From the purchase of PT to the millionaire fine of Altice

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The present case concerns, mainly, the request by Altice Europe NV ("Altice Europe") to annul Commission Decision C(2018) 2418 final, of 24 April 2018, which resulted in the imposition of two fines, each in the amount of 62.25 million euros, to Altice Europe, as a result of the execution of a concentration operation, before it was communicated and the Commission declared (im) compatible with the internal market, in breach of the provisions of the articles 4, no. 1 and 7, no. 1 (EC) no. 139/2004 of the Regulation, of 20 January 2004, on the control of companies, respectively.

In fact, this is not an innovative decision on the part of the Commission, which had already punished a company for having carried out a concentration before it was notified and declared compatible with the internal market[1].

Returning to the case under analysis, the concentration involving Altice Europe and PT Portugal, that was officially notified to the Commission on 25 February 2015, and the Commission, pursuant to Article 6(1)(b) of Regulation no. 13/2004, in conjunction with its internal article 6, appeared to be subjected to full compliance with the commitments attached to that decision, including the assurance of certain obligations, by Altice Europe, towards its subsidiaries Cabovisão and ONI. Everything seemed, from the outset, to follow the proper legal procedures. However, after careful and detailed analysis, it was found that, in fact, it was on December 9, 2014, that Altice Europe, headquartered in the Netherlands, actually entered into a share purchase agreement (*Share Purchase Agreement*, commonly known as SPA) through which, using its subsidiary Altice Portugal SA, acquired exclusive control of PT Portugal, within the meaning of article 3, no. 139/2004, because some clauses of the SPA gave the applicant a right of veto over

[1] vs. Commission Decision of 10 June 2009 imposing a fine for the early completion of a concentration in breach of Article 7(1) of Council Regulation (EEC) No 4064/89 and the Article 57 of the EEA Agreement (Case COMP/M.4994 — Electrabel/Compagnie Nationale du Rhône) [notified under number C(2009) 4416] and Decision C(2014) 5089 final of 23 July 2014, imposing fines for carrying out a concentration in breach of Article 4(1) and Article 7(1) of Regulation No 139/2004 (Case COMP/M.7184 — Marine Harvest/Morpol).

decisions relating to PT Portugal's commercial policy and allow it to influence the day-to-day functioning of PT Portugal.

Having said that, the Commission concluded that Altice Europe had implemented the SPA before the merger of companies was notified and authorized, in breach of Article 7(1) of Regulation No 139/2004 and, consequently, the EC adopted the decision of Decision C(2018) 2418 final mentioned above, against which Altice Europe appealed to the General Court, giving rise to the judgment discussed herein.

With relevance to the decision in the case, the General Court of the European Union held that, as regards the fines imposed, the Commission examined the factors listed in Article 14(3) of Regulation No 139/2004 , specifically, the nature, gravity and duration of the infringement, clearly showing which elements were taken into account when determining the amount of the fine, which "*allows the appellant to defend itself and the General Court to exercise its supervision*"[2] . In addition to what has already been pointed out, it should be noted that the fact that Altice Europe has notified the transaction or proposed commitments in no way affects the infringement, and since it is not authorized to carry out the transaction, its behavior is worthy of scrutiny, not forgetting that, on the date of notification of the SPA, the preparatory clauses were already in force since they were signed and the first meeting between the applicant and PT Portugal had already taken place.

In addition, the General Court added that "*the Commission was right to consider, in the contested decision, that the preparatory clauses had given the applicant the possibility of exerting a decisive influence on the activity of PT Portugal in breach of Article 4(1) 1 and Article 7(1) of Regulation No 139/2004, that those provisions at issue had been carried out several times in breach of Article 4(1) and Article 7(1) of Regulation No 139/2004 and that there had been exchanges of information which had helped to demonstrate that the applicant had exercised decisive influence over certain aspects of PT Portugal's activity, in breach of those provisions."*[3].

As regards Altice Europe's allegation that the decision infringes the principle of the presumption of innocence, insofar as the Commission assumes that the exchange of

[2] Judgment of the General Court (Sixth Chamber) of 22 September 2021, Case T-425/18 - Altice Europe v Commission, paragraph 26 et seq.

[3] Judgment of the General Court (Sixth Chamber) of 22 September 2021, Case T-425/18 - Altice Europe v Commission, paragraph 323.

information constitutes a lasting change in control, the General Court notes that, on the contrary, the Commission analyzed in detail the implications of the exchange of information that had taken place between the applicant and PT Portugal before the conclusion of the transaction and concluded that those exchanges contributed to demonstrate that the applicant had exercised a decisive influence over PT Portugal, by participating in the determination of campaigns of *marketing* and request privileged and/or confidential information.

However, considering that Altice Europe had, three days after signing the SPA, requested the appointment of a team to conduct its process and, on 3 February 2015, submitted to the Commission a draft notification form containing a copy of the SPA among its annexes, the General Court decided to reduce one of the fines by 10%[4].

That said, Altice Europe saw rejected its appeal for annulment of the Commission's decision that imposed fines of 124.5 million euros on it, within the scope of the acquisition of PT Portugal, although it managed to obtain a reduction in the overall value of the fines imposed to around 118 million euros.

[4] In this regard, it should be noted that, concerning the seriousness of the infringements, we must bear in mind that it is known that setting a fine is not a precise arithmetical exercise (Judgments of 5 October 2011, Romana Tabacchi v Commission, T 11 /06, EU:T:2011:560, no. 266, and of July 15, 2015, SLM and Ori Martin/Commission, T 389/10 and T 419/10, EU:T:2015:513, no. 436). The determination of its amount must be proportionate to the seriousness of the infringement and have a certain deterrent effect.