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Suspensory Effects of Merger Notifications and Gun Jumping - Note by France

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More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

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1. Introduction - The aims of pre-merger control

1. The French competition law regime includes an *ex ante* administrative control on merger transactions, which places companies under an obligation to file a clearance request in accordance with the statutory deadlines and in the prescribed form and manner.

2. As set out in Articles L. 430-3 and L. 430-4 of the French Commercial Code (*Code de commerce*), "the concentration must be notified to the *Autorité de la concurrence* prior to its completion" and it can only be effectively completed "after the *Autorité de la concurrence* has given its consent"[1].

3. A suspensory effect thus applies to the planned transaction, while the competent regulatory authority analyses its effects on competition. This is known as a *standstill* obligation.

4. Many other legal systems have opted for a mandatory *ex ante* merger control regime with a suspensory effect. This is the case in the United States, the European Union and all its Member States, except the United Kingdom, and, as the Secretariat of the OECD's Competition Division[2] has noted, many other countries across the world.

5. The general aim of this system is to guarantee the existence of an efficient and competitive market, the functioning of which is not affected by the creation or strengthening of a dominant position or purchasing power that is likely to harm competition. Compliance with the standstill obligation is essential to this aim, so as to allow the competition authorities to analyse the impact of mergers on the market, as well as identify and, define the necessary measures to remedy or prevent any adverse effects on balanced competition.

2. Close supervision by the *Autorité* to ensure compliance with its procedures

6. Effective implementation of pre-merger control requires strict compliance with the procedure by businesses and close supervision by the competition regulator. Therefore, as tasked by law, the *Autorité de la concurrence* closely supervises compliance with its procedures, and can start proceedings *ex officio* if it suspects any infringement of the law.

7. A distinction should be made between two categories of infringement of the abovementioned provisions, though the term *gun jumping* can be used to refer to either. The first is the failure to notify the relevant competition authorities of a merger. The second is the completion of a merger prior to obtaining clearance by these same authorities.

[1] This article also sets out the conditions under which it is possible, by way of an exception, to be exempt from this standstill obligation, for example in the case of insolvency proceedings or the risk of imminent bankruptcy of the target company (see points 124 to 133 of the Merger Control Guidelines of the *Autorité de la concurrence*).

[2] OECD, Suspensory *Effects of Merger Notifications and Gun Jumping*, Background Note by the Secretariat, DAF/COMP(2018)11

8. In the former case, that of completing a concentration transaction subject to control without first notifying the authority, the companies in question will be liable to sanctions as set out in Article L. 430-8-I. They will be ordered to notify the merger, or return to the state prior to the merger transaction, subject to payment of a fine that shall not exceed 5% of pre-tax turnover generated in France during the last closed financial year. Completing a merger that does not benefit from the exemptions provided for, prior to a decision by the *Autorité* renders the companies liable to a financial penalty as set out in Article L. 430-8-II, which is the same as the amount referred to in Article L. 430-8-I.

9. The *Autorité de la concurrence* has imposed fines for failing to notify a merger on three occasions. In December 2013[3], Copagef, the parent company of Castel Frères, was fined four million euros for failing to submit the acquisition of six companies in the Patriarche Group to the examination of the *Autorité* prior to the transaction being carried out. The *Autorité* was informed that the merger had been carried out by a third party, during its examination of another acquisition in the sector. In this case, it was shown that the company had deliberately avoided checking whether or not the transaction was subject to control.

10. The French Administrative Supreme Court (*Conseil d'Etat*), ruling on Copagef's appeal, reduced the fine but otherwise upheld the lawfulness of the decision. It considered that the *Autorité* had rightly taken into account the need for the fine to act as a deterrent, particularly in light of the intrinsic seriousness of the company's failure to notify the merger, which undermines the *Autorité*'s merger control powers and its duty to safeguard public economic order. In view of that fact, Copagef's failure to notify cannot be regarded as mere oversight.

11. While both categories of infringement involve a failure to comply with the obligation to obtain clearance from a competition authority before implementing a merger, the characteristics of cases where the merger is implemented after notification but before obtaining clearance are quite specific. The term *gun jumping* is used solely to refer to the latter in what follows. These two categories can be distinguished both timewise, because the standstill obligation may be breached either before or after notification, and materially, because the premature completion of a merger does not constitute a mere formal breach of a procedural obligation but requires that the competition authority demonstrate, by means of a body of evidence, that such completion was effective before the merger was cleared.

12. *Gun jumping* practices present specific and serious risks to the market. Not only can they disrupt or distort the market, they can also lead to pre-emptive rights being exercised, or to a situation in which acquired rights may have economic and social consequences. Closing a notified merger before obtaining clearance may also hinder the *Autorité de la concurrence*'s review, affecting the result of its investigations and preventing it from making an objective analysis of the impact of the merger. In addition, any information-sharing and agreements made during the standstill period between two companies required to remain independent would likely be subject to investigation, for example, regarding the sharing of sensitive information. In such cases, it is crucial to sanction such practices firmly, especially when they are the result of a deliberate strategy.

[3] Decision 13-D-22 of 20 December 2013 regarding the situation of the Castel Group in light of Article L. 430-8 of the French Commercial Code

13. This was the message the *Autorité* wished to send in its decision of 8 November 2016[4] regarding the Altice-Numericable case.

3. The Altice-Numericable case

14. Numericable Group (hereinafter referred to as "Numericable") is a cable operator in the Internet access, mobile telephone and Pay TV markets, as well as in the electronic business communications markets. In 2014, Numericable was under the control of Altice, a holding company at the head of several subsidiaries operating in the electronic communications sector.

15. In 2014, Altice-Numericable Group notified the *Autorité de la concurrence* of two merger transactions.

16. Numericable's acquisition, from Vivendi, of SFR (*Société Française de Radiotéléphonie*), a company primarily active as a mobile phone, broadband and superfast broadband, landline, Pay TV and business services provider, was notified on 5 June 2014 and cleared subject to commitments, following an in-depth examination procedure, by the *Autorité*'s Decision 14-DCC-160 of the 30th of October 2014.

17. Numericable's acquisition of sole control, through a bid accepted by the shareholders, of the OTL Group (Omer Telecom Limited), a UK-based company that provides telecommunications services under the Virgin Mobile brand, was notified on 25 September 2014 and cleared without commitments by Decision 14-DCC-179 of the 27th of November 2014.

18. The *Autorité* found that a number of clues - from competing operators in particular - pointed to possible gun jumping in connection with both acquisitions. Therefore, on the 2nd of April 2015, it conducted dawn raids at the Numericable, SFR and OTL premises.

19. Following its review of the situation, the *Autorité* found that the combined practices amounted to gun jumping, based on the general analysis grid for determining whether decisive influence[5] had been acquired before the clearance decision was issued.

20. The behaviour identified consisted, first, relative to the acquisition of SFR, in the control exercised by Numericable over SFR's strategic decisions, the strengthening of ties between Altice and SFR, and information sharing, and second, relative to the acquisition of Virgin Mobile, in Numericable intervening in the management of Virgin Mobile based on the terms of the Share Purchase Agreement (hereinafter referred to as the "SPA"), the appointment of senior executives before the merger had been cleared, and information sharing.

21. Thus, certain practices – the buyer exercising control over the target company's strategic decisions, sharing strategic information – were common to both mergers, while others were specific to one or the other – strengthening business ties during the standstill period, the appointment of senior executives prior to clearance.

[4] Decision 16-D-24 of 8 November 2016 relative to the situation of the Altice Group in light of Article L. 430-8 Section II, of the French Commercial Code (*Code de commerce*)

[5] Whether or not a decisive influence, also known as "*de facto* control", is acquired is determined with regard to all circumstances in law and in fact using the analysis grid given in Sections 47 and following of the Merger Control Guidelines.

4. Behaviour common to both transactions

22. Regarding control over strategic decisions, these two transactions were subject to SPAs containing different terms. In the case of the SFR acquisition, the arrangements proposed in the SPA were apparently limited to a conventional clause protecting the buyer against any loss in value of the target company during discussions. In the case of the Virgin Mobile transaction, the *Autorité* found that the very terms of the SPA were enough to allow Numericable to exercise tight control over Virgin Mobile. However, in both cases, the buyer's prior approval was in fact sought before several strategic decisions were taken, implying the exercise of *de facto* control.

23. In both cases, the buyer intervened on many occasions in strategic decisions regarding the operational activities of the target company or in its day-to-day running.

24. So, we should note for example that, contrary to the terms of the SPA, SFR's involvement in a bid for a fibre optics network contract had to be submitted to Altice first, and that SFR and Altice had coordinated over the takeover of the OTL group, resulting in Altice acquiring the group instead of SFR.

25. In the case of Virgin Mobile, the buyer, in application of certain provisions in the SPA, was able, for example, to intervene and approve two agreements being negotiated between OTL and a third-party operator, Orange, expressly referring to the interests of the future entity after the merger, and to approve OTL's use of overdraft facilities previously negotiated with the banks.

26. It was also found that, in both cases, the parties shared a great deal of strategic information, outside the scope of *due diligence*. In the case of SFR, "pre-integration" meetings arranged for key management executives were actually organised to give the buyer an exhaustive review of SFR's activities and information regarding its sales strategy. For Virgin Mobile, the buyer set up a system to monitor the target company, and was sent documents containing detailed information on OTL's sales performance – which was similar to the information disclosed by Numericable to its own controlling shareholder, Altice.

5. Behaviour specific to one or the other of the two contentious transactions

27. Certain behaviour was only seen in one of the two merger transactions. In the case of SFR, the strengthening of business relations during the suspensory period, the implementation of coordinated strategies before clearance was obtained – of which SFR's plans for the launch of a new range of superfast broadband services using the Numericable network reflect a clear shift in the target company's strategy – form a particularly blatant example. In the case of Virgin Mobile, the appointment of Virgin Mobile's CEO to the Board of SFR-Numericable Group, prior to obtaining clearance for Numericable's acquisition of OTL, was announced in-house in terms that played down the fact that the appointment was conditional upon clearance and, more seriously, he took up this position within the SFR-Numericable Group without waiting for clearance of the acquisition.

6. The fine for *gun jumping*

28. In light of the fact that, regardless of whether or not assets were transferred, the buyer had acquired decisive influence over the target company, the *Autorité* found that, in both cases, the merger was implemented during the standstill period. The influence was demonstrated with regard to all circumstances in law and in fact, before the date on which clearance was issued.

29. Given that such behaviour infringes the rules set out in Article L.430-8, Section II of the French Commercial Code, the *Autorité* ordered Altice Luxembourg and SFR Group to pay a joint fine of 80 million euros for having implemented two mergers before they had been cleared.

30. To determine the amount of the fine, the *Autorité* took into account the scale of the mergers and their impact on the telecommunications sector, the extent and accumulation of behaviour that infringed the law, the scale of the target companies' activities affected by these practices, the duration of the violations, and the intentional nature of the behaviour, made worse by the fact that the behaviour was repeated in both cases. Nonetheless, in calculating the amount of the fine, the *Autorité* also took into account the parties' choice to accept the transaction proposal and not contest the reality of the infringement in question nor its legal characterisation.

31. The decision has raised a great deal of discussion among legal practitioners specialising in company and competition law. The *Autorité* has endeavoured to clarify the impact of its decision, together with the reasoning behind it and the lessons to be learned. To this end, it has taken part in many discussions (for example, during the "Rendez-vous de l'Autorité" which it held in Paris on 23 March 2017). A dialogue has been opened up with the legal profession, notably under the umbrella of the APDC (association of competition law practitioners). Further insight has also been provided thanks to the publication of an article in a law review, signed by the President of the *Autorité de la concurrence*.

7. Lessons that can be learned from the Altice-Numericable case

32. The decision of the *Autorité* has resulted in the identification of certain types of behaviour that, during the standstill period, require notifying companies to be especially vigilant.

8. Management of the target company

33. The usual practice in drawing up an SPA takes into account the legitimate objective of preserving the value of the target company between the time of signing the SPA and *closing*. Such *covenants* usually include clauses relative to an "ordinary course of business" obligation or a ban on making investments above a certain amount.

34. It must be stressed that the decision regarding Altice does not in any way undermine the principle of drawing up SPAs. Indeed, the SPA itself, drawn up for the acquisition of SFR by Numericable, was not regarded as problematic[6].

35. The SPA may therefore legitimately aim to preserve the value of the target company, provided that the aim is set out in terms proportionate to that end. The principle according to which the competition regulator assesses the terms of the SPA is based on the strict alignment of the terms to that end, i.e. to protect the buyer in the event that the target company makes a decision that would have a significant impact on its value.

36. However, provisions that would lead to the buyer interfering in the target company's business are likely to be regarded as problematic.

37. In the case before us, "the SPA agreed between Numericable and the sellers of OTL granted Numericable extensive rights, including the right to control strategic decisions for OTL."[7] The seller was thus tied to a very low level of investment during the interim period, and undertook not to take certain decisions, for example, decisions relative to signing major contracts, or to opening new stores under the brand – without prior authorisation from the buyer. Interference in the target company's "ordinary course of business" was thus provided for, whereas, for the purposes of the objective of safeguarding the value of the target company, the clause in the SPA should have applied only to exceptional decisions.

38. Regardless of the terms in the SPA, its application may be problematic.

39. In the case of Altice's acquisition of SFR, the SPA included clauses restricting the independent management of the target company, which did not in themselves appear to be problematic, since they did not provide for either direct intervention in the target company's decisions, nor did they place the target company under any obligation to seek authorisation from the buyer. Nonetheless, in practice, the parties felt that SFR should submit certain decisions regarding investments during the standstill period for approval by Altice. In such a case, the competition regulator looks to see whether, due to their nature, impact and number, these interventions, which exceeded the rights of the buyer as agreed in the SPA, may have given it a decisive influence over the target company. The *Autorité* indeed determined this to be the case in the transaction between Altice and SFR.

9. Preparing for integration of the companies

40. Preparations for a merger usually entail a need for buyer and seller to share a great deal of information, and there are various solutions available to protect them against the risks to competition that may result from such information-sharing.

41. The merger control authority checks that any exchange of information is proportionate in terms of content and that the information is transmitted securely. This is assessed on the basis of criteria similar to those used for analysing exchanges of strategic information in the case of horizontal agreements.

[6] Section 205 of Decision 16-D-24 of the 8th of November 2016: "The clauses in the SPA signed between Vivendi and Altice did not, in themselves, dictate Altice's control over SFR, nor did they necessarily imply any such control."

[7] Section 303 of Decision 16-D-24 of the 8th of November 2016

42. In the case before us, the *Autorité* found that highly sensitive information had been exchanged systematically and at the highest level of management.

43. The *Autorité* analysed the content of the information shared between Altice and SFR at the "pre-integration meetings" held, which was found to be extremely detailed and covered all SFR group's activities. The information was found to relate to the target company's sales strategies, technological developments and future pricing, and, in addition, was exhaustive in nature. It also examined the recipients, as well as the strategic and confidential nature of the information in question, and the purpose of these exchanges, geared not only towards drawing up the bid or negotiating the terms of the SPA but actually preparing to complete the merger.

44. All these parameters are examined to ascertain whether the information shared was justified for the purposes of the transaction, or likely to contribute to the acquisition of *de facto* control.

45. As well as this link between information sharing and the requirements for conducting the transaction, the issue of safeguards is another important factor that needs to be taken into account. In this case, the *Autorité* noted that not one of the methods that can be used by companies to secure information sharing (using a third party, setting up *clean teams* that may or may not include employees, etc.) is preferable to another, and the choice of safeguard measures implemented is dependent on the nature of each transaction.

46. Preparing to integrate the companies may also include the announcement of a future appointment to an executive post, conditional upon obtaining clearance for the merger from the competition regulator. Here, however, the *Autorité* found that the CEO of OTL had been involved in various projects relating to the new post-merger entity, not only before officially taking up his post as a member of SFR-Numericable's Executive Board, but also before clearance for the merger had been obtained.

10. Economic relations between the parties to the transaction

47. In addition to information sharing, other preparations are necessary, which may affect the economic relations between the parties. However, during the standstill period, the buyer and the target company must continue to be independent businesses. If they both operate on the same markets, then they must act as competitors, and if their relations are those of customer/supplier, they must continue to operate as two separate companies.

48. This principle is to be used as a guideline in the competition regulator's assessment of whether or not the buyer has exercised *de facto* control on the target company, and which may be apparent in, for example, the parties signing or implementing agreements for the purposes of the future transaction and in the interests of the future entity.

11. To conclude, the Altice-Numericable case was examined on the basis of the following aspects

49. As noted in the Decision, the purpose of *ex ante* merger control is to "prevent the parties to the transaction from ceasing, prior to the clearance date, to behave like competitors and instead behaving like a single entity and to prevent the buyer from

prematurely exercising control over the target in law or in fact[8]". The *Autorité*'s review also focused on determining whether the behaviour(s) in question enabled the buyer to prematurely, since prior to the clearance decision, acquire decisive influence on the target company, as determined using the criteria set out in the guidelines drawn up by the *Autorité*, with regard to all circumstances in law and in fact.

50. It is perfectly legitimate for an SPA to include clauses and mechanisms that protect the buyer in the event of a loss in value of the target company between the time of signing the SPA and *closing*. However, such mechanisms must not go further than what is strictly necessary to achieve that end.

51. The *Autorité* took into account a number of facts making up the body of evidence that resulted in its determination that *de facto* control was acquired and, as a result, in characterising the offence as gun jumping.

52. This evidence includes the fact that the parties had prematurely ceased to behave as separate companies and acted in the interests of the future merged entity. Regardless of the need to prepare for a merger, it is essential that the companies involved ensure that they continue to act independently, in line with their situation as competitors or their normal customer/supplier relations, depending on the circumstances.

53. In the Altice-Numericable case, it was a number of different types of behaviour that combined to demonstrate the premature acquisition of *de facto* control by Altice over SFR and OTL. Taken individually, no one type of behaviour would necessarily be sufficient to constitute gun jumping – nor should it be inferred that the same series of facts must be demonstrated in order to classify the offence as gun jumping. Close attention must be given to all behaviour during the standstill period, to ensure that, as a result of either one specific type of behaviour or of a combination of practices, companies do not get into a situation where the buyer prematurely acquires decisive influence over the target company, which would put them at risk of being sanctioned by the competition regulator.

[8] Section 187 of Decision 16-D-24 of 8 November 2016