



Altice – The Issues

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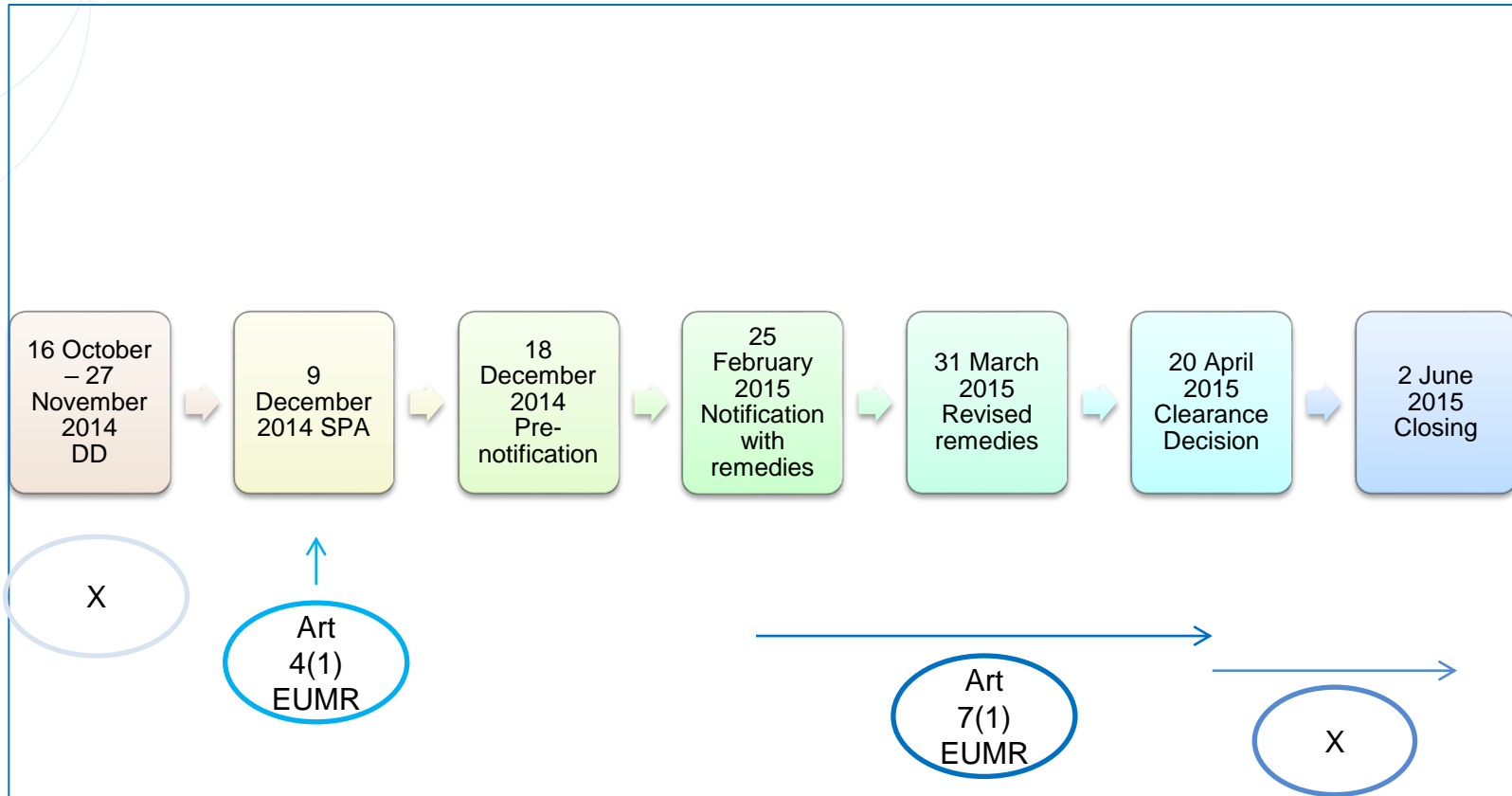
Agenda

- Conceptual Framework
- Facts
- Commission Decision
- Grounds for annulment
- Issues

Conceptual Framework

	DD	OCB-Clause as such	OCB-Clause in operation	Pre- integration
101 TFEU Information Exchange	Potential applicability	X	Potential applicability	
4(1) EUMR Notification obligation	X	Potential applicability		
7(1) EUMR Standstill obligation	X			

Facts and qualification by the Commission



Decision – Framework

- 32 – Article 3(1) and (2) EUMR
 - * Acquisition of control
 - * De jure or de facto
 - * Possibility of exercising decisive influence
- 38-41 – Distinction between Articles 4(1) and 7(1) EUMR
 - * Article 4(1) Positive obligation + Powers of the Commission
 - * Articles 7(1) Negative obligation + Safeguarding of effective competition
- No mention of Article 101 TFEU in relation to exchange of information

Decision – Conduct qualification

	SPA	Influence on decision making	Exchange of information
Article 101 TFEU		X	
Article 4(1) EUMR		Infringement 1	
Article 7(1) EUMR		Infringement 2	

SPA - Clauses

- Article 6.1(a): PT Portugal to be run within OCB
- Article 6.1(b): Prohibition without prior approval of Altice
 - * (ii) Enter into transaction or incur liability > [...] EUR
 - * (iii) Commitments exceeding 3 months and > EUR
 - * (vii) Enter into, terminate or modify Material Contracts
 - * (ix) Acquire assets > [...] EUR except as provided for in budget
 - * (xii) Contracts with Oi
 - * (xiii) Payment of dividends
 - * (xviii) Recruit any new director or officer
 - * (xx) Terminate or amend contract with any director or officer except for cause or in ordinary course of business
 - * (xxi) Settling litigation > [...] EUR
 - * (xxvi) Amend pricing policies or standard offer prices other than as reflected in budget, excluding day to day action with specific customers
 - * (xxvii) Enter into, terminate or modify Material Contracts other than for cause or OCB

SPA - Clauses

- “Material Contracts”
 - * Value > [...] EUR
 - * “Communication Agreements”
 - Schedule 5.15(a)
 - Wholesale
 - Providers
 - TV Channel suppliers
 - Network infrastructure
 - Smartphone distribution
 - Value > [...] EUR
- Reduction of the value thresholds upon one month from signing
 - * 96: Oi: to give time to adjust in respect of pre-existing internal Oi thresholds

SPA - Assessment

- 70 – OCB-Clauses are common and appropriate to protect the value of the target between signing and closing
- 71 – However, a strict proportionality test applies
 - * May not impact target's OCB
 - * May not impact target's commercial policy
- 73 – Having the contractual right to influence target's behaviour is sufficient
- 74 a.f. – Staff
 - * Formulation too broad (“any officer or director”)
 - * Effect too broad (“possibility to co-determine structure of senior management”)
 - * Commission does not discuss “except for just cause” carveout

SPA - Assessment

- 78 a.f. – Pricing policies
 - * Pricing policy is a fundamental part of a company's commercial policy
 - * Veto right goes beyond what is necessary
- 85 a.f. – Material contracts
 - * Low thresholds
 - Based on negotiation and not on proportionality assessment
 - Commission looks at value and turnover over PT Portugal
 - Lower than pre-existing Oi thresholds
 - Commission looks at contracts disclosed in data room
 - * Contracts within OCB are covered
 - Discussion on discrepancy between (vii – no OCB carveout) and (xxvii – with OCB carveout)
 - Discussion on whether or not a value threshold applies to the Communication Agreements

SPA - Altice defense

- OCB Clause does not go further than necessary
 - * EC: No, distinction with protection rights
 - * EC: Possibility to apply for derogation from standstill obligation
- OCB Clause did not result in control
 - * Not a minority protection consent right, but a consultation right
 - * “Not unreasonably withheld” – EC: common limiter
- Altice did not interpret ACB Clause as conferring control
 - * EC: Possibility and not exercise
 - * EC: Possibility was effective

Exchange of sensitive information

- From PT Portugal to Altice between signing and clearance
- Strategic, commercially sensitive, extensive and granular
- Altice defense
 - * Ancillarity with regard to DD and pre-integration
 - EC: DD had already been completed
 - EC: No confidentiality arrangements
 - * Altice MT was the actual clean team
 - EC: No arrangements
 - EC: Altice MT was commercially involved
 - * Exchange of information does not amount to control
 - EC: Test is not whether CSI was used to exercise decisive influence



Fines

- Separate infringements for 4(1) and 7(1)
- No fining guidelines
- Nature
 - * Independent of outcome of notification
- Gravity
 - * At least negligence
 - * Doubts as to compatibility with internal market
- Length
 - * “Instantaneous infringement” of Article 4(1) on signing date
 - * Continuous infringement of Article 7(1) until clearance, 4 months and 11 days
- No mitigating or aggravating circumstances
- Two distinct fines of EURM 62.25
 - * No quantitative explanation as to where these figures come from

Grounds in Case T-425/18

OJ 2018 C 341/31

- Notion of “implementation” of a concentration
 - * Legality principle/Lex certa (49(1) EUFRC/7 ECHR)
 - * Presumption of innocence (48(1) EUFRC/6(2) ECHR)
 - * “Implementation” requires more than the possibility of exercising decisive influence
- Error in fact and in law as to the finding of acquisition of control
- Error in fact and in law as to infringements
 - * SPA
 - * Exercise of control
 - * Exchange of information
- Distinct fines
 - * *Ne bis in idem* (50 EUFRC/4(1) P 7 ECHR)
 - * Proportionality (49(3) EUFRC)
- Fines as such

Issues covered

- OCB-clause
 - * Possibility or exercise?
 - Article 3(2): Possibility
 - * Is acceptable if it is strictly necessary
- Exchange of information
 - * Can be acceptable for DD, OCB or pre-integration purposes if certain confidentiality safeguards are in place
 - * EC does not dismiss clean team approach as such (Cf French Altice Decision)
 - * Confirms requirement that clean team members may not be commercially active

Issues not covered

- OCB clause
 - * Rights equal to minority protection rights
 - CJN: Do not confer control
 - * Ancillarity
 - Is a valid defence in relation to 101 TFEU, but in relation to the EUMR?
 - * Contracts: what is proportionate?
 - * Key employees: what is proportionate, assuming that only key employees are concerned?
- Exchange of information
 - * 4(1)/7(1) EUMR or 101 TFEU?
 - * Between clearance and closing?