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PRE-CLOSING COMPETITION LAW ISSUES: HOW TO OVERCOME THE GUN JUMPING MANIA AND OTHER COMPETITION LAW RISKS

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Pre-Closing Competition Law Issues: How To Overcome The Gun Jumping Mania and Other Competition Law Risks

The pre-closing phase in a concentration between independent undertakings is a critical and risky phase in terms of competition law, not only because it can trigger the relevant merger control thresholds, in one or several jurisdictions, but also because it can provide the parties, in certain circumstances, with a privileged platform for coordination during a period in which the implementation of the concentration is still uncertain. Within this context, it is of the utmost importance for the parties to adequately consider the risks associated with the pre-closing scenario, especially in view of the increasingly relevant decision practice and case law, at the EU and national level, which resulted in very significant fines and have highlighted the existence of unclear scenarios, which must be carefully assessed.

Key words:

Concentration of Undertakings; Merger Control; Merger Regulation, Portuguese Competition Act; Pre-closing Period; Gun Jumping; Mandatory Notification; Standstill Obligation; Restrictive Practices; Competition Law Risks; M&A Best Practices.

Pré-*closing* em Sede de Operações de Concentração: Como Ultrapassar a *Gun Jumping Mania* e Outros Riscos de Direito da Concorrência

A fase anterior ao closing *numa concentração entre empresas independentes é uma fase crítica e com riscos acrescidos em termos de direito da concorrência, não só porque a existência de uma concentração pode desencadear o preenchimento de limiares de controlo de concentrações, numa ou mais jurisdições, mas também porque pode proporcionar às partes, em determinadas circunstâncias, uma plataforma privilegiada de coordenação, durante um período em que a realização da concentração é ainda incerta. Neste contexto, é da maior importância que as partes considerem adequadamente os riscos associados ao cenário anterior ao encerramento, especialmente tendo em conta a prática decisória e a jurisprudência cada vez mais relevante a nível da UE e a nível nacional, que resultam em coimas muito significativas e aumentaram a existência de cenários pouco claros, que devem ser cuidadosamente avaliados.*

Palavras chave:
Concentração de Empresas; Controlo de Concentrações; Regulamento de Concentrações; Lei da Concorrência; Período Antes da Implementação (Período Pré-*Closing*); *Gun Jumping*; Notificação Obrigatória; Obrigação de Suspensão; Práticas Restritivas; Riscos Jus-Concorrenciais; Boas Práticas em sede de Fusões e Aquisições.

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1. Introduction

In June 2009, the European Commission (“**EC**”) imposed a €20 million fine on Electrabel[1] for allegedly implementing a deal without the EC’s necessary clearance under the European Union (“**EU**”) merger control framework, a surprising decision as, at the time, the highest fine imposed by the EC for gun jumping was €174,000[2]. But the gun jumping mania was only picking up speed. In 2014, a fine of €20 million was imposed on Marine Harvest for a very similar violation[3], in April 2018, the EC fined telecom company, Altice, €124.5 million, for an alleged gun jumping infringement[4], and in June 2019, it fined Canon €28 million for allegedly using a “warehousing” two-step transaction structure when acquiring Toshiba Medical Systems Corporation (“**TMSC**”)[5].

National authorities are also into the gun jumping mania. In November 2016, the French competition authority fined Altice €80 million for the alleged premature implementation of its acquisition of SFR and Virgin Mobile[6]. In 2018, the German Bundeskartellamt imposed a €4.5 million fine on Mars for partially implementing a transaction[7]. On September 2019, the UK Competition and Markets Authority (“**CMA**”) imposed a record fine of £250,000 on PayPal in the context of its acquisition of iZettle[8]. Also, gun jumping issues are becoming a priority for more recently incorporated competition enforcers. For instance, in a rather complex case, Engie, Gazprom, OMV, Shell, Uniper and Wintershall are currently under investigation in Poland for conducts related to the setting up of the Nord Stream Project that may include the non-notification of financing agreements potentially amounting to a concentration, allegedly aiming to circumvent the obstacles raised by the Polish competition authority to the creation of a joint venture, facing a potential record fine[9].

This authority has already imposed an unusually heavy fine of almost €40 million on Engie due to a lack of cooperation within this investigation[10].

In the Iberian Peninsula, the same trend is also picking up speed. In October 2012, the Comisión Nacional de los Mercados y la Competencia (“**CNMC**”) imposed a €286,000 fine on Verifone, the highest fine to date, followed by a number of cases in which it imposed fines between €20,000 and €106,005, to the relevant undertakings, for implementing the transaction before the clearance decision[11]. In Portugal, the Portuguese Competition Authority (“**PCA**”) has also increased its focus on parties found to have implemented notifiable transactions prior to clearance, and the latest fine imposed, in terms of percentage of the turnover of the parties in alleged breach, was 5 times higher than the previous ones[12], amounting to €155,000[13]. More recently, the PCA has once again demonstrated its growing attention on such practice, having in September 2020 issued a new statement of objections for failure to notify a merger related to the acquisition of a real estate investment fund, a concentration that was, furthermore, found to raise competition concerns and had to be abandoned by the parties[14].

Outside the EU the gun jumping mania is also spreading. Indeed, in 2016, Cisco Systems and Technicolor have been fined with a fine of €6.7 million by the Brazilian Administrative Council for Economic Defence (“**CADE**”) for implementing their merger before the CADE’s clearance. At the time, this fine was already ten times higher than the former record fine imposed by the CADE in the case Goiás Verde/Brasfrigo. However, in December 2019, the CADE imposed a new record fine of €12.4 million to IBM and Red Hat for gun jumping.

The European Court of Justice (“**ECJ**”), very recently, in March 2020, confirmed the General Court’s decision that upheld the EC’s decision, in the Marine Harvest case, confirming the imposition of a double fine for violation of the notification obligation (€10 million) and violation of the standstill obligation (€10 million). Thus, not following the opinion of the Advocate General, Evgeny Tanchev, which is not frequent and demonstrates the complexity of this issue, the ECJ clarified that completing a merger prior to notification and completing a merger prior to the authority’s clearance are two distinct infringements, which may justify the imposition of two separate fines[15].

Notwithstanding other pending appeals on the EC decisions to date, the ECJ has also recently been confronted with gun jumping issues, within the context of a preliminary ruling, requested by a Danish national court, regarding the intended concentration between auditing firms KPMG Denmark (“**KPMG DK**”) and Ernst & Young (“**EY**”), in order to ascertain which “preparatory acts” could amount to gun jumping[16].

In fact, apart from clear-cut cases, where undertakings “forget” to check relevant notification thresholds, avoiding gun jumping is, usually, rather complex, considering the interpretative difficulties pertaining to the relevant merger control frameworks, including in jurisdictions in which market share thresholds exist, as in Spain and Portugal, but, especially, in view of the increasing complexity of M&A structures.

Furthermore, gun jumping is not a legally defined concept, but rather a set of illicit practices that occur around concentrations that trigger merger control thresholds. In addition, the issuance of a clearance decision, when required, seems not to be sufficient to overcome antitrust issues before

closing, and pre-closing antitrust issues are not excluded in cases in which a merger control filing is not mandatory.

Therefore, the purpose of this article is to provide a comprehensive analysis of the different types of practices, which may constitute a breach of competition rules within the context of a concentration between independent undertakings, as well as to provide guidance on best practices to avoid competition law risks. To this end, decision practice and case law are an essential guide, even though some aspects of these cases are puzzling, as we will further explain.

2. Concentrations between undertakings subject to mandatory merger control filing: gun jumping risk

We will start by addressing the scenario of a concentration subject to mandatory merger control filing before the EC or, in alternative, in view of the one stop principle, before the National Competition Authorities ("**NCAs**") of one or more Member States, including Portugal.

First of all, we should determine which transactions could, in general, generate a gun jumping risk, in order to allow us to assess the specific situations in which a concrete competition risk exists. This was, as we will further explain below, one of the main aspects of the decision practice of the EC and of the case law of the ECJ.

We will, in the next sections, address the main issues related to the merger control framework with impact in terms of gun jumping risk.

2.1. What is a concentration under competition law?

From a competition standpoint, the concept of concentration encompasses transactions which constitute a lasting change in the control structure of the undertaking at stake and, as a consequence, possibly, in the structure of the relevant market[17]. Therefore, the concentration is deemed to occur whenever there is a durable change of control over certain assets with a market presence that could constitute an undertaking for competition purposes[18].

A situation of change of control could arise from rights, contracts or other means which, based on considerations of fact or law, confer the possibility of exercising a decisive and lasting influence over an undertaking[19]. Therefore, control over an undertaking is defined as the actual possibility of exercising decisive influence by the acquirer over the target company, "*that is to say, the power to block actions which determine the strategic commercial behaviour of an undertaking*"[20]. The same approach is undertaken by the EU Merger Regulation and EU Member States rules, in particular by Law 19/2013, of 8 May (the "**Portuguese Competition Act**").

Many issues arise from this rather open definition, first of all, what are the assets that can constitute an undertaking? What are the means by which control can be acquired? What type of acquisition of control is relevant for merger control purposes and what is "lasting basis" supposed to mean?

Indeed, the concept of concentration can cover not only transactions regarding an entire undertaking, or the acquisition of tangible assets, but also the acquisition of intangible assets, such as trademarks, patents and other intellectual property rights, provided that these assets constitute an activity resulting in a market presence, to which a turnover can be attributed. In other words, the target assets must, by themselves, allow the development of an economic activity, in order to constitute an undertaking for merger control purposes, and the configuration and scope of the assets must be assessed in a case-by-case basis.

Within this context, we recall, for instance, that the PCA stated, in the concentration *Modelo Continente/Macmoda/Tribo*, that, in case of a clothing business, the mere transfer of the stores, equipment and workers, without stocks, sales policy, marketing, brands and clientele of the sellers does not amount to an undertaking for merger control purposes. In this case, the PCA decided that the target assets alone did not allow the development of an independent economic activity, and, therefore, no concentration existed[21].

Furthermore, a change of control over an undertaking can occur *de jure* or *de facto*, meaning that the control may be expressly granted by a legal right, included, for instance, in the by-laws or shareholders' agreement (*de jure*) or through a set of factual circumstances (*de facto*).

Consequently, a company may acquire control over another undertaking, not only by acquiring the majority of its voting shares, for instance, by means of a Share Purchase Agreement or further to and insolvency procedure, but also through a minority share granting the ability to influence the target's strategic decisions. To this end, the minority shareholder may exercise a decisive influence through veto rights in key strategic matters, such as budget's approvals, business plans and appointment of board members. Besides, situations of acquisition of *de facto* sole control can take place, irrespective of the absence of *de jure* mechanisms. For instance when a shareholder is highly likely to achieve a majority at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years, or in case of a situation of economic dependence, when very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence.

Also, control can be exercised by one undertaking, sole control, or by two or more undertakings or entities. In this case, this will correspond to a joint control scenario[22]. It should be noted that the nature of control, as well as the number of undertakings exercising control, is relevant to determine the existence of a change of control situation, relevant for merger control purposes (and, subsequently, for the assessment of the merger control thresholds). For instance, a change in the nature of control, from sole control to joint control or vice versa is relevant for these purposes, as well as the replacement of a controlling shareholding for another controlling undertaking.

Finally, the proposed definition of a concentration provides for another component, related to duration. The concept of concentration, under competition law, requires a lasting change in the structure of the target that would have, consequently, an impact in the market[23].

This means that a transaction that leads to a temporary change of control is *ab initio* excluded from the concept of concentration. This is the case of the acquisition of control for a transitional period,

for the purposes of, for example, preparing a resale, or in case of a parking structure[24]. Structures where the target is parked on a temporary basis through an interim buyer are commonly used for several purposes. For example, for a potential acquirer to be able to efficiently compete against other bidders, avoiding competition concerns on the short run or for sellers that look for a quick cash inflow, without having to wait for merger clearance.

However, if this transitional transaction is preparatory of a final pre-establish transaction that will lead to a lasting change of control, then these transactions would, most likely, be treated as a single operation and enter the concept of concentration and the initial transaction would amount to the "first step" in terms of clearly established change of control.

This issue was raised, in a recent gun jumping case, in which the parties seem to have relied on the concept of temporary change of control not relevant for merger control purposes. In fact, in the Canon/Toshiba case, the EC stated that multi-step acquisition structures through an intermediate purchaser may constitute a single concentration, even if the ultimate purchaser does not acquire control over the target before the last phase[25].

Canon acquired TMSC through a two-step transaction structure, using an intermediate buyer, an investment vehicle specially created for the purpose of the transaction. The two-step structure was motivated by Toshiba's financial difficulties, which apparently needed a substantial cash inflow before the end of the financial year, meaning it could not wait for the standstill period to end. Within this context, this structure did not contemplate a merger control filing before the acquisition of TMSC from the intermediate buyer.

In fact, as a first step, under this structure, the intermediate buyer acquired 95% of TMSC's share capital for €800 and Canon acquired the remaining 5% and an option on the intermediate buyer's shareholding for a value of €5.28 billion. Later, in August 2016, Canon notified the EC of its intention to acquire TMSC and the transaction was authorised, without remedies, in September 2016, and, after the merger was approved by the EC, Canon exercised its call option, by acquiring 100% of TMSC's shares.

In parallel, the EC opened an investigation for alleged gun jumping, and concluded – based on the financial conditions of the deal and the fact that, since the completion of the first phase, Canon assumed most of the economic risks – that the two phases of the structure of the operation constituted a single notifiable concentration, as the amounts initially paid seemed to reveal, and Canon was, consequently, fined €28 million.

The Cannon/Toshiba case, decided last year, called the attention for the need to review, in detail, M&A structures, in order to ensure that schemes designed to safeguard commercial or tax issues, do not raise serious competition issues.

The investigation of the Polish Competition Authority, referred above, highlights even further that, under competition law, a concentration may take many forms and are not limited to the "classic" types of mergers, acquisitions and joint ventures.

As referred the Polish Competition Authority is currently investigating six energy companies, including Gazprom, Engie and Shell for failing to notify a finance agreement related to the construction of the Nord Stream 2 gas pipeline. Initially the six companies notified to the authority a joint venture for the construction of the Nord Stream 2 project. However, as the authority raised concerns, the undertakings decided to withdraw their notification and later on signed a mere investment financing agreement aiming to finance the project. Nevertheless, the competition authority decided to open an investigation for gun jumping, considering that the conclusion of this agreement to finance the construction of the Nord Stream 2 gas pipeline serves the same purpose of the joint venture and probably results in a change of control over the relevant assets.

In any case, to determine the existence of a concentration, for merger control purposes, is only the first step. Once it is determined that the transaction is a concentration under competition law, it must be assessed whether the concentration is subject to a mandatory merger control filing or not, a task faced with its own complexities.

2.2. When is a concentration subject to mandatory merger control filing?

A second group of doubts is raised in what concerns the interpretation of the merger control provisions that set forth the relevant filing thresholds at national and EU level.

These thresholds are normally based on the parties' turnover, since it is considered an adequate proxy in order to allow the prior assessment of potential limitations of competition in certain markets. To this end, by granting a mandatory nature to the merger control filing, the EU and national legislators aim to be able to deter concentrations with a negative impact on competition.

As referred, when a concentration triggers the EU Merger Regulation, it should not be assessed elsewhere within the EU, as the EC is exclusively competent to assess it within this jurisdiction, notwithstanding the referral mechanisms that could, in certain circumstances, attribute competence to Member States. The thresholds set forth in the EU Merger Regulation are based on the worldwide, EU and Member State turnover of the parties to the concentration[26].

Within this context, there is debate on what concerns the scope of the parties' activities relevant for the calculation of the turnover for merger control purposes[27], the scope of the economic group of the acquirer, especially when equity funds are involved[28], as well as to the jurisdiction to which the turnover is attributable[29].

In addition, in certain jurisdictions, the complexity of the assessment of the relevant thresholds is increased, when the relevant merger control framework sets forth, further to the turnover thresholds, alternative market share thresholds.

This is the case, in Portugal, where concentrations are subject to prior notification to the PCA when, alternatively, they fulfil turnover or market shares thresholds[30]. With different threshold levels, a similar approach is undertaken in Spain.[31]

Consequently, the Portuguese and Spanish legal frameworks present a significant difference in comparison with the European and other Member States systems. Indeed, most jurisdictions have opted for thresholds based exclusively on turnover, whereas Portugal and Spain have also introduced, alternatively, the market share criterion within an *ex ante* mandatory merger control system, that, according to the authorities decision practice contemplates mere transfers of market shares (*i.e.*, do not require overlap).

In fact, in the EU, some Member States also have market share requirements, although in different terms. This is the case in the UK, where the voluntary notification system also includes a market share thresholds[32]. In Latvia, for example, the market share threshold to notify was removed in 2016 and instead in cases where the combined market shares of the parties exceed 40% the competition authority may require the parties to notify[33]. In Slovenia, as far as we are aware, the market share is not exactly a threshold for formal notification, but if a combined market share above 60% is generated, the parties must inform the competition authority and may be requested to notify[34]. This means that the market share requirements are unlikely to lead to gun jumping infringements in the EU in other countries than Portugal and Spain (even though in jurisdictions outside the EU market shares should also be carefully assessed, for instance in Cape Vert, which competition law is clearly inspired by the Portuguese Competition Act).

The market share thresholds are controversial, in the sense that they generally require the prior definition of relevant product and geographic markets, which is particularly difficult in technical markets and in markets in which no decision practice exists. Furthermore, in many cases, commercial approaches do not match the criteria for the relevant market definition and there is no public market share information for the majority of economic activity.

Also, markets are not static and their definition is neither literal nor linear, what entails a significant margin of error. Especially for new products (*e.g.* in technological and digital sectors), market definition is an all-the-more difficult exercise as the activities/products concerned are new, which excludes the existence of relevant precedents that may help to define the market or to orientate the parties.

Consequently, in addition to entailing increased costs for the parties and the competition authorities due to the need for external expertise, these aspects increase the risk of violation of the notification obligation, as if the relevant market is not correctly delimited, and the sources of market data are not clearly establish or do not exist, the market share calculation will also be wrongly computed.

In this scenario, and even though the market share thresholds could potentially be useful, particularly in digital markets in which killer acquisitions occur, the parties could be misled as to the determination of the obligation to notify the prospective transaction, what could lead to a gun jumping practice, where the parties unintentionally fail to notify and start implementing a notifiable concentration.

It happened in Portugal, in a case where the acquirer considered that the transaction was not notifiable, since according to public information available, that did not include turnover market shares, the parties' combined market share in volume, in the post-merger scenario was below the 50%

threshold (and the turnover threshold was not met). According to this assessment, the acquirer believed the transaction could be implemented without being notified. However, the PCA analysed the market according to different criteria, had access to turnover market shares, and concluded that the combined market shares of the parties had exceeded the market share threshold, therefore that the transaction had been carried out in breach of the notification and standstill obligation. The PCA applied to this case, surprisingly, the highest fine, to date, in terms of percentage of the turnover in a case of gun jumping, amounting to a €155,000 fine, in particular since it considered that the notifying party should have been more careful, as relevant decision practice existed on the relevant market at stake, in the health sector[35].

In fact, normally, cases of gun jumping in transactions that meet the market share criterion should be treated more leniently, with regard to the complexity of this threshold. This seems to have been the approach of the Spanish competition and markets commission, the CNMC, contrarily to what took place, as explained, in Portugal. For example, in the 2014 Essilor case, in which the CNMC sanctioned Essilor for gun jumping, but applied a reduced fine of €5,065, pointing out that the reason for the failure to notify was an error in the calculation of the market share[36].

In view of the above, in jurisdictions where a market share threshold exists, the assessment of the relevant merger control thresholds should be particularly careful and, in case of doubt, a prior consultation to the authorities could be advisable, in order to avoid complications that could, not only harm the implementation of the concentration, but also imply serious fines.

Furthermore, market share thresholds are unlikely to be on the way out, but probably could face some expansion in the near future. In fact, since many merger transactions in digital markets involve start-ups, which did not yet generate sufficient turnover to meet the thresholds, these transactions may escape a potentially necessary merger control. Therefore, it is currently under discussion, at the EU level, as well as in some Member States, whether it would make sense to introduce a threshold based on the value of the transaction or market share threshold specific for digital markets[37].

Consequently, the complexity surrounding the assessment of the merger control thresholds is expected to last, and probably to increase in the new future and, therefore, particular attention should also be paid to this aspect.

2.3. When does the implementation of a concentration take place?

Finally, the moment of the implementation is also subject to significant doubts and scrutiny.

Once the obligation to notify the relevant competition authorities is established, in view of the existence of a concentration between independent undertakings, and after the confirmation of triggering of the relevant merger control thresholds, there is an obligation not to implement the transaction before obtaining the authorisation of the notified authority, the so-called standstill obligation.

Such obligation applies in every cases where the transaction must be notified, except in cases where the notifying party demonstrates that a serious harm will arise from the referred suspension in cases in which no competition law concerns are expected[38]. Under this very exceptional scenario, the relevant competition authority can grant a waiver from the standstill obligation[39].

The standstill obligation, in the vast majority of the cases subject to merger control provisions, applies to the period of time before closing, that can take from two months to more than a year. During this period, the parties cannot act as a single entity in anticipation of the transaction closing and, if applicable, must continue to act as actual or potential competitors.

The objective of this obligation is to prevent the implementation of a transaction that could have eventual irreversible negative effects on the market, while the investigation of the competent authority takes place, and the breach of the standstill obligation widely depends on the densification of the concept of "implementation" of the change of control, in particular in what concerns the moment in which implementation starts to take place.

It seems that implementation takes place when the acquiring undertaking has the mere possibility of exercising a decisive influence over the target, but this concept seems to have been subject to conflicting interpretations.

The Marine Harvest case and the Canon case, referred above, also addressed this issue, since the acquisition of an apparent minority shareholding was, in both cases, sufficient to amount to the implementation of the respective concentrations, considering the factual and legal circumstances of each case.

In what concerns the Marine Harvest case, in particular, in December 2012, Marine Harvest acquired a 48.5% stake in Morpol but notified it only eight months later, in August 2013. The EC considered that by acquiring 48.5% of the shares in Morpol, Marine Harvest had acquired de facto control of the target company since, given the significant dispersion of the remaining shares and the low attendance rate of the other shareholders to the General Shareholders Meeting, it now had a stable majority at these meetings. According to the EC, even if the voting rights of Marvin Harvest in Morpol had not been exercised, it was at least possible that the competitive interaction between Marine Harvest and Morpol had been affected as a result of the acquisition. In March 2020, the ECJ confirmed the EC's decision, considering that a multiple-step acquisition, when there is a conditional link between the phases must be analysed as a single concentration.

The ECJ's ruling is in line with the latest decisions of the NCAs and EC (namely the Altice and Canon/Toshiba cases) and provides another warning of the increasing vigilance on gun jumping.

Furthermore, the EY/KPMG case law provided specific insights into the analysis of this obligation, in particular in what concerns limits that must not be crossed between the signing and closing phases of a merger transaction[40].

In the EY/KPMG case, the ECJ has ruled for the first time on a gun-jumping case, within a preliminary ruling, and concluded that no infringement of the standstill obligation existed, contrary to the

Danish competition authority initial assessment. Following the ECJ ruling, on 13 November 2018, the Danish Competition Council's decision was annulled.

In fact, prior to the prospective acquisition by EY, KPMG Denmark was a member of KPMG's International Network, through an integrated cooperation agreement under which the companies operated according to the same standards and presented themselves to clients as a joint network. However, KPMG's Denmark terminated this material contract prior to the formal authorisation of the concentration involving EY.

The ECJ concluded that the termination of the cooperation agreement between KPMG Denmark and KPMG's International Network does not fall within the scope of the prohibition of gun jumping provided by the standstill obligation. Indeed, according to the ECJ, this measure does not, as such, contribute to the change of control in the target company. The ECJ stated that the likely effects of the refereed termination on the market should not be taken into account, as long as the decision does not change the control structure over the target company before the concentration is authorised.

This decision offers guidance by, apparently, providing a broader freedom for the parties to take preparatory measures linked to the transaction, but unrelated to any change of control. Therefore, the ECJ clarifies that the prohibition of anticipated implementation corresponds to the prohibition of (i) formal anticipated acquisition of control and (ii) adoption of measures that contribute to the change of control.

However, attention should be paid to the fact that the Danish Competition Council understood that a mere preparatory measure, as the one described, could amount to gun jumping, an approach that, notwithstanding the ECJ understanding, could be undertaken, in different precautionary ways, by other national competition authorities.

In the Altice cases involving, on the one hand, PT Portugal[41] and, on the other SFR[42], both the EC and the French competition authority, respectively, clarified that the acquiring undertaking cannot overstate the right to lawfully monitor the target's obligation to keep ordinary course of business during the interim period prior to closing, since this could amount to a breach of the standstill obligation.

Given that the pre-closing period often takes several months, it is understandable for the acquirer to be interested in keeping an eye on the target's business, in order to safeguard the value of the acquired assets. However, there are limits, and the EC and the French authority have taken the opportunity to remind it.

Within this context, in both cases, according to the EC and to the French competition authority, the acquirer had allegedly interfered in commercial matters, as marketing and commercial campaigns, having also access to extensive commercial information, all of which were considered to allow this undertaking to exercise decisive influence over the target, before the closing. Thus, in line with what has been explained above, the exchange of sensitive information was considered within the alleged breach of the standstill obligation[43].

In short, it results from the above, that the acquirer must not interfere in the day-to-day business of the target, except in strictly exceptional circumstances for matters that are materially relevant to the protection of the value of its investment, and any "precipitation" to do so can be interpreted as anticipated implementation.

Finally, it is important to note that, the clearance decision from the competition authority does not preclude the standstill obligation. The obligation to remain independent apply until de real closing of the operation. Indeed, even if in theory, according to article 7(1) of the EU Merger Regulation, the parties must wait until the transaction has been declared compatible with the common market, meaning until the clearance decision. In practice, before the actual closing date, *i.e.* the implementation of the purchase and sale transaction, the parties are still independent, and the concentration can still not take place, and must, therefore, comply with competition rules.

2.4. Consequences of a Gun Jumping Infringement and Possible Restrictive Practices Investigations?

It is essential that companies strongly consider these limitations, as the financial stakes are, as previously referred, significantly high. The EC and NCAs have the power to impose fines of up to 10% of the total turnover of the undertakings concerned in the preceding financial year, when it is proved that the acquirer failed to notify and start implementing a notifiable transaction[44]. As example of record fines applied in cases of anticipated implementation of a merger transaction, Altice was fined €124.5 million by the EC and €80 million by the French Authority; Canon was sanctioned with a €28 million fine; and Marine Harvest and Electrabel were both fined €20 million by the EC. In Portugal, as mentioned the record fine imposed for gun jumping amounted €155,000.

In the EC's cases, it is clear that undertakings are sanctioned for failure to notify, as well as for breaching the standstill obligation. Indeed, as mentioned, the ECJ, in the Marine Harvest case, differently from the opinion of the Advocate General, confirmed the EC's decision to impose a double fine, one sanctioning the failure to notify (€10 million) and one for the violation of the standstill obligation (€10 million). Thus, the ECJ clarified that completing a merger prior to notification and completing a merger prior to the authority's clearance are two distinct infringements, which can lead to the imposition of two separate fines.

Additionally, under the Portuguese Competition Act members of the board of directors of the infringing undertakings, as well as any individuals responsible for the management or supervision could be sanctioned for gun jumping conducts, especially when directly involved in the unlawful decision not to file or to breach the standstill obligation. The fine imposed on individuals cannot exceed 10% of the individual's annual income deriving from the exercise of their functions in the undertaking concerned.

Even though it has never occurred, to our knowledge, since the gun jumping infringement has absorbed all the other related breaches, we cannot totally exclude that, in addition to the gun jumping infringement, the access to confidential information, as well as the attempt to influence the target during pre-closing, even after the competition clearance, can amount to an infringement of

Article 9 of the Competition Act and of Article 101.º of the TFUE, with the respective sanctioning consequences.

For example, in the EY/KPMG case, the ECJ outlined that, when an agreement or practice of the parties to the merger does not lead to an anticipated change of control (before the complete closing of the transaction), this agreement or practice may still fall under the scope of the prohibition of restrictive practices between competitors. This would mean that an undertaking may be simultaneously sanctioned for conducts that would constitute early implementation of the transaction – because it allows a change of control over the target before closing (gun jumping) – and for conducts that, during the pre-closing phase, do not constitute an early implementation but are restrictive of competition (prohibition of restricted practices). Both being subject to fines of up to 10% of the total turnover of the undertakings concerned.

In addition to the potential fines, competition authorities have the power to initiate an *ex officio* merger control procedure against non-notified concentration that took place less than five years before the infringement is detected. Under this procedure, the PCA, besides requiring the payment of a particularly increase filing fee, that, in Portugal, can amount to €50,000, can also, if significant competition concerns are to exist, determine the reversion of the concentration, with all the serious consequences it has for the seller and for the buyer.

Therefore, it is strongly advisable to have a competition lawyer at hand, since the beginning of the setting up of the acquisition, in order not to allow the design of M&A structures not compatible with the competition law framework.

Further to assessing if a concentration exists and if the concentration is notifiable, as well as to guaranteeing that a concentration is only implemented after the closing, and that no control steps are undertaken prior to the irreversible consummation of the acquisition of control, the competition law counsel will ensure that contractual confidentiality mechanisms are put in place in order to avoid unlawful information sharing.

In this sense, besides a multijurisdictional merger control assessment, and to the inclusion of adequate mechanisms in the SPA to accommodate the standstill obligation, in particular by setting forth a condition precedent on merger control clearance prior to the closing, it is necessary to put in place Non-Disclosure Agreements ("NDA") to be signed by members of the clean teams involved in the negotiations, as well as balanced control mechanisms related to the interim period, as further developed in section 2, below.

3. Acquisitions of Control not Subject to Mandatory Merger Control Filing: other competition law risks

As referred above, the mandatory merger control rules, including the obligation to notify and standstill until clearance of the concentration, were established for transactions that are deemed capable, because of their dimension, to affect the internal market (EU dimension) or any market within a Member State. However, this does not mean that in cases of acquisitions of control,

which are not subject to mandatory merger control filing, the parties fall out the scope of general competition rules. In this case, the parties do not need to wait for a review and authorisation of the competition authorities, therefore their actions and behaviours are not susceptible to lead to an anticipate implementation of the transaction. Nevertheless, their actions and behaviours may breach general competition prohibitions, especially when the parties to the concentration operate in the same markets.

The ECJ clearly stated in the EY case above referred, that Regulation 1/2003, applicable to restrictive bilateral or unilateral practices, continues to apply to the actions of undertakings which, without constituting a concentration within the meaning of the EU Merger Regulation, are nevertheless capable of leading to coordination between undertakings in breach of Article 101 of the TFEU, and which, for that reason, are subject to the control of the EC or of the national competition authorities[45].

Consequently, within the scope of acquisitions of control not subject to notification under the EU Merger Regulation, the Competition Act or any other prior merger control frameworks, the coordination between parties before the closing, including sharing or exchanges of commercially sensitive information, is still prohibited under Article 101(1) of the TFEU, under Article 9 of the Portuguese Competition Act or under any other applicable similar provisions[46].

In view of Article 101 of the TFUE and Regulation 1/2003, as well as under Article 9 of the Portuguese Competition Act, a concentration between independent undertakings could present special challenges in cases of transactions involving actual or potential competitors at the same level of the supply chain (*i.e.* undertakings operating in the same market(s), horizontal) and undertakings operating at different levels (vertical relationship).

These provisions prohibit any agreement or concerted practice, which has as its object or effect preventing, restricting or distorting competition on a given product, or service market. As such, parties to a proposed concentration must take caution during the pre-closing period and understand the limits of what is strictly necessary for the prospective transaction, without going beyond the boundaries of competitive prohibitions.

The drafting of the SPA must still be particularly careful in case no prior notification exists, in what concerns the interim period, in particular the obligations related to the ordinary course of business. The same caution must be put into place in the access to the parties' commercial information, site visits and communications.

The buyer can neither be granted unlimited access to the target's premises and employees, nor take commitment or act in the name of the target (and vice versa), the parties must preserve their full commercial freedom and shall not conform their behaviour until the completion of the transaction.

However, since, as referred, the parties must inevitably share information, notably to enable the acquirer to have sufficient knowledge of the target company to, for example, assess the business opportunity, or to facilitate due diligence and other audits essential for the transaction, even in

mergers not subject to prior merger control assessment, thoughtful attention must be paid to the manner of disclosure confidential sensitive information.

The parties must ensure a limited disclosure of such information, restricted to what is strictly necessary for the transaction, *i.e.,* make available information on a need to know basis, in order not to reduce the parties' incentive to maintain their respective economic independence in the market. Also, the parties must resort to data rooms, clean teams and NDA and all communications between the parties should be subject to prior review by the respective lawyers.

Additionally, the EC also drew attention to the issue of anticipated transfer of economic risk[47]. When the acquirer bears the economic risk of the overall transaction, before the closing date, it is likely to remove the target's incentive to compete with the acquirer during the pre-merger phase, for instance, when the target's financing needs are assured by the acquirer prior to closing. Therefore, such consequence may be interpreted as being a concerted practice between the parties to reduce competition between them in the market they operate, which is strictly prohibited by Article 101 of the TFEU, as well as by the equivalent national law provisions, including Article 9 of the Portuguese Competition Act.

Finally, it is important to bear in mind that the courts and competition authorities interpret Article 101(1) of the TFUE, and national equivalent prohibitions, as broadly as possible.

Indeed, under these provisions, substance always prevails over form. To fall under the scope of this prohibition, it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way[48]. Moreover, for the conduct itself to be considered anticompetitive, it is not necessary for it to have any specific impact on the competition, as the abstract possibility of impact is sufficient.

These infringements, in the context of a concentration not subject to merger control, are as serious as the infringements mentioned above in the context of a merger subject to mandatory filing. Exactly in the same way as for the violation of the merger control rules, the violation of the prohibition of coordination between independent undertakings, at EU and national level, may be punished with a fine up to 10% of the parties' aggregate turnover in the preceding business year[49]. These infringements can also give rise to potential damages claims, by the undertakings harmed by the referred conduct, under the private enforcement rules implemented at national level,[50] through the transposition of the EU Damages Directive.[51]

Once again, even in cases in which a mandatory merger control prior assessment is not required, competition advice cannot be omitted. It continues to be essential to avoid that hastened communication between parties and poorly drafted contractual provisions could raise significant competition risks.

4. Conclusion

As outlined above, the merger pre-closing phase is a critical and risky phase in terms of competition law, not only because the legal framework applicable to merger control is particularly complex, the M&A structures are increasingly intricate, and gun jumping proceedings are particularly "trendy" with competition authorities, but also because the proximity between parties within a concentration scenario can provide the context for a potential breach of the prohibition of restrictive practices, a particularly serious issue especially when the parties are actual or potential competitors. In both cases, gun jumping and restrictive practices, substantial fines can apply to the infringing party(ies).

Therefore, the parties to a concentration, subject or not to merger control filing, must ensure that all relevant pre-closing competition angles are covered, from the moment the concentration structure is established to the moment of the implementation of the transaction. Meanwhile, negotiations, site visits, preparation of the merger control filing(s), post signing interactions, extraordinary authorisations concerning the assets to be acquired, among others, must be made competition law compliant.

Notas

1 Decision of the European Commission of 10 June 2009, in the case Electrabel / Compagnie Nationale du Rhône (COMP/M.4994).

2 Decision of the European Commission of 10 February 1999, in the case A.P. Møller (IV/M.969).

3 Decision of the European Commission of 23 July 2014, in the case Marine Harvest/ Morpol (COMP/M.71).

4 Decision of the European Commission of 24 April 2018, in the case Altice / PT Portugal (M.7993).

5 Decision of the European Commission of 27 of June 2019, in the case Canon/Toshiba Medical Systems Corporation (M.8179).

6 Decision of the Autorité de la concurrence of 8 November 2016, in the case Altice / SFR (16-D-24).

7 Decision of the German Bundeskartellamt of 15 December 2008, in the case Mars/Nutro Products.

8 Decision of the UK Competition and Markets Authority of 24 September 2019, in the case Paypal / iZettle.

9 Press Release available at https://www.uokik.gov.pl/news.php?news_id=14323.

10 Press Release available at https://www.uokik.gov.pl/news.php?news_id=15941.

11 Decision of the CNMC of 24 October 2012, in the case Verifone/Hypercom (SNC/0022/12).

12 Decision of the PCA of 26 June 2014, in the case Farminveste/Farminveste SA/ANF (PRC/2012/01); Decision of the PCA of 27 December 2017, in the case Fundos Vallis (PRC/2012/05).

13 Decision of the PCA of March 2020, in the case HPA/HSGL (the public decision was not yet available at the time of publishing this article, see press release 04/2020).

14 Press Release 13/2020, available at http://concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202013.aspx?lst=1&Cat=2020.

15 Decision of the European Court of Justice of 4 March 2020, in the case Marine Harvest v Commission (C-10/18 P).

16 Decision of the European Court of Justice of 18 January 2018, in the case EY v Konkurrencerådet (C-633/16).

17 Recital 20, Preamble, Regulation 139/2004, of 20 January 2004, on the control of concentrations between undertakings.

18 Article 3(1), Regulation 139/2004, of 20 January 2004, on the control of concentrations between undertakings.

19 See Article 3(2), Regulation 139/2004, of 20 January 2004, on the control of concentrations between undertakings.

20 Decision of the Court of First Instance of 23 February 2006, in the case Cementbouw v Commission (T-282/02), paragraph 42.

21 See Decision of the PCA of 30 May 2006, in the case Modelo Continente/Macmoda/Tribo (Ccent. 16/2006).

22 Paragraph 62, Jurisdictional Notice under Council Regulation 139/2004 on the control of concentrations between undertakings.

23 Recital 20, Preamble, Regulation 139/2004, of 20 January 2004, on the control of concentrations between undertakings.

24 A temporary acquisition for the purpose of resale will not constitute a merger transaction, in cases where credit institutions, financial institutions or insurance companies acquire shares in another undertaking for the purpose of resale within a one-year period (see Article 3(5)(a), Regulation 139/2004, of 20 January 2004, on the control of concentrations between undertakings).

25 Decision of the European Commission of 27 of June 2019, in the case Canon/Toshiba Medical Systems Corporation (M.8179).

26 Concentrations in which cumulatively (i) the aggregate worldwide turnover of all the parties exceeds €5 billion, and (ii) the aggregate European turnover of at least two parties individually exceeds €250 million (see Article 1(2) of the EU Merger Regulation); or according to a complementary threshold, transactions in which (i) the aggregate worldwide turnover of all the parties is more than €2,5 billion, (ii) the aggregate turnover of all the parties in three Member States individually is more than €100 million, (iii) the individual turnover of at least two parties is more than €25 million in each of these three Member States, and (iv) the aggregate European turnover of at least two parties individually is more than €100 million (see Article 1(3) of the EU Merger Regulation).

27 Paragraph 161, Jurisdictional Notice under Council Regulation 139/2004 on the control of concentrations between undertakings.

28 Paragraphs 175 and seq., Jurisdictional Notice under Council Regulation 139/2004 on the control of concentrations between undertakings.

29 Paragraph 130, Jurisdictional Notice under Council Regulation 139/2004 on the control of concentrations between undertakings.

30 Article 37(1) of the Portuguese Competition Act provides three alternative criteria, two of them including market shares: the transaction leads to the acquisition, creation or reinforcement of a market share equal to or greater than 50% in the national market of a specific product or service, or in a substantial part of it (market share criterion); the transaction leads to the acquisition, creation or reinforcement of a share equal to or greater than 30% but smaller than 50%, provided that the turnover individually achieved in Portugal, by at least two of the companies concerned, is higher than €5 million (mixed criterion); or the involved undertakings have an aggregate turnover in Portugal of more than €100 million, provided that the turnover achieved individually in Portugal by at least two of those undertakings is higher than €5 million (turnover criterion)

31 Article 8(1), Law no. 15/2007, of 3 July (BOE of 4 July 2007) (Spanish Competition Act) provides two alternative criteria: as a result of the concentration, a market share equal to or greater than 30% of the relevant product or service market is acquired or increased at the national level or in a defined geographic market within the country, except if the overall turnover in Spain of the acquired company or of the assets acquired in the last period does not exceed the amount of €10 million, provided that the participants do not have an individual or joint share equal to or greater than 50% in any of the affected markets; or the aggregate turnover in Spain of all the participants exceeds €240 million in the last financial year, provided that at least two of the parties have an individual turnover in Spain of more than €60 million.

32 See https://www.gov.uk/topic/competition/mergers.

33 See https://www.kp.gov.lv/en/darbibas-virzieni/tirgus-dalibnieku-apvienosanas.

34 See https://uk.practicallaw.thomsonreuters.com/w-017-1948?transitionType=Default&contextData=%28sc.Default%29.

35 PCA, Press Release 04/2020, available at http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_202004.aspx?lst=1&Cat=2020

36 Decision of the CNMC of 31 July 2014, in case Essilor (SNC/DC/0035/14), available at https://www.cnmc.es/sites/default/files/486759_3.pdf

37 For further reflexion on the convenience to maintain market share merger control thresholds, please refer to Tânia Luísa Faria, *Review of the Portuguese Competition Act - The Seven Year Itch*, available at http://www.concorrencia.pt/vPT/Estudos_e_Publicacoes/Revista_CR/Documents/CR_39.pdf

38 Article 7(3), Regulation 139/2004, of 20 January 2004, on the control of concentrations between undertakings.

39 Such derogation is granted only in exceptional circumstances and has mainly be applied in cases where the target was facing serious financial and structural difficulties threatening is viability, e.g. Decisions of the European Commission of 9 November 2018, in case M.9202 - Bain Capital / Oscar Holding,; of 7 June 2017, in case M.8553 – Banco Santander S.A. / Banco Popular Group S.A.; and of 27 February 2017, in case M.8385 - Pillarstone / Famar.

40 Decision of the European Court of Justice of 18 January 2018, in the case EY v Konkurrencerådet (C-633/16), paragraph 86.

41 Decision of the European Commission of 24 April 2018, in the case Altice / PT Portugal (M.7993).

42 Decision of the Autorité de la concurrence of 8 November 2016 (16-D-24).

43 In any case, it must be noted that Altice has appealed against the EC's decision to the General Court and at the time of writing this article the action is still pending (case no. T-425/2018). Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=206084&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5002445.

44 Articles 14(2)(a) and 5(1), Regulation 139/2004, of 20 January 2004, on the control of concentrations between undertakings.

45 Decision of the European Court of Justice of 18 January 2018, in the case EY v Konkurrencerådet (C-633/16), paragraph 54; Decision of the European Court of Justice of 7 September 2017, in the case Austria Asphalt (C248/16), paragraph 33.

46 Article 101(1), Treaty on the Functioning of the European Union: *"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."*

47 See Decision of the European Commission of 27 of June 2019, in the case Canon/Toshiba Medical Systems Corporation (M.8179).

48 Decision of the Court of First Instance of 11 December 2003, in the case Adriatica di Navegazione v Commission (T-61/99), paragraph 88.

49 Article 23(2), Council Regulation 1/2003, of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty

50 In Portugal: Law 23/2018, of 5 June 2018 (n.º 107/2018, Série I of 2018-06-05).

51 Directive 2014/104/EU of the European Parliament and of the Council, of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.