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Uncertainties Surrounding Gun-Jumping in Portugal: You Better Not Jump the Gun!

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As in most jurisdictions, the Portuguese Competition Act ('PCAct') provides for an *ex-ante* merger control regime, according to which concentrations above certain thresholds are subject to mandatory pre-notification. Three alternative thresholds apply *i)* a turnover threshold, *ii)* a standard market share threshold and *iii)* a *de minimis* market share threshold (*see* Article 37 of the PCAct).

Together with its mandatory notification, the law provides for an obligation not to implement the operation until the Portuguese Competition Authority ('PCA') has cleared the transaction [1] – the famous 'standstill obligation'. While these rules are not new and the PCAct contains provisions on the calculation of the market share and the turnover of the undertakings concerned which follow closely the EC Merger Regulation, an erroneous interpretation and application, both the concept of concentration as well as of the applicable jurisdictional thresholds render the risk of *jumping the gun* particularly high.

As recent decisions and other indicia seem to suggest, gun-jumping, that is, the implementation of a merger before its mandatory notification and a clearance decision by the competent authority may well be in the spotlight of the competition watchdog in the time ahead.

Since 2017, the failure to file concentrations subject to prior notification has given rise to six sanctioning decisions by the PCA, three of which were issued in 2021 and the most recent one in September 2022. [2] Even though the policy of detecting and investigating unnotified mergers was already included in the Competition Policy Priorities for 2016, 2017, 2018 and 2020 [3], **the year 2021 may well mark the beginning of a 'new era' in the Portuguese merger control regime**. Demonstrative of this is the text of the Competition Policy Priorities in 2022, which reads as follows: "*the AdC* [PCA] *will continue to pay attention to mergers which fail to comply with the obligation of prior notification, or which were implemented prior to their approval (gun-jumping)*".

There are many uncertainties surrounding this new era, though. And the latest decision on gun-jumping – the *SCML* case – from 6 September 2022, is good proof of that. According to the PCA and building on the Court of Justice of the European Union's ('CJEU') case law, two different infringements were at stake: *i)* the failure to notify a concentration that meets the relevant jurisdiction thresholds and *ii)* the implementation of such concentration without a clearance decision by the PCA.

As developed in more detail below, the question of whether there is *i)* a single infringement or, on the contrary, *ii)* two distinct infringements, which pursue different objectives, does not seem to be settled, though. At least not under the Portuguese competition law provisions, and certainly not as assertively as the PCA puts it in recent cases.

The facts of the SCML case

The *SCML* case relates to a share purchase agreement that, according to the PCA, amounted to a concentration subject to prior notification. In particular, *Santa Casa da Misericórdia de Lisboa* ('Target') acquired a majority shareholding in the share capital of *CVP – Sociedade de Gestão Hospitalar, S.A.* ('Acquired company'), the management company of *Hospital da Cruz Vermelha Portuguesa* ('*HCVP*'), which, in the absence of any shareholder agreement that could rule that out, conferred the Target the ability to exercise, on a lasting basis, decisive influence over the activity of the Acquired company. Since the transaction was subject to prior notification pursuant to the PCAct, and in light of the fact that the Target only notified after the concentration had been implemented, [4] the 'standstill obligation' was not complied with and the Target was sanctioned with a fine of €2.500.000 for gun-jumping.

While the PCA firmly alleged that the Target acted freely, consciously and voluntarily, knowing or being aware that the conduct imputed to it was prohibited by law, [5] the case's contours are much more complex and do not reveal, at least *prima facie*, such a state of mind. [6]

Indeed, throughout the proceedings, the Target stated that when the transaction in question was negotiated, it considered that none of the jurisdiction thresholds (turnover threshold or market share threshold) outlined in Articles 37(1)(a), (b) or (c) of the PCAct had been met. And even if the PCA concurred that none of the market share criteria were met, it disagreed with the Target as to the fulfilment of the turnover threshold.

In particular, the dispute between the parties stemmed from a fundamental disagreement on the meaning of '*consolidated turnover*', in the sense of Article 39(3) of the PCAct. According to this provision, the turnover to be considered, by reference to each undertaking concerned by the concentration, comprises the value of products sold, and services provided to undertakings and consumers in the Portuguese territory, net of taxes directly related to turnover.

In this case, the truly determinant question was to assess whether the portion of the net operating results generated by the activity of operating social games (whose exploration the Target operated on the basis of a concession) should be accounted for as the Target's '*consolidated turnover'*.

Whereas the Target sustained that the value generated by such activity should be qualified as '*State's revenue'*, the PCA qualified it as '*Target's revenue*', in light of the *ratio legis* underlying the concession. In particular, while the activity at stake is indeed performed for and on behalf of the State, which also controls it, the State's supervisory prerogatives are to be understood in the framework of the protection of the public interest and the exercise of public authority.

All in all, such control does not rule out that the management of these activities is effectively carried out by the Target which can exercise a decisive influence over the activity of operating social games, this rendering the respective revenue part of the Target's revenue.

In addition to the substantive disagreement over the determination of the relevant turnover, this decision is important in that it revisits the problem of the duality of infringements that had already been subject to litigation in the case *Fidelidade – Sociedade Gestora de Organismos de Investimento Coletivo, S.A.* (‘*Fidelidade SGOIC’*).

In that case, building on the General Court’s Ruling in *case Altice Europe NV* [7], the PCA brought forward the argument that, when implementing a merger before its notification to the PCA and a clearance decision, the Target committed two distinct infringements: *i)* an infringement of Article 37(2) and, specifically, of the *positive duty* provided for therein to notify the concentration before it is put into effect, and, *ii)* an infringement of Article 40(1)[8] which contains a *negative duty* not to carry out the said concentration before a decision of non-opposition is issued by the PCA.

Such a *dualism* does not seem however to be embraced by the Portuguese Court of Competition, Regulation and Supervision, as its judgment of 13 June 2022 in the case *Fidelidade SGOIC* seems to show.

Uncertainties, dangerous paths and some food for thought

As far as the Portuguese jurisdiction is concerned, the years 2021 and 2022 have shown the centrality that gun-jumping infringements may assume in the enforcement of Competition Law, and, in particular, in the system of merger control. In its achievements for 2021, the PCA noticed that “*3 sanctioning decisions for gun-jumping were issued, leading to total fines of €395,000 imposed to Fidelidade – Sociedade Gestora de Organismos de Investimento Coletivo, S.A., SFI Group Gestión de Participaciones Minoritarias and AOC Health GmbH*”. In the same year, the PCA issued the Statement of Objections in the procedure that would originate its most recent decision on 6 September 2022.

However, contrary to dangerous assumptions by the PCA, in particular regarding the parties’ intention or, at least, their obligation to know the elements of the type, in these cases, the Targets sought to explain and justify why they had not prefigured the operation in question as subject to prior notification (in Portugal). Besides, as the case files show, as soon as they were aware of the existence of risks, the Targets immediately proceeded and acted in compliance with the law and in a cooperative manner with the PCA. This is a point that deserves further consideration and that cannot be disregarded or pushed aside. In particular, the whole range of uncertainties concerning notification requirements “*need to be balanced against the benefits of ex-ante merger control and of delaying merger implementation for the duration of a standstill obligation*”. [9] As a result, such a *state of uncertainty* must be duly considered when evaluating the elements of the type as well as in determining the amount of the fine.

Indeed, while the system of *ex-ante* notification together with the standstill obligation are considered to be pillars of the whole merger control system and indispensable guarantees for its effectiveness, the rule of law and its subprinciples such as legal certainty permeate the whole system. In light of this, infringement decisions on gun-jumping, rather than simple opportunities for applying heavy fines on undertakings, need to be regarded as forums for the resolution of some of the open questions that, in the actual system of merger control, represent unjustified costs, both to businesses and competition authorities.

With regard, in particular, to the Portuguese experience in the last 2 years of gun-jumping

procedures, there are several issues worthy of further thought. These range from disputes on whether there is a concentration to the interpretation and application of notification thresholds. Both the *SCML* and the *Fidelidade SGOIC* cases pave the way for further discussion and are demonstrative of how uncertainties in merger control remain alive. [10]

As to the *SCML* case, the question of whether revenues generated by activities whose exploitation has been given to an undertaking through concession should be considered part of the undertaking's turnover is of the utmost importance. The question might be formulated as follows: having the State decided to grant an undertaking a concession for the development of a certain activity, to what extent could it be considered that it retains control over that activity, in terms that rule out the qualification of such activities' revenue as 'Target's revenue'? [11] Is it possible to differentiate between supervisory prerogatives that follow a logic of protection of the public interest or public authority and an atomistic logic of control assumed by competition law provisions? Is such an abstract differentiation sufficient or even possible? And if not, which criteria need to be asserted to determine the content of the State's *ius imperii* and its relevance for the competition law logic of control?

A more relevant, or perhaps more urgent topic (given its transversality) refers to the problem of whether the violation of the obligation to notify and of the standstill obligation is to be regarded, in light of the PCAct, as one single infringement or, instead, as two infringements.

Building on the case law of the CJEU, the PCA considered, in both cases that the behaviours at stake consisted of two infringements: *i)* the failure to notify the concentration in violation of Article 37 of the PCAct; and ii) the implementation of the concentration without the respective non-opposition decision by the PCA, in violation of Article 40(1) of the PCAct. Such an interpretation seems to be shaken by the Portuguese Court of Competition, Regulation and Supervision ('Court'), in its judgement in the case *Fidelidade SGOIC.*

In that ruling, the Court took the view that, while the EC Merger Regulation distinguishes between the omission of the duty to notify and the implementation of an operation in violation of Article 7, in two different subparagraphs of Article 14(2) – namely, subparagraphs a) and b), respectively -, the PCAct [12] does not make nor allow for such a distinction. As a result, an equivalence between the two conducts is to be assumed. To use the Court's words, there is "*a continuity and unicity*" subjacent to the formula "*implementation of a concentration between undertakings before there has been a decision of non-opposition in breach of articles 37 and 38, of article 40, paragraph 1 and paragraph 4, subparagraph a)*" (as provided for by Article 68(1)(f) of the PCAct).

To put it simply, contrary to the EC Merger Regulation, the PCAct provides a clear answer in this regard and unifies both conducts, under the umbrella of one single infringement. And while the Court acknowledged that Article 40(1) of the PCAct refers to two identified types of conduct, it did so with a clarifying purpose, rather than assuming that, in the event of cumulation, two distinct *meanings of illegality* are present. [13]

In spite of this ruling, the *dualistic* approach is once again embraced by the PCA in its most recent decision on gun-jumping. In the *SCML case*, a fine was applied to each of the identified infringements. Following legal cumulation, this resulted in a single fine of 2.500.000€.

Lessons for the future? Certainly many. But above all, countless uncertainties and shades of grey. Indeed, besides being a hot topic, gun-jumping is and is expected to continue to be a subject of

controversy. While this does not relieve companies of their duties, it certainly cannot be ignored as a problem or, at least, as a failure of the system. Its resolution, or at least gradual mitigation, is something which is also part of the competition authorities' mission. And it certainly cannot be sidelined.

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[1] In certain sectors, mergers are subject to autonomous (and cumulative) approval by competent regulatory authorities.

[2] By decision of 26 June 2014, *ANF – Associação Nacional das Farmácias* and *Farminveste – Investimentos, Participações e Gestão, S.A.* were also fined for failure to notify a merger subject to mandatory notification,. See the case details here.

[3] The Priorities for 2019 seemed to focus more on celerity and the effectiveness of the control – see the 'Competition Policy Priorities for 2019', available here. As regards the year 2021, the PCA committed itself to base its merger control analysis on the independence and rigour focused on competition law analysis – see the 'Competition Policy Priorities for 2021', available here.

[4] Following an Inquiry Process opened by the PCA to clarify whether the transaction was likely to constitute a concentration and whether it was subject to mandatory notification.

[5] According to the PCA, the Target did not act preventively to comply with its legal obligation of prior notification, since it could always have notified the concentration as a precautionary measure and, in the limit, would obtain an inapplicability decision pursuant to the PCAct.

[6] The same problem arose in other gun-jumping procedures, where, in contrast to the straightforward PCA's conclusions as to the Target's state of mind, the facts of the case are compatible with the existence of an excusable error.

[7] In this ruling, the General Court ruled that "*Article 4(1)(b) and Article 7(1)(b) of the regulation pursue autonomous objectives in the context of the 'one-stop shop' system referred to in recital 8 of that regulation and that Article 4(1)(b) lays down an obligation to do something, which is instantaneous, whereas Article 7(1)(b) lays down an obligation not to do something, which is continuous*." and that "The fact that Article 4(1) and Article 7(1) of Regulation No 139/2004 pursue autonomous objectives accordingly constitutes a differentiating factor which justifies the imposition of two separate fines." – see paras. 262 *et seq*. (in particular, paras. 264 and 270).

[8] Article 40(1) reads as follows: "*A concentration subject to prior notification shall not be implemented prior to being notified, or if this is done, prior to a non-opposition decision by the Competition Authority, express or tacit*". Both are Articles of the PCAct.

[9] On these uncertainties and the costs that delaying merger implementation imposes costs both on merging parties and on society in general, see OECD – DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE. "Suspensory Effects of Merger Notifications and Gun Jumping – Background Note by the Secretariat", DAF/COMP(2018)11, in particular '§2.3. 2.3. Costs of ex-ante merger control and the suspension of transactions', available here.

[10] Indeed, at least as far as *Fidelidade SGOIC* case is concerned, the PCA seemed to have had its doubts, when, in answering the *Fidelidade*'s Request for Preliminary Assessment, stated that "*it could not exclude that such transaction, already occurred, constituted a concentration operation under the terms of the referred Article 36*" – see the PCA's Final Decision, available here. In particular, §3 (our translation).

[11] *See* the case DCC-PCC/2021/3, with details here.

[12] In particular, Article 68(1)(f) reads as follow: "*The following are deemed to be administrative offences punishable with a fine: […] f) Implementation of a concentration between undertakings before there has been a decision of non-opposition in breach of articles 37 and 38, of article 40, paragraph 1 and paragraph 4, subparagraph a), or where there has been a prohibition decision pursuant to article 53, paragraph 1, subparagraph b)*".

[13] See, in particular, §200 *et seq*. of the Judgement, available here.

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