

AdC issues statement of objection to Santa Casa da Misericórdia de Lisboa for failure to notify a merger

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On December 21, 2021, the Competition Authority (AdC) accused Santa Casa da Misericórdia de Lisboa (SCML) of carrying out a merger without prior notification. The merger consisted of the purchase by Santa Casa da Misericórdia de Lisboa of CVP – Sociedade de Gestão Hospitalar, S.A., a management company of the Hospital da Cruz Vermelha Portuguesa (HCV), thus obtaining its exclusive control. This purchase was made without SCML notifying the transaction in advance and, consequently, without having obtained non-opposition from the AdC. The purchase took place on 14 December 2020 and was not notified to The AdC until 28 May 2021, a notification that arose only as a result of a fact-finding process initiated by the AdC on 11 February 2021¹.

It is worth starting this analysis by understanding a concentration operation. In accordance with Article 36 Competition Law (LdC) "(...) *it is understood that there is a concentration of companies [...] where there is a lasting change of control over all or part of one or more undertakings (...)*". This may occur as a result "a) *the merger of two or more companies or parts of previously independent companies; (b) the acquisition, directly or indirectly, of the control of all or parts of the share capital or elements of the asset of one or more other undertakings, by one or more undertakings or by one or more persons who already have control of at least one undertaking*". There are three types of concentration: horizontal, when the companies involved are competitors; (a) where the concentration concerns two or more undertakings in a supplier-customer relationship; and conglomerates, which fall into three subcategories and relate to other mergers. In this case, we are faced with a horizontal concentration. This category of concentration raises the greatest fears in terms of competition because the market could become a monopoly². It is a horizontal concentration because SCML and HCV SG overlap in the market for the provision of hospital health care by private units.

¹ <https://www.concorrencia.pt/pt/artigos/adc-acusa-santa-casa-da-misericordia-de-lisboa-da-realizacao-de-uma-operacao-de-0>.

² MOURA E SILVA, Miguel; *Competition Law*; 2020 - Reprint, AAFDL Publisher, p.1157.

Mergers, in certain cases, are subject to the prior notification as set out in Article 37 LdC. The concentration of undertakings is subject to notification in three situations:

- when a share of more than 50% is created or strengthened in a given market;
- where they have a share of more than 30% and less than 50% of the national market and the turnover of at least two of the companies exceeds 5 million;
- or where all the undertakings have made a turnover of more than EUR 100 million in Portugal, provided that the turnover achieved individually in at least two of the undertakings concerned exceeds EUR 5 million.

Looking at the points of this article, we conclude that in the case in question, we are dealing with the situation of point (c). Although SCML states that it does not have a turnover of more than EUR 100 million and would not need to make prior notification, the AdC considered that SCML has the possibility of exercising a decisive influence over the activity of operating social games. once the SCML is granted a concession and exclusivity regime. This would embody the prerogative of approval by the protecting certain so-called strategic parameters, being a prerogative of public authority and protection of the public interest³. For this reason, the AdC considered that the turnover generated by this activity should be attributed to the Gaming Department and, consequently, to the SCML, under Article 39. In that sense, SCML's turnover, in conjunction with that of HCV SH, exceeds 100 million euros. It needed to be notified in advance in order for the AdC to be able to analyse all the surroundings fairly and clearly and to conclude whether the concentration in question would be (or not) detrimental to the competitive market.

The lack of notification limits the anticipated power of the AdC, creating difficulties in ensuring the absence of obstacles to competition, and may cause several harmful effects. In addition, after they occur, all these effects, become very *difficult* to eliminate. As such, there must be a sanction for this failure to comply with the notification duty. This practice is regarded as serious and is punishable with a fine of up to 10% of

³ https://www.concorrencia.pt/sites/default/files/processos/ccent/AdC-CCENT_2021_25-Decisao-VNC-final-net.pdf

the turnover carried out by the infringing undertaking in the exercise immediately preceding the final judgment handed down by the AdC.

Although it was not previously notified, the concentration was eventually notified, attenuating the fine. For the AdC to ascertain whether the concentration is detrimental to the competitive market and to take its position of opposition or non-opposition, it is necessary to investigate several aspects, starting with the analysis of the market in which these two companies are part. Both HCV SG, which has as its object the management of the Red Cross Hospital, and The SCML are in the market for the provision of hospital services by private units. The AdC considered the provision of hospital services by private units relevant. It also considered that the geographical scope of these units has a regional delimitation, referring to territorial units already established for statistical or administrative purposes of level III (NUTS III). And in our case, the concentration operation takes place in NUTS III - Lisbon Metropolitan Area (AML) - since this is where the Red Cross Hospital is located and SCML is also present through the Orthopedic Hospital of Sant'Ana and the Rehabilitation Medicine Center of Alcoitão.

Due to the lack of statistical data on the size of the market, the notifying company used the turnover statistics by CAE and NUTS III, based on INE's 2018 data and updated data for 2019, with an increase of around 6,2%. In 2019, the weight of AML was 46%. Therefore, the size of the market exceeded EUR 1 billion.

With the concentration of the two entities, SCML would then have a market share of about 5-10%, and previously would have only a 5% share. The increase would be only 5%, which allows horizontal competitive problems to be excluded from the market. Thus, it is concluded that the concentration is not capable of creating significant barriers to competition⁴.

Despite this conclusion, the AdC also requested an opinion from the Health Regulatory Authority (ERS) under Article 55 LdC, since we are dealing with a regulated sector. ERS concluded that the merger results from low-expression increases and that the parties involved had small shares in the present market.

Given all that has been set out, the Board of Directors of the AdC adopted a decision not to be opposed to the merger in accordance with Article 50 (b) LdC, on the

⁴ https://www.concorrencia.pt/sites/default/files/processos/ccent/AdC-CCENT_2021_25-Decisao-VNC-final-net.pdf



way that the concentration in question does not create significant barriers to competition on the markets examined. For all that has been exposed previously, it is our understanding that the AdC's decision not to oppose was the correct decision to make *in casu*.