lens competitors. There were also no indications in the Parties' internal documents that they planned to tie sales of eyewear with sales of lenses following the Transaction. Furthermore, the investigation showed that opticians are reluctant to accept tied or bundled offers as they value their independence in choosing the products they purchase and sell.

As regards effects on the competitors' competitiveness, the investigation did not confirm claims about potential loss of scale economies. Most lenses sold in the EEA are produced in Asia, which limits the likelihood that lower EEA volumes would bring down production cost efficiency.

Finally, the investigation did not produce any evidence that Luxottica and Essilor were becoming important competitors in each other's core activities or that the merged entity would be able to use Essilor's market power to foreclose rivals in frames and sunglasses.

This case shows that the Commission is ready to examine concerns expressed by market participants thoroughly but also to dismiss them if they are not fully supported by evidence gathered by its in-depth investigation.

[3] Non-Horizontal Merger Guidelines, para 18.

Competition *merger brief*

Lufthansa/Air Berlin - the slot machine

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Introduction

Following several years of financial difficulties, Air Berlin, Germany's second largest airline, filed for insolvency in August 2017. An insolvency administrator was appointed and he initiated a bidding process to sell Air Berlin's assets.

In October 2017, easyJet and Air Berlin entered into an agreement pursuant to which easyJet would acquire some of the assets and rights used by Air Berlin for its passenger transport operations at Berlin Tegel airport, including slots at Berlin Tegel airport and at some destination airports.[1]

Also in October 2017, Lufthansa and Air Berlin entered into an agreement under which Lufthansa would acquire:

- leisure air carrier NIKI with its aircraft, crew and slots;
- regional air carrier Luftfahrtgesellschaft Walter GmbH ('LGW'),2 which (prior to Air Berlin's insolvency proceedings) primarily provided connecting flights for Air Berlin's short- and long-haul operations at Berlin and Düsseldorf airports; and
- a collection of additional Air Berlin aircraft, crew and slots at several EU airports, in particular in Austria, Germany and Switzerland. These assets were transferred to LGW.

EasyJet's acquisition of certain assets of Air Berlin did not raise competition concerns and, on 12 December 2017, the Commission unconditionally approved the acquisition [3]

By contrast, Lufthansa's acquisition of parts of Air Berlin did raise competition concerns. Part of the deal, namely the acquisition of LGW, was approved with remedies on 21 December 2018.[4] The remainder of the deal – Lufthansa's acquisition of air carrier NIKI – never materialised at all. The acquisition would have led to a monopoly on a large number of routes. Faced with the Commission's concerns about competition on those routes, Lufthansa decided not to acquire NIKI. This was made possible by a clause in the agreement with Air Berlin, which gave Lufthansa the option to drop NIKI from the scope of the acquisition. Lufthansa exercised this option on 13 December 2017 and this led to NIKI filing for insolvency on the same day. NIKI was subsequently purchased by LaudaMotion, a company owned by Mr. Niki Lauda.[5]

Both the easyJet and Lufthansa case involved acquisitions of parts of an insolvent airline that had ceased its flight operations prior to the sale of the assets. This feature gave rise to interesting issues relating to (i) the assessment of slot portfolio effects, which were at the heart of the Commission's theory of

In a nutshell

The Lufthansa/Air Berlin and easyJet/Air Berlin cases concerned the acquisition of certain assets and rights of the insolvent airline Air Berlin by Lufthansa and easyJet.

In both cases, the assessment of the competitive effects of the combined slot portfolio was at the core of the competition analysis. A remedy was necessary to prevent Lufthansa from having so many slots at Duesseldorf airport that competition could be hampered.

It is crucial for a fruitful and successful outcome of a merger case in which (parts of) an insolvent airline are acquired, that airlines not only contact and cooperate with DG COMP, but also DG MOVE and the national regulators.

[1] The transaction would also entail the conclusion of new leases for aircraft and the hiring of crew in order to operate the slots to be transferred.

[2] NIKI and LGW were both subsidiaries of Air Berlin. They had their own operating licence and did not file for insolvency at the time when Air Berlin filed for insolvency.

[3] Decision in case M.8672 – easyJet/Certain Air Berlin assets, 12 December 2017.

[4] Decision in case M.8633 – Lufthansa/Certain Air Berlin assets, 21 December 2017.

[5] Insolvency proceedings for NIKI were first opened in Germany where IAG's subsidiary Vueling was initially chosen as purchaser of NIKI. Following a court ruling, NIKI insolvency proceedings were later transferred to Austria where LaudaMotion was selected by the insolvency administrator and the creditors' committee as acquirer for the NIKI assets in a new bidding process. The acquisition of NIKI by LaudaMotion was cleared by the Spanish and Austrian competition authorities in February 2018. On 20 March 2018, Ryanair announced that it had agreed to buy a 75% stake in LaudaMotion.

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harm, and (ii) the interplay between insolvency proceedings, EU competition rules and EU aviation rules.

Assessment of slot portfolio effects

Air traffic has steadily increased in the past decade and, as a result, airports have become busier. This can be felt by passengers at the check-in counter, but also by airlines, which face congestion on the runway. At congested airports, slots – that is the permission to take off or land at a specific date and time - are essential for airlines, as they enable airlines to access the airport infrastructure and thus to operate flights. Slots are connected to an airport, but are not linked to a specific route.

While airlines need slots to fly from or to busy airports, not all airlines have the same access to slots. Slots at congested airports are allocated pursuant to a procedure set out in the Slot Regulation.[6] Historically, certain airlines have a higher number of slots at specific airports and, as long as the slots are used, they remain allocated to the same airline. In the European Union, slots are generally not traded.[7] They therefore rarely change hands outside an airline group.

At busy airports, the limited availability of slots constitutes a barrier to entry and expansion for airlines. If a single airline controls a large share of all slots, other airlines may be unable to provide much competition, because they will struggle to schedule flights efficiently. In turn, the dominant airline will have the power to charge higher prices or provide a below-standard service on the routes to and from that airport.

Since a large slot portfolio at a congested airport may prove detrimental to effective competition, the Commission must assess a merger's impact on the combined slot portfolio of the airlines involved. An increase in slots may raise the barriers that other airlines face to enter or compete at the airport, and allow the dominant airline to foreclose its competitors.

Slot portfolio effects have been assessed in previous cases, such as Ryanair III and IAG/BMI.[8] However, the easyJet and Lufthansa cases constitute the first cases where slot portfolio effects are at the core of the Commission's theory of harm. The cases involved airlines which operated to a significant extent from the same airports in Germany, Austria and Switzerland. In addition, since Air Berlin had already exited all the routes that it used to operate, the transfer of slots did not result in the transfer of Air Berlin's positions on specific routes, but at specific airports. Therefore, in both the easyJet and Lufthansa cases, the Commission did not perform a route-by-route assessment but an assessment of slot portfolio effects.

In the easyJet case, the Commission found that the increase in easyJet's slot portfolio resulting from its acquisition would not raise concerns. The transaction resulted in the transfer of slots at Berlin Tegel airport. easyJet's slot holding at Berlin's airports (Tegel and Schoenefeld) would be less than 25% and it would continue to face competition from companies which held sizeable slot portfolios of their own. These included Lufthansa, notably its subsidiary Eurowings, and Ryanair.

By contrast, in the Lufthansa case, the increase in Lufthansa's slot portfolio at Duesseldorf airport resulting from the merger did raise competition concerns. Lufthansa's acquisition of Air Berlin's slots would increase its share of slots at Duesseldorf airport in the summer season to 54%, with a "net" increment of 5%.[9]

The Commission found that, with this large slot portfolio, Lufthansa would have the ability and incentive to foreclose competitors from the markets for flights to and from Duesseldorf airport. This would lead to less competition from Lufthansa's competitors and would harm consumers using Duesseldorf airport.

To remedy the concerns, Lufthansa submitted commitments which allowed the Commission to clear the transaction in phase I. The commitments ensure that Lufthansa's share of slots at Duesseldorf airport would be limited to 50% of the available slots, with a very limited net increment of 1% compared to a scenario without the transaction.

Interaction between insolvency proceedings, EU merger control and the EU aviation rules

Since Air Berlin was in insolvency proceedings, an important issue in both the easyJet and Lufthansa cases was the question of the relevant situation absent the transaction, i.e. the correct counterfactual.

In a bankruptcy scenario, it is indispensable to determine whether the deterioration of the competitive environment would likely result from the merger or from the discontinuity of the operations of the failing competitor, irrespective of the merger. The Commission assessed if, absent the transaction, Air Berlin's slots to be transferred to easyJet or Lufthansa would either be made available to other third parties through the sale of all or

[6] Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (the "Slot Regulation").

[7] With the exception of the United Kingdom, in which secondary trading of slots has been implemented for London, as an exchange of slots between air carriers.

[8] Cases M.6447 – IAG/bmi, paragraph 483 et seq (in relation to slots at London Heathrow); M.6663 – Ryanair/Aer Lingus III (in relation to slots at Dublin airport).

[9] The Commission acknowledged that, even without the acquisition, Lufthansa's share of slots at Duesseldorf airport was bound to increase, since, if Air Berlin's slots were not transferred to Lufthansa as a result of the transaction, they would return to the slot pool and be re-allocated. Through this process, Lufthansa would obtain part of Air Berlin's slots in any event. However, the transaction would result in Lufthansa obtaining a greater percentage of slots than it would have obtained through the re-allocation process. The Commission's assessment focused on this difference between the slots that Lufthansa would have obtained in any event, and the total number of slots that it would obtain following the acquisition (the "net" increment).

parts of Air Berlin during the insolvency proceedings, or, in the absence of acquirers, fall back to the slot pools and be subsequently reallocated by the relevant slot coordinators.

In the easyJet case, the question whether the slots would be transferred to another airline could be left open, since the acquisition did not raise competition concerns in any event. In the Lufthansa case, the Commission considered that the slots operated by LGW (the Air Berlin subsidiary acquired by Lufthansa) would likely fall back to the slot pools absent the transaction, based on the information received during the market investigation about the credible bids submitted for Air Berlin's operations (excluding NIKI and the assets acquired by easyJet).[10]

In addition, the transactions took place in a highly regulated sector and were subject not only to EU merger control rules but also to EU aviation rules.

Given the interplay between these two sets of rules, the cooperation between the relevant Commission services (DG COMP and DG MOVE), as well as the dialogue between the acquirers and both DG MOVE and DG COMP, proved to be crucial.

The Commission services had to work closely together and take a position on a number of jurisdictional and analytical issues, made more complex and pressing due to the on-going insolvency proceedings. For example in the easyJet case, the target mainly consisted of certain assets and rights of Air Berlin, including slots.

On the one hand, DG COMP had to decide on the notion of undertaking under the EU merger control rules to establish jurisdiction. On the other hand, DG MOVE had to decide on the notion of partial takeover of an air carrier under the Slot Regulation, which allows the transfer of slots in the case of a total or partial take-over of an airline when the slots are directly related to the air carrier taken over.

It turned out that distinguishing, among airline assets, between those that are no more than inputs and those that, taken together, constitute a business with a market presence was a challenge.

In the easyJet case, the transaction would result in the transfer of slots and of ancillary assets indispensable for the use of these slots (such as parking stands). The transaction would also entail the conclusion of new leases for aircraft and the hiring of crew in order to operate the slots to be transferred.[11] Therefore, the transaction would enable easyJet to develop its airline operations at some airports where Air Berlin used to operate. The Commission concluded that the transaction amounted to the acquisition of parts of an undertaking, within the meaning of the EUMR.

In line with the conclusion that the assets and rights to be acquired by easyJet formed part of an undertaking, the transaction was deemed to be a partial takeover of an air carrier within the meaning of the Slot Regulation. The national slot coordinators accordingly transferred the former relevant Air Berlin slots to easyJet.

It is crucial for the transaction to proceed that the two notions of undertaking and partial take-over of an airline are understood and their scope addressed immediately by air carriers in their discussions with the Commission and national authorities, like the national slot coordinators.

Another example of the close cooperation between the Commission and the national civil aviation authorities was to ensure that the correct procedure for operating licences under Regulation 1008/2008[12] was followed, namely that air carriers which cannot meet their financial obligations for the next 12 months can be granted a temporary licence. This also had the effect of, ultimately, preserving the slots to be transferred. Under the Slot Regulation, the general principle regarding slot allocation is that an air carrier having operated its particular slots for at least 80 % during the summer or winter scheduling period is entitled to the same slots in the equivalent scheduling period of the following year (the "grandfather rights"). Consequently, slots which are not sufficiently used by air carriers are reallocated (the "use it or lose it" rule). In addition, only an airline with a valid operating license can hold slots. If an airline ceases to hold a valid operating license its slots revert back to the slot pool. It was therefore essential that the civil aviation authorities granted in a timely manner and as required by Regulation 1008/2008, temporary licenses to Air Berlin and its subsidiary NIKI, which, in accordance with the Slot Regulation, suspended the application of the "use it or lose it" rule until the closing of the sale of Air Berlin's and NIKI's assets.

More generally, the suspension of the "use it or lose it" rule was instrumental in the orderly liquidation of Air Berlin, limiting the social, economic and competition damage entailed by the group's bankruptcy. The involvement of all Commission services, but importantly of slot coordinators, national civil aviation authorities, national competition authorities was key in ensuring that the consolidation of the EU airline sector was not carried out at the expense of customers by guaranteeing a fair access of

[10] It should be noted that no failing firm defence applied in these cases. One criterion for a failing firm defence is that the assets of the insolvent company would exit the market without the transaction. Given the high demand for access to airport infrastructure at the busiest airports in Germany, Austria and Switzerland, the slots of Air Berlin would likely be allocated to other air carriers absent the transaction (either through a partial takeover of an airline or after having returned to the slot pools). Therefore, slots would not have exited the market.

[11] easyJet intended to enter into new leases for aircraft, in order to replace the leases of the aircraft previously leased by Air Berlin for part of its passenger air transport operations and to hire crew on the open market, likely former Air Berlin employees.

[12] Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community ('Regulation 1008/2008').

competing airlines, in a context of increasing congestion of EU airports.

Conclusion

The assessment of the Lufthansa/Air Berlin case raised a number of challenges but ultimately showed the relevance and adaptability of the EU merger legal framework. On the one hand, the choice of Lufthansa as the acquirer of Air Berlin's subsidiary NIKI confronted the Commission with a highly problematic concentration that would reduce competition and make passengers in Germany, Austria and Switzerland worse off. At the same time, Air Berlin's precarious financial situation meant that there was very little time for the merger review process to run its course. In addition, the scope of the transaction itself changed throughout the proceedings, as Lufthansa decided not to acquire NIKI.

The case also holds several lessons, which will be relevant in future similar scenarios.

One lesson concerns the insolvency administrators and their role during the sale process. It is incumbent upon them to ensure that creditors pay attention to regulatory issues, notably competition concerns, when they select a preferred bidder for a failing carrier. This is in their own interest: if the sale to the selected bidder would result in a monopoly or duopoly on many routes, part of the target will likely have to be divested.

Another lesson concerns the aviation community. European carriers are strong and able to challenge non-EU carriers because the European market is highly competitive. Favouring a national champion in merger processes will not make it more fit for international competition. In addition, favouring a national champion may leave European travellers themselves with less choice and higher prices. The Commission will not compromise with passengers' welfare, with their choice and the quality of services they can aspire to.

A third lesson was that while designing such complex merger operations, airlines should take a holistic view on the EU acquis to be respected, that includes not only merger and state aid law but also aviation law.

All these lessons learnt during the break-up of Air Berlin may prove helpful when dealing with future sales process in the air transport sector.

Competition *merger brief*

Altice / PT Portugal: Altice fined for jumping the gun on EU merger

Sara Ashall, Pierantonio D'Elia, Andreea Staicu, Simon Van Cutsem

Introduction

On 24 April 2018 the Commission imposed a €124.5 million fine on Altice, the multinational cable and telecommunications company based in the Netherlands, for implementing its acquisition of its competitor, the Portuguese telecommunications operator PT Portugal, before notification and before approval of the transaction by the Commission.[1]

The EU merger control system is built on procedural rules that companies must respect. Among these is the requirement that companies notify their planned transactions of EU dimension to the Commission (known as the notification requirement) and also that merging companies do not implement their planned mergers until they are cleared by the Commission (known as the standstill obligation). Breaches of these rules are commonly referred to as gun-jumping.

Compliance with these obligations is essential for the Commission to review mergers and takeovers effectively. The upfront assessment of concentrations is essential to grant legal certainty and a level playing field for market players as it is very difficult, costly and time-consuming to dissolve a concentration that has already been implemented and almost impossible to undo competitive harm should the implemented transaction produce any anticompetitive effects.

In this case, the Commission found that Altice gained the possibility to exercise control over PT Portugal from the moment that it signed the share purchase agreement and that by giving instructions to PT Portugal on a wide variety of issues, Altice actually exercised control over PT Portugal, prior to clearance by the Commission and in some instances prior to notification. The Commission also found that Altice and PT Portugal exchanged highly confidential information without any appropriate safeguards.

The legal framework

The notification requirement in Article 4(1) of the Merger Regulation and the standstill obligation in Article 7(1) of the Merger Regulation [2] are cornerstones of the ex-ante system of EU merger control, each enshrining distinct legal principles and playing distinct and complementary roles.

Article 4(1), the notification requirement, relates to the act of bringing applicable transactions to the Commission's attention by way of a formal notification, before such transactions are implemented. By providing for the mandatory notification of concentrations, Article 4(1) safeguards the Commission's ability to detect and investigate concentrations.

The standstill obligation enshrined in Article 7(1) states that applicable transactions shall not be implemented prior to their notification or clearance. Article 7(1) therefore goes beyond Article 4(1) by safeguarding against the potentially detrimental impact of a transaction pending the outcome of the Commission investigation. Such safeguards cannot be achieved by notification alone.

Pursuant to Article 14(2) of the Merger Regulation, the Commission may impose fines not exceeding 10% of the aggregate turnover on the undertakings concerned for intentionally or negligently breaching each of these obligations.

In a nutshell

In the *Altice / PT Portugal* case, the Commission fined Altice because it failed to notify its acquisition of its competitor PT Portugal before implementing the deal and because it implemented the deal before the Commission had approved the deal.

Altice had the ability to exercise decisive influence because of rights granted in the transaction agreement that could not be justified for value preservation purposes, and actually exercised control by giving instructions to PT Portugal.

The Commission considers such infringements to be serious as they can undermine the effectiveness of the EU merger control regime.

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[1] In April 2015 the Commission had cleared the Transaction whereby Altice acquired PT Portugal, subject to a remedies consisting of the divestment of Altice's telecoms business in Portugal, comprising the companies Cabovisão and ONI. Commission Decision in case M.7993 – Altice / PT Portugal (Art. 14.2 proc.). See http://europa.eu/rapid/press-release_IP-18-3522_en.htm

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "Merger Regulation")

The Transaction Agreement

On 9 December 2014, Altice entered into a share purchase agreement with Oi to purchase PT Portugal (the "Transaction Agreement"). As is customary, the Transaction Agreement included a number of clauses, known as restrictive covenants, which determined how PT Portugal should be run by Oi during the period between when the Transaction Agreement was signed, and when the transaction closed and Altice took full legal ownership of PT Portugal. Accordingly, from the moment it was signed, the Transaction Agreement gave Altice the ability to determine certain of PT Portugal's actions.

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 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.

However, such an agreement is only justified under the Merger Regulation if strictly limited to that which is necessary to ensure that the value of the target is maintained. It follows that an agreement that affords 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 under the Merger Regulation and can be considered as a breach of the notification requirement and the standstill obligation.

Restrictive covenants take a variety of different forms in transaction documentation 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. In this instance, the obligations on how Oi ran the PT Portugal business included a wide range of actions that Oi could not take without Altice's prior consent.

The Commission found that the rights afforded to Altice in three specific areas, individually and collectively, gave Altice a legal right to intervene in PT Portugal's business beyond that which was necessary to guarantee maintenance of its value between signing and closing, and gave Altice the possibility to exercise decisive influence over PT Portugal.

First, the possibility for Altice to influence the employment of PT Portugal's **senior management**. 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.

In this case, Altice's consent was required before Oi could appoint any new officer or director, or terminate or amend the terms of their contracts, irrespective of whether retention of that director or officer was integral to the value of the business. The Commission considers that this gave Altice the power to exercise decisive influence over the identity of the whole of PT Portugal's 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.

Second, the possibility for Altice to influence PT Portugal's **pricing policies**. Altice's consent was required before modifications to PT Portugal's pricing policies, standard offer prices and for certain amendments to the existing standard terms and conditions for customers.

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. The requirement to obtain Altice's consent prior to modifying its pricing policies and standard offer prices inherently reduced PT Portugal's discretion and ability to act independently on the market. The Commission therefore concludes that Altice's veto right over PT Portugal's commercial decisions went beyond what was necessary to guard against material changes to its business for the purposes of preserving its value.

Third, the possibility for Altice to influence PT Portugal's **entry into, termination or modification of contracts**. The Commission considers that having a degree of oversight over contracts which a target can enter into, and the commitments it can make, 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 concludes that the range of contracts and actions 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 level of the monetary thresholds above which Altice's consent was required, and the definition of the types of contracts and actions that were covered. The Commission considers that having a veto right over almost all commercial actions, with a low monetary threshold in the context of PT Portugal's business, went beyond what would be necessary to guard against material changes to its 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.

The Commission's decision makes clear that the relevant legal test is whether the acquirer has the possibility to exercise decisive influence; while the possibility to exercise decisive influence must be effective, it is not necessary to show that the decisive influence was actually exercised.

Actual exercise of decisive influence

The Commission found that from the moment that the Transaction Agreement was signed, Altice was heavily involved in the decision making processes at PT Portugal. This involvement was both within the framework provided for in the Transaction Agreement but also in situations where Oi was not obliged to obtain Altice's agreement. Essentially, a variety of commercial decisions were not made unless and until Altice consented.

In practice, PT Portugal sought Altice's instructions, and agreed to implement, or actually implemented Altice's instructions in a number of instances. On those occasions, Altice also received commercially sensitive information from PT Portugal. By way of example, Altice gave instructions on targets to be achieved and the duration of a commercial campaign designed by PT Portugal to increase the number of its post-paid mobile subscribers. Altice was also involved in decisions regarding TV channels to be included in PT Portugal's retail TV offering: Altice set the targets and negotiating strategy for the renewal of a contract with an existing TV channel supplier and was also involved in the decision whether to include a new TV channel in PT Portugal's offering. Altice also took part in establishing the process for the selection of radio access network suppliers and in defining the terms for the negotiation of an agreement for the supply of movies to be distributed in PT Portugal's video-on-demand platform. Altice gave extensive strategic guidance and instructions on how PT Portugal should negotiate with its co-owners in the company SIRESP, in a manner that went further than required for the preservation of the Target's value. Altice was also involved in decisions concerning investments to be made to fulfil an existing contract with a Portuguese agri-business.

The Commission's decision is clear that it is not the number of the target's decisions that the acquirer is involved in that is relevant to establishing whether its behaviour constitutes early implementation, but the nature of the decisions it is involved in.

Another manner in which Altice was involved in the decision making process of the Target was through systematic and extensive provision of commercially sensitive information by PT Portugal. This took place during meetings between the management of the two companies, and 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 the agenda for the meetings and requesting specific information from PT Portugal in the follow-up of the meetings.

During meetings Altice received strategic information on PT Portugal's commercial targets and behaviour in the market, tariffs, margin, costs, average revenue per user and details on PT Portugal's network, none of which was in the public domain. The information was extensive and granular and covered key activity areas of PT Portugal's business and its financial results.

The decision notes that the exchanges 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.

In addition, through bilateral communications with the Target, Altice received granular, non-historic information of a strategic nature on future pricing strategies and up-to-date key performance indicators.

Fine

Under Article 14(2) of the Merger Regulation, the Commission may impose fines not exceeding 10% of the aggregate turnover on the undertakings concerned for intentionally or negligently breaching Article 7(1) and 4(1) EUMR. In this case, the fine was imposed on Altice as the obligation was on it to notify the transaction as the acquiring party.

In setting the fine, the Commission first took account of the nature of the infringement. The Commission considers that any infringement of Article 4(1) and Article 7(1) of the Merger Regulation is, by nature, a serious infringement because such infringements undermine the effectiveness of the Merger Regulation. The fact that the legislator set the same maximum fine thresholds in the Merger Regulation as in Regulation No. 1/2003 for breaches of Articles 101 and 102 TFEU highlights the seriousness of such infringements.

With regard to the gravity of the infringement, the Commission took into account that Altice's infringement was intentional, or at the very least negligent. Moreover, the fact that the transaction raised serious doubts as to its compatibility with the internal market because of the loss of competition between PT Portugal and Altice's Portuguese businesses (Oni and Cabovisão) increased the gravity of the infringement. Indeed, the transaction was only cleared following Altice's commitment to divest its Portuguese operations to remove the overlap between the parties.

The Commission considers the duration of the infringement of Articles 7(1) and 4(1) to be different. The failure to notify a transaction in breach of Article 4(1) is an instantaneous infringement; accordingly, it was committed on 9 December 2014 when the Transaction Agreement was signed. 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).

The Commission did not take any mitigating or aggravating factors into account.

Conclusion

This case is another example of the Commission imposing fines on companies for failing to respect the procedural rules set out in the Merger Regulation, which ensure that the EU merger control system functions effectively.

This case underlines that gun-jumping can take a variety of forms, for example, the acquisition of shares as in *Marine Harvest*[3] and *Electrabel*[4] or rights derived from the transaction documentation and the conduct of the merging parties as in this case.

The Commission recognises that the limited and controlled exchange of confidential information in due diligence between parties contemplating a merger is a normal part of commercial negotiations. Equally, once the transaction agreement has been signed, the acquirer has the right to be kept up to date regarding the business they are buying. It is also standard that the acquirer has some say over decisions that could materially change the scope, value or nature of the business they are buying once they have signed on the dotted line. This decision makes it clear however that such oversight before notification and clearance can only be justified as far as it is truly necessary to maintain the value of, and prevent material changes to, the target. Unconstrained information flows and control beyond this, however, cannot be justified, and therefore constitute a violation of the rules.

[3] Case T-704/14, Marine Harvest v. European Commission ECLI:EU:T:2017:753

[4] Case T-332/09, Electrabel v. Commission, 12 December 2012, EU:T:2012:672