

## SUSPENSORY EFFECTS OF MERGER NOTIFICATIONS AND GUN JUMPING

### OECD Competition Committee Meeting

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– Note by Portugal –

#### I. Overview: the Portuguese *ex-ante* merger notification system and its standstill obligation

1. A transaction that confers control over an undertaking is deemed as a merger operation and, potentially, subject to mandatory notification to the Autoridade da Concorrência ('AdC' or 'Authority'), the Portuguese Competition Authority, if any of the notification thresholds are met.
2. The Portuguese competition regime does not empower the AdC to review mergers falling below the notification thresholds. In addition, merger control in Portugal closely follows the EU regime, so there is no jurisdiction over transactions which involve solely the acquisition of non-controlling shareholdings.<sup>1</sup>
3. However, as a tight-knit system, the Portuguese merger control regime is able to catch the majority of operations that may have competitive effects in Portugal since notification thresholds are not solely based on turnover, but also on market shares. In particular, the Portuguese *ex-ante* merger notification system is based on three different types of criteria: market shares in the relevant national market, undertakings' turnover in Portugal and a combination of both market shares and turnover in Portugal.<sup>2</sup>

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<sup>1</sup> This said, common ownership and minority shareholdings are encompassed in the assessment exercise of a duly notified merger. This issue is specifically addressed in the AdC's Economic Horizontal Guidelines on Merger Control (available in Portuguese at [http://www.concorrenca.pt/vPT/Noticias\\_Eventos/ConsultasPublicas/Documents/Linhas%20de%20Orientação%20para%20a%20Análise%20Económica%20de%20Operações%20de%20Concentração%20Horizontais.pdf](http://www.concorrenca.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Linhas%20de%20Orientação%20para%20a%20Análise%20Económica%20de%20Operações%20de%20Concentração%20Horizontais.pdf)). Furthermore, in order to allow the AdC to conduct its assessment, the Merger Notification Form specifically requests information on minority shareholdings.

<sup>2</sup> Article 37(1) of the Portuguese Competition Act. The following circumstances are subject to mandatory filing of the underlying transaction: (i) acquisition, creation or reinforcement of a market share of at least 50 per cent in the relevant national market; (ii) acquisition, creation or reinforcement of a market share of at least 30 per cent but less than 50 per cent, in the relevant national market, provided that the individual turnover of at least two participating undertakings in the preceding financial year exceeds €5 million; (iii) the aggregate turnover of the participating undertakings in Portugal, in the preceding financial year, is over €100 million, provided that the individual turnover in Portugal of at least two of the undertakings exceeds €5 million.

4. If notifiable, transactions cannot be implemented before the AdC approves the merger. Therefore, as a general rule, there is a standstill obligation, which may only be derogated in exceptional circumstances.<sup>3</sup>
5. Exemptions to the standstill obligation include the implementation of a takeover bid or a public exchange offer notified to the AdC, as long as the acquirer does not exercise its voting rights or does so with the aim of protecting the value of its investment and requests the AdC a derogation from the standstill obligation.<sup>4</sup>
6. In the latter case and in general terms, the AdC may authorize a derogation from the standstill obligation on a case by case basis, following a reasoned request from the undertakings concerned.<sup>5</sup> In these cases, the AdC will balance on the one hand the consequences of suspending the implementation of the merger or the exercise of voting rights for the undertakings concerned, against, on the other hand, the possible negative impact on competition deriving from the aforementioned derogation. If necessary, the AdC may add conditions or obligations to the derogation in order to ensure the preservation of effective competition.

## II. Legal consequences of failure to notify and breaching the standstill obligation

7. Failure to notify merger transactions that meet the legal thresholds (the so-called “hard” gun jumping) prevents a timely assessment of the effects of such operations on the markets concerned. These effects may potentially be difficult to reverse, and consequently increase the costs of regulatory intervention (in *lato sensu*, including but not limited to cases involving regulated markets). Likewise, breaching the standstill obligation through early merger implementation, prior to clearance (“soft” gun jumping), undermines the effectiveness of the merger control system and may also lead to irreparable anticompetitive effects in mergers ultimately blocked by competition authorities. Therefore, gun jumping infringements are considered to be serious infringements.
8. Law No. 19/2012 of 8 May (hereinafter the “Portuguese Competition Act”) stipulates a 5-year statute of limitation to pursue a gun jumping case.<sup>6</sup>
9. The legal framework for pursuing gun jumping violations typically comprises two complementary procedures: (i) the supervisory procedure, in which the Authority investigates whether there is sufficient evidence that gun jumping occurred; and (ii) the infringement procedure, which follows the supervisory procedure and in which the Authority assesses all relevant factors based on which it may issue a decision imposing fines.

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<sup>3</sup> Article 40(1) of the Portuguese Competition Act.

<sup>4</sup> Article 40(2) of the Portuguese Competition Act.

<sup>5</sup> Article 40(3) of the Portuguese Competition Act. Since the enactment of the current Portuguese Competition Act in 2012, the AdC has assessed 9 derogation requests, all of which were granted a positive reply. In terms of timing of the requests, one was submitted at the same time as the notification form and 8 as *ad-hoc* requests prior to the notification submission. None of the requests were subject to conditions or obligations.

<sup>6</sup> Article 74(1)(b) of the Portuguese Competition Act.

### **1. Supervisory procedure – detection of gun jumping**

10. When the AdC has a reasonable suspicion of a gun jumping situation, it investigates it under a supervisory procedure, based on the Authority's supervisory administrative powers, which cover all sectors of the economy.
11. Under this procedure, the Authority may request from any relevant entity, including the parties in question, the necessary information to confirm whether it is in the presence of a gun jumping situation. Requests for information usually take the form of written questions, but they may also take the form of interviews and consist in other types of request.<sup>7</sup> During the supervisory procedure, the Authority does not have the power to conduct dawn raids – this is only possible once the infringement procedure has formally been initiated<sup>8</sup> (e.g. to gather evidence relevant for the determination of the level of the fine).
12. At this stage, the parties may explain why the transaction was not notified (in case of hard gun jumping)<sup>9</sup> or why the behaviour of the companies does not amount to an early implementation of the notified merger (in case of soft gun jumping).
13. At the end of the supervisory procedure, once all information is gathered, validated and assessed, the AdC decides whether there is sufficient evidence that gun jumping occurred. Based on this decision, the Authority will either (i) close the investigation due to lack of evidence or (ii) open up to two (depending on the type of gun jumping) parallel procedures.
14. First, in case of failure to notify (hard gun jumping), the Authority will open an *ex-officio* (administrative) merger procedure, informing the relevant undertaking that it is obliged to notify the transaction within a given timeframe and to observe the standstill obligation. The fee due for filing a concentration doubles in case of a notification in these circumstances.
15. In this case, once the merger is notified, the regular procedural legal framework applies (*i.e.* as if one was dealing with a regular merger assessment procedure), the standstill obligation is enforceable *ope-legis*<sup>10</sup> and the Authority has to issue a clearance decision (subject or not to remedies) or a prohibition decision<sup>11</sup>

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<sup>7</sup> In a recent case, the addressee was requested to perform an electronic search on certain key-employees' email accounts and computer files, based on pre-defined keywords, and to supply the findings to the AdC.

<sup>8</sup> So far, the AdC has not carried dawn raids for this purpose.

<sup>9</sup> Under the Portuguese Competition Act, parties may engage in pre-notification discussions with the AdC, including regarding jurisdiction issues. In particular, the AdC is available for discussing whether the merger may be subject to prior mandatory notification under the market share criteria. Therefore, the parties can hardly justify gun jumping behavior solely on the basis of doubts concerning jurisdiction issues.

<sup>10</sup> The notifying party can request, at this stage, a derogation of the standstill obligation. The request will be assessed in the same terms as any other in a regular merger procedure.

<sup>11</sup> One can reasonably set aside a non-applicability decision as, at the time of the notification, the Authority should be sufficiently confident that the transaction constituted a merger and was subject to notification filing in Portugal.

within the regular 90-day period.<sup>12</sup> Until the merger is cleared, all related acts, although not illegal, are not enforceable.<sup>13</sup>

16. In addition, both in case of failure to notify and of violation of the standstill obligation, the Authority will open an infringement procedure in order to assess all relevant factors based on which it may issue a decision imposing fines.

## **2. Infringement procedure – fining policy for gun jumping**

17. If in the supervisory procedure the AdC concludes that there is sufficient evidence that gun jumping occurred, it opens an infringement procedure to conclude whether there was a gun jumping infringement, and determine the seriousness of the offense and the applicable sanctions (fines and/or other measures).
18. Even if a merger does not pose negative effects on competition and is cleared by the AdC, the parties “jumping the gun”, either by failing to notify or breaching the standstill obligation, are subject to fines.
19. Failure to notify a merger or breaching the standstill obligation constitute serious administrative offenses and render the undertakings liable for fines of up to 10 per cent of the turnover of their respective group in the year preceding the decision of the AdC.<sup>14</sup>
20. Moreover, the Portuguese Competition Act provides for administrative sanctions for individuals, as directors and individuals heading or supervising the departments of undertakings involved in the gun jumping infringement may be liable for that infringement and subject to fines if the breach was, or should have been, to their knowledge and they have not taken the necessary measures to stop it as of the moment they became, or should have become aware, of the breach.<sup>15</sup>
21. In addition, in cases of failure to notify, the Authority may also decide to apply a periodic penalty payment of up to 5 per cent of the average daily turnover of the last year, for each day of delay in notifying the transaction.<sup>16</sup>
22. Furthermore, if the merger implemented in breach of the standstill obligation is challenged by the AdC, the latter may order measures such as the separation of the undertakings or of any aggregated assets, including the reversal of the operation, or the cessation of control.<sup>17</sup>

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<sup>12</sup> 30-day period for a first-phase decision and a total of 90-day period from the day the notification was accepted. This timeline is suspended by stop-the-clock events such as requests for information to the notifying party, responding to an eventual Statement of Objections or discussion of remedies.

<sup>13</sup> Article 40(6) of the Portuguese Competition Act.

<sup>14</sup> Article 69(2) of the Portuguese Competition Act.

<sup>15</sup> Article 73(6) of the Portuguese Competition Act.

<sup>16</sup> Article 72(b) of the Portuguese Competition Act.

<sup>17</sup> Article 56(4) of the Portuguese Competition Act

23. In accordance with Article 69 of the Portuguese Competition Act, together with the AdC's guidelines on the methodology for setting fines,<sup>18</sup> the level of the fine is set taking into account factors such as: the cooperation of the notifying party with the AdC; the outcome of the competitive assessment (whether the transactions leads to competitive concerns or not) and of the case (whether it involves a clearance or prohibition decision; if it is a clearance, whether it involves remedies and which kind of remedies are envisaged); the level of implementation of the transaction while the standstill obligation is in force; whether the parties were negligent or had the intention not to notify.
24. This said, the AdC enjoys a wide margin of discretion when exercising its power to impose fines within the limits set by the Portuguese Competition Act. Therefore, the specificities of a given case could justify departing from the referred methodology.

### **3. Examples of gun jumping proceedings – settlement procedures following failure to notify**

25. Over the past five years the AdC has closed two cases imposing fines on firms that “jumped the gun” on their respective mergers by implementing transactions before due notification to the AdC.
26. The AdC's fining policy in both cases followed the general rules discussed above.

#### **PCC/2012/01 – Farminveste/Farminveste S.A./ANF**

27. In 2014, the AdC condemned two pharmaceutical companies and their trade association for implementing a merger operation without prior approval from the AdC.
28. The proceedings started with a third-party complaint which claimed that the referred merger operation had been implemented without the prior approval by the AdC despite meeting the notification thresholds.
29. Following an investigation under the AdC's supervisory powers, the AdC opened an *ex-officio* administrative merger control procedure (Cent. 47/2009 – *Farminveste/ParaRede*), the transaction was notified and the AdC ultimately issued a first-phase clearance decision.
30. In addition, the AdC launched infringement proceedings, in which the envisaged undertakings submitted a settlement proposal acknowledging the facts and accepting their respective liability.
31. The AdC decided to accept the settlement proposal, considering that it had efficiencies in terms of the burden involved in eventual judicial proceedings and

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<sup>18</sup> Available in Portuguese at [http://www.concorrenca.pt/vPT/Praticas\\_Proibidas/Praticas\\_Restritivas\\_da\\_Concorrenca/Documents/Linhas\\_de\\_Orientação\\_Coimas\\_DEZ2012.pdf](http://www.concorrenca.pt/vPT/Praticas_Proibidas/Praticas_Restritivas_da_Concorrenca/Documents/Linhas_de_Orientação_Coimas_DEZ2012.pdf)

that the goals concerning deterrence resulting from the infringement decision would still be accomplished.

32. The AdC ultimately imposed fines amounting to €118,837, taking into account all the relevant facts, in particular the fact that the merger did not lead to significant anticompetitive effects (the transaction was subject to a clearance decision), the undertakings' pleas and the legal criteria for the application of fines. One of the pharmaceutical companies involved was not fined since it had no turnover in the year considered for the calculation of the fine.

#### **PCC/2012/05 - Fundos Vallis**

33. In 2017, the AdC imposed fines of €38,500 on two firms for failing to notify a merger in the dental care clinic market.
34. The infringement proceedings originated from the notifying party, as the latter notified the transaction only after implementing the merger (Ccent. 38/2015 - *Vallis Sustainable/32 Senses*), which was cleared by the AdC in phase-1.
35. The undertakings introduced a settlement submission during the proceedings whereby they acknowledged the facts and accepted their respective liabilities.
36. The AdC accepted the settlement in view of the companies' behaviour and all relevant facts, including: the fact that the infringement was voluntarily reported to the AdC by the notifying parties and, from that date, the latter suspended their voting rights in relation to the acquired business; the fact that the transaction did not lead to significant anticompetitive effects; and the parties' close cooperation with the AdC throughout the proceedings.

### **III. Investigation of gun jumping in Portugal – policy, tools and challenges**

37. In recent years gun jumping has become one of the AdC's main priorities, head-to-head with cartel detection and investigation. Both the Portuguese Competition Act and the AdC's Statutes of 2014 stipulate that the Authority has to publish its priorities for the upcoming year and the topic of gun jumping has been recurrently listed as one of them.<sup>19</sup>
38. According to the AdC's experience, the most common situations and the main challenges lie with failure to notify and early implementation that take place prior to notification, thus the considerations below will mainly focus on these two dimensions.

#### **1. Sources of information**

39. Experience shows that detecting and pursuing gun jumping involves considerable challenges. While in regular merger notifications the relevant information on the transaction is voluntarily provided by the notifying parties in accordance with a pre-established notification form, in gun jumping cases the

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<sup>19</sup> AdC priorities for 2016, 2017 and 2018, available in Portuguese at [http://www.concorrenca.pt/vPT/A\\_AdC/Instrumentos\\_de\\_gestao/Prioridades/Paginas/Prioridades.aspx](http://www.concorrenca.pt/vPT/A_AdC/Instrumentos_de_gestao/Prioridades/Paginas/Prioridades.aspx).

Authority has to build a case from scratch. This invariably involves: determining which information is necessary to assess whether a gun jumping situation has in fact taken place; gaining access to such information; validating such information and assessing it to determine the next course of action (open infringement proceedings or close the case).

40. With these challenges in mind, the AdC has tried to diversify its sources of gun jumping information, in particular in what concerns detection. Usually, potential gun jumping situations come to the attention of the Authority through two types of sources: (i) the AdC's *ex-officio* monitoring; and (ii) third-party sources. Although it happens more rarely, a gun jumping investigation may also result from information voluntarily provided by the parties involved in the infringement.<sup>20</sup>
41. A primary third-party source consists of complaints submitted by those (directly or indirectly) active in the relevant market (e.g. customers, competitors, suppliers, etc.).
42. In addition, investigations can also result from referrals to the AdC by other institutions, in particular other sectoral regulators as well as other public bodies and professional associations. First, there is a general legal obligation for public bodies to cooperate with the Authority on all aspects related to Competition Law enforcement (and advocacy), including on gun jumping. Furthermore, in order to boost the chances of uncovering gun jumping and other types of infringement, the AdC has signed Memoranda of Understanding with sector regulators and other public bodies, namely the telecoms regulator (ANACOM) (2003), the Court of Auditors (2006), the Institute of Public Procurement, Real Estate and Construction (2017) and more recently Infarmed, the National Authority of Medicines and Health Products (2018).
43. Finally, other national competition authorities may also constitute an important source of information to detect gun jumping, in particular through the merger information provided as part of international cooperation mechanisms (e.g. filing of the "ECA Notification Form" concerning multijurisdictional mergers within the European Competition Authorities network, which gathers the competition authorities of the EU Member States and EEA EFTA States, as well as the European Commission and the EFTA Surveillance Authority).
44. Detecting gun jumping by way of an *ex-officio* investigation based on the AdC's own monitoring activity is potentially more cumbersome and time-consuming, requiring a regular and constant monitoring of all transactions that occur in every market, as well as determining if a given transaction may constitute a merger (instead of the recurrent internal restructurings) and whether it may be subject to notification in Portugal.<sup>21</sup>

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<sup>20</sup> See case *PCC/2012/05 - Fundos Vallis* mentioned in this paper.

<sup>21</sup> The geographical nexus is important due to rules on attribution of jurisdiction between the European Commission and competition authorities of the EU Member States (the so-called "one-stop-shop" system) defined in Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.



45. In addition, as better detailed below, validating the information in *ex-officio* investigations, constitutes one of the main and most difficult challenges when building a case on gun jumping.
46. The challenges mentioned above are inherent to *ex officio* investigations and, in order to overcome them, the Authority uses a variety of sources to feed its own monitoring activity. First, *ex-officio* detection of gun jumping cases may result from specialized mass media as well as databases.
47. *Ex-officio* detection may also result from information contained in other merger files, which is an important source. As the parties have to describe their respective corporate groups and structures of control, put forward their views on the relevant market and assess their rivals' position/strength in it (past, present and future), the merger file, taken as a whole, constitutes a very important tool in detecting past gun jumping situations.
48. It can also result from internal investigation, namely other departments and units - such as market studies and monitoring departments and antitrust units - which report to the merger department situations of possible gun jumping.
49. Finally, *ex-officio* gun jumping detection may also result from a regular consultation of the websites of sector regulators (in particular the Portuguese Securities Market Commission) and companies, which usually display formal announcements to the market concerning business deals.
50. This has showed a strong potential in terms of gun jumping detection, as it allows the AdC officials to run through a considerable amount of transactions in various sectors, many of which, most likely, will constitute merger transactions for the purposes of competition law.
51. In conclusion, enhanced cooperation and other advocacy initiatives (e.g. seminars, workshops, trainings), together with the development of other tools (electronic alerts, databases and track-records) to better validate the information, represent a step further in building a proactive detection strategy.

## **2. Other investigative challenges**

52. Gun jumping detection and investigation pose a second set of challenges to the Authority. First, the AdC must be confident that the transaction in question is, in fact, a *merger* for the purposes of competition law merger control. Second, it has also to determine if the notifying party failed to duly notify it or that it implemented it prior to the merger clearance.
53. As for qualifying the transaction as a merger, the most common situations involve an agreement between two independent undertakings for the sale and purchase of a third undertaking (target) share capital. However, on many other occasions less obvious transactions may also amount to a merger transaction, thus requiring much more further in-depth information than usually available on the spot. Examples of these deals include the cessation of shareholders' agreements, the celebration of long-term agreements for exploiting certain assets in a given sector/market or the creation of *ab-initio* joint-ventures.
54. Regarding the assessment of early implementation, the AdC understands that some information exchange and collaboration between the merging parties may



be necessary prior to merger approval. Such activity has generally fallen into two overlapping categories, due diligence and transition planning, both of which are analyzed on a case by case basis, in particular by reference to the concept of ordinary course of business (similarly to the proceedings of the European Commission's Directorate-General Competition).

#### **IV. Conclusion**

55. Under Portuguese competition law, failure to notify a merger or early merger implementation before clearance constitute serious administrative offenses and may lead to fines of up to 10 per cent of the relevant undertakings' turnover.
56. In line with this, gun jumping is one of the AdC's priorities, head-to-head with the detection and investigation of cartels.
57. In particular, over the past five years the AdC has imposed fines in two cases against firms that "jumped the gun" by implementing transactions before due notification to the AdC. In both cases, the relevant undertakings accepted to settle the case by acknowledging the facts and accepting their liability, leading to the imposition of fines.
58. However, experience shows that detecting and pursuing gun jumping raises significant challenges. Enhanced cooperation between the AdC and other public bodies, together with integrated use of different tools represent an important step towards a proactive detection strategy.