# BEST PRACTICES GUIDE ON GUN-JUMPING

Autoridade da Concorrência

**Foreword**

The mission of the Autoridade da Concorrência ("Autoridade" or "AdC") is to ensure compliance with the rules that promote and defend competition. The AdC's main goal is to guarantee the undertakings' commercial autonomy, as well as to ensure the existence of free competition, in the interest of consumer welfare and the competitiveness of the economy.

Under its Bylaws, the AdC is responsible for advocating the adoption of practices that enhance the culture of competition among economic agents and the general public, as well as for publishing guidelines on competition policy. For this purpose, the AdC has, namely, the power to issue recommendations and general directives.

Portuguese Competition Law (No. 19/2012, of 8 of May), establishes a system of mandatory prior notification of mergers that meet one of the notification criteria set out in Article 37 of that law.

The Competition Act prohibits the implementation of a merger subject to mandatory prior notification, prior to its notification or, in case it has been notified, prior to a clearing decision, be it explicit or tacit, by the AdC (stand-still obligation).

The early implementation of a merger subject to mandatory prior notification, in violation of competition law (at both national and international level), is a behavior internationally known as gun-jumping. This phrase stems from sports and means to start the race before the starter gun is fired.

This Guide intends to promote the understanding of this illegal behavior and manners to avoid it, contributing to a more robust implementation of competition law.

## SECTION I - CONCEPT AND OUTLINE OF GUN-JUMPING

The concept of gun-jumping corresponds to the violation of the obligation not to implement a merger — which meets any of the notification criteria set out in the Portuguese Competition Act — prior to the clearing decision by the Autoridade. This violation may occur before or after the notification.

Gun-jumping prior to the notification of a merger may occur for the following reasons, among others:

(i) Difficulties in ascertaining the fulfilment of the notification criteria set out in the Competition Act, namely with regard to the criteria involving the determination of market share, or;

(ii) Difficulties in assessing the concept of merger between undertakings, set out in Article 36 of the Competition Act, in particular with regard to the possibility of exercising, on a lasting basis, solely or jointly, and taking into account the factual or legal circumstances, a decisive influence on the activity of an undertaking.

To prevent the difficulties described above, the AdC allows undertakings to submit the Prior Assessment Procedure[1], on a voluntary, informal, and confidential basis.

The prior assessment allows parties to anticipate issues related to the transaction, namely regarding the assessment of the possible inapplicability of the duty to notify the transaction to the AdC, either because (i) it does not constitute a merger; (ii) it does not meet the criteria for mandatory prior notification; or (iii) the assessment of the operation falls within the competence of the European Commission.[2]

Between 2017 and 2022, the AdC sanctioned six gun-jumping cases, regarding situations of implementation of the operation before prior notification (and prior to the clearing decision by the AdC).

The early implementation of a merger is not limited to cases of undertakings not complying with the prior notification obligation. Indeed, gun-jumping may occur after the notification, but before the issuing of a clearing decision by the AdC.

The following sections address this issue, with the aim of raising undertakings' awareness of the risks of early implementation of mergers, presenting recommendations to prevent such risks.

[1] See Guidelines on Prior Notification

[2] See the Council Regulation (EC) No. 139/2004, of 20 January 2004, on merger control.

## SECTION II: EARLY IMPLEMENTATION OF THE MERGER

### 1. The acquisition process and the early implementation of the merger

The process of acquiring control over a company involves different forms of interaction and exchange of information between the acquirer and the vendor ("Parties") that in a different context would not be admissible under competition laws.

For example, in the context of a process of acquisition of control, the exchange of commercially sensitive information is only admitted to the extent it is strictly necessary for the completion of the transaction, as analyzed below.

A distinction should therefore be made between the interaction and exchange of commercially sensitive information which is directly related to and strictly necessary for the implementation of the merger and the one that may correspond to the early implementation of the merger.

The early implementation of a merger may result from:

— the exchange of information which has by object or by effect the early implementation of the merger (point 2 below);

— the ownership of assets and/or rights acquired by contract, granting the possibility of exercising a decisive influence (point 3 below);

— the *de facto* acquisition of a decisive influence (point 4 below).

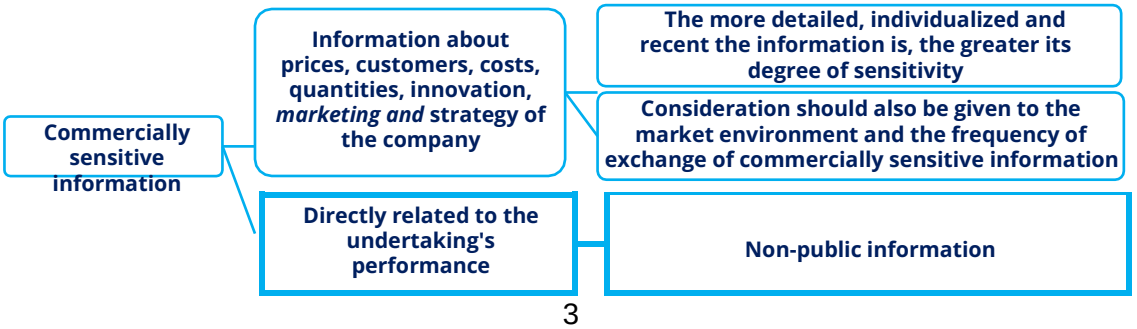
### 2. The exchange of commercially sensitive information

What is meant by commercially sensitive information?

The Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, of 14 January 2011, OJ C 11, ("the Guidelines"), adopt the concept of strategic information, to which reference is made in respect of commercially sensitive information.

Under the Guidelines, in general, the information related to prices and quantities has the greatest strategic value, followed by the information on costs and demand. However, if the Parties are competing in research and development ("R&D"), the technology data may be the most strategic in terms of competition.

In accordance with the Guidelines and practice of the European Commission, the strategic relevance of commercial information also depends on its aggregation or individualization, its age (older vs. latest), as well as the context of the market and the frequency of exchange, as set out in the following diagram:



Based on competition authorities' practice, the table below gives examples of strategic business matters which, from the outset, may correspond to commercially sensitive information:

| | |
|---|---|
| **COMMERCIALLY SENSITIVE INFORMATION**<br><br>**Examples** | Prices and other transaction conditions, including discounts, reductions or rebates and tenders in tender procedures |
| | Strategic plans, including marketing and positioning plans vis-à-vis competitors, including marketing plans |
| | Quantities produced and sold, market shares, turnover, profits and profit margins |
| | Installed capacity and capacity expansion or reduction plans |
| | Production costs |
| | Identity of customers and their contracts |
| | Identity of suppliers, distributors and their contracts |
| | R&D projects and products in project |
| | Investments made or planned |
| | Contractual conditions of workers |
| | Non-public information on trademarks and patents, including proprietary technology |
| | Secrets and methods of production; know-how |

As mentioned above, the exchange of commercially sensitive information strictly necessary for the purpose of completing the merger is legitimate.

The exchange of commercially sensitive information may be considered a typical part of the acquisition process, if properly conducted and if the nature and purpose of such exchange is directly linked to the acquirer's need to assess the value of the target and/or to plan the integration of its assets.

The exchange of commercially sensitive information not strictly necessary may contribute for the demonstration of the exercise of a decisive influence over the target.

The exchange of commercially sensitive information in the absence of any kind of safeguard aimed at limiting the number of individuals with access to the information and the dissemination of information within the acquirer before the closing date (deadline for the conclusion of the acquisition process), as described in the following point, is evidence of early implementation.

### 3. Early implementation by contractual means

The possibility of exercising a decisive influence over the target — before a clearing decision — may explicitly result from rights established in M&A contracts, namely from a potential

acquirer's veto rights in relation to the activity of the target.

The acquirer should not have the possibility to exercise (or exercise *de facto*) a decisive influence over the commercial policy of the target, in particular over the transaction conditions, which are essential for the commercial and operational autonomy of the target during the merger's stand-still period.

The following table illustrates a few strategic matters of commercial policy in which the intervention of the acquirer during the stand-still period is susceptible of corresponding to early implementation:

| | |
|---|---|
| **Clauses that allow interference in strategic matters of the target's activity**<br>**Examples of strategic matters** | Transaction conditions, namely prices, including discounts |
| | Commercial strategy, including marketing strategy, R&D and new products in pipeline |
| | Investments policy |
| | Relationship with customers, suppliers, distributors and business partners |
| | Appointment or removal of directors |

It should be noted, however, that the restriction imposed on the vendor regarding the introduction of (significant) material changes in the target's activity, to the extent strictly necessary to preserve its value, as described in Section III below, does not correspond to the possibility of exercising a decisive influence over the target.

The possibility of exercising a decisive influence over the target's activity is not limited to the type of control exercised, as a rule, in undertakings' deliberative and executive bodies, such as the budget, the strategic plan or significant investments approval or the appointment or dismissal of the members of corporate bodies.

The possibility of intervening in the target's day-to-day management (in its day-to-day commercial operations, internal organization, etc.) can also be an expression of the possibility of exercising a decisive influence, since it is also susceptible to affect, directly or indirectly, the target's market behavior during the stand-still period.

The table below presents examples of clauses linked to non-compliance with the stand-still obligation due to the possibility of the acquirer's intervention in the target's day-to-day management:

| | |
|---|---|
| **Clauses that allow interference of the acquirer in the normal course of the target's activity**<br>**Examples** | In the day-to-day operational decisions of the target |
| | In the ordinary management of the target's contracts, including contracts to be concluded involving insignificant amounts |
| | In investments already budgeted and not budgeted with minor impact |
| | In day-to-day relationships with customers and suppliers |
| | In day-to-day relationships with staff |
| | In the usual relationship with financing entities |

Other clauses associated with the merger's early implementation are those that allow acquirers to prematurely integrate the target' assets or activity, as shown in the examples of the following table:

| | |
|---|---|
| **CLAUSES THAT ALLOW THE ACQUIRER TO PREMATURELY INTEGRATE THE ASSETS OR ACTIVITY OF THE TARGET**<br>**Examples** | Non-competition during suspension |
| | Anticipating the effect of contracts by reference to the closing date of the transaction |
| | Enabling the integration of assets of the target, including facilities |
| | That allows the sharing of physical spaces with the target |
| | That leads to the closure or resizing of production units, facilities and the allocation/reduction of employees of the target |
| | That allows operational instructions to the target |
| | Leading to the takeover of the target's operating profits and losses |
| | That allow for joint purchases or through the target |

The clause of non-refundable advance payment, full or partial, shall also be avoided, except in the case of down payment typical in commercial transactions of that nature.

**4. Early implementation in practice**

The early implementation can be grounded on the very exercise of a decisive influence (*de facto* control acquisition).

Examples of conduct indicative of the acquisition of a *de facto* control over the target:

| | |
|---|---|
| **Conduct susceptible of revealing *de facto* control**<br>**Examples** | Subjection, in practice, to the acquirer's veto or authorization regarding strategic matters of the target's activity, in particular under the terms of the table above, relating to strategic matters |
| | Subjection, in practice, to the acquirer's veto or authorization regarding matters of the target's day-to-day management, in particular under the terms of the table above, relating to the normal course of business |
| | Target´s pricing, product allocation, territories and customers determined by the acquirer |
| | The coordination of trade policies |
| | Changes in the target's business structure and organization |
| | The takeover by the acquirer of the target's day-to-day management |
| | Transfer and/or use of target's assets in general |
| | Access to the target's commercially sensitive information not strictly necessary, especially without the adoption of appropriate safeguards |

It is the premature integration, in practice, of the target's assets or activity.

The interpretation given to contractual clauses, or the practice adopted under their light by the Parties may, notwithstanding their acceptable formulations, lead to conduct that indicates the exercise of a decisive influence in accordance with the exposed in the table above.

The practices described above are just examples of conducts that, after a case-by-case analysis, may indicate an early implementation.

## SECTION III: PROCEDURES TO MITIGATE THE RISK OF EARLY IMPLEMENTATION

### Antitrust Protocol

During the acquisition process — and as soon as possible — the adoption of a protocol regulating the Parties' conducts to address the risk of gun-jumping ("antitrust protocol") is recommended, particularly in respect to the exchange of commercially sensitive information.

The safeguards to be included in the protocol, which are described on the following point, are especially recommended when the merger involves actual or potential competitors.

#### 1. Drafting of the M&A contracts

In drafting the clauses governing the conduct of the Parties until the completion of the acquisition process, the principle to be followed — to be included in the antitrust protocol — should be that of not damaging the competitive environment until the adoption of a clearing decision by the Autoridade.

This principle may, however, be reconciled with the acquirer's legitimate interest in preserving the target's value.

This legitimate interest may be expressed in clauses binding the vendor, such as the obligation not to make investments beyond a certain (significant) amount or the obligation not to introduce material changes in the target's business or activity until the closing of the transaction.

In any case, these clauses cannot constitute an unjustified restriction of the target's commercial autonomy.

In other words, contract provisions restricting the target's commercial autonomy must be limited to what is strictly necessary to preserve its full value and must be truly exceptional.

This implies that decisions and matters relating to the day-to-day management or normal course of business of the target should not be subject to any intervention by the acquirer, since they will not, in principle, have a material impact on the value of the target's assets.

The same applies to the acquirer' intervention regarding easily reversible decisions of the target, which are unlikely to affect its value.

It should be noted that even veto rights in matters going beyond the normal course of business of the target will have to be substantiated considering the objective of preserving the value of the target.

In summary, the Parties must assess carefully the obligations stipulated during the stand-still period, which should be in strict accordance with the abovementioned.

In this context, before or after the notification, if there is a strict need for the adoption of special measures to avoid a target's assets devaluation, the Parties may request an exemption from the stand-still obligation, in the terms of paragraph 3 of article 40 of the Competition Act, with a view to the (partial) implementation of the deal before the clearing decision, under the terms provided for therein.

## 2. Conduct of the Parties

As stated before, during the stand-still period, the acquirer shall not be able to:

— influence strategic decisions of the target or actually exert such influence, except in exceptional cases, with a material impact on the activity of the target;

— influence the normal course of business of the target or *de facto* exercise that influence;

— prematurely integrate the target's activity and/or assets or *de facto* integrate the target's activity and/or assets.

Therefore, it is recommended that the antitrust protocol ensures that the clauses governing the conduct of the Parties until the clearing decision are effectively complied with, safeguarding the correct interpretation and application of the clauses, in order not to allow the early implementation of the merger in any of the cases abovementioned.

The interpretation given to the M&A agreements, or the practice adopted by the Parties, may, notwithstanding their acceptable formulation, lead to conduct that indicates the exercise of a decisive influence over the target in accordance with the tables above.

## 3. Safeguards for the exchange of commercially sensitive information

As to the exchange of commercially sensitive information, the Parties should not share information beyond what is strictly necessary for the pursuit, in the specific case, of the intended objective, namely the assessment of the target's value (due diligence) and/or the planning of the target's assets integration.

The greater the amount of strategic information to be disclosed and the greater the degree of its sensitivity, the stronger the safeguards contained in the antitrust protocol should be.

The implementation of these safeguards is crucial to the compliance with the stand-still obligation of the merger.

The safeguards aim to restrict as much as possible the access to commercially sensitive information, ensuring the Parties' commercial and operational autonomy during the stand-still period.

In particular, it is a matter of preventing the access to sensitive business information of the target by the staff involved in the definition of the acquirer's commercial policy.

As regards to the access to commercially sensitive information, the recommended procedural safeguards — to be included in the antitrust protocol — are as follows:

| | |
|---|---|
| **ANTITRUST PROTOCOL** | Data room |
| **Safeguards on access to commercially sensitive information** | Clean team |
| | Confidentiality agreements |
| | Executive Committee |

The inclusion of all the safeguards contained in the table above in the antitrust protocol will ensure a high degree of protection, specially recommended when there is a need for access to a large amount of commercially sensitive information and/or the merger involves direct competitors. It is up to the Parties, in each case, to adopt the appropriate safeguards.

### 3.1 Data Room

If there is a need for access to commercially sensitive information, it is highly recommended that the information in question be gathered, treated, accessed, and kept in a physical space exclusively dedicated, delimited, and conditioned for this purpose (data room), for the following purposes:

| | |
|---|---|
| **Data room: objectives** | Gathering and maintenance of information |
| | Access reserved to clean team members |
| | Prohibition of reproduction or use outside the room |
| | Data treatment |
| | Return or destruction of information at the end of the acquisition process |

Therefore, it is highly recommended to restrict access to the data room to members of the clean team only, whose structure is analyzed below.

It is also recommended that the antitrust protocol includes:

— the prohibition of the reproduction or the sending of information outside the data room by individuals with exclusive access to the data room;

— rules on the recording of all information received from the Parties, identifying their nature, destination, and place of storage;

— clear instructions for the return or complete destruction of information if the operation does not proceed, including penalties and supervision to ensure that these instructions are followed.

### 3.2 Clean team

If there is a need to exchange commercially sensitive information, it is highly recommended to (i) avoid the direct exchange of information between the Parties, (ii) contain the dissemination of information and (iii) treat the information to mitigate its degree of sensitivity.

The direct exchange of information is avoided by using independent consultants or employees not involved in the definition of the Parties' commercial policy, the so-called *clean team*, with exclusive access to the information gathered in the data room.

The clean team aims to ensure that commercially sensitive information is transmitted, on a need-to-know basis, to a limited number of the Parties' officials/employees/advisors, bound by confidentiality agreements.

The clean team should be the sole point of contact between the Parties, in addition to the executive committee.

The members of the clean team should be responsible for sending, receiving, gathering, and treating the information.

The information requested by the clean team to the Parties shall be limited to what is strictly necessary for the merger.

In summary, as for the clean team:

— on the basis of the information received from the Parties and after the commercially sensitive information treatment, the clean team shall send a report to the executive committee, composed of the Parties' qualified staff, for analysis;

— the clean team shall report directly and exclusively to the executive committee members;

— clean team members shall not participate in the executive committee or vice-versa;

— the exchange of information shall be formally recorded;

— the information must be transmitted through separate and independent communication channels, for example: clean team – company A; clean team – company B; clean team – executive committee;

— any change in the clean team or executive committee composition must be communicated in writing to the other members; each new member must sign a confidentiality agreement and comply with the antitrust protocol;

— if the acquisition process is not successful, the Parties shall require the clean team to fully return or destroy all information sent and/or treated, so that no data can be re-used nor kept on file;

— in the same context, the Parties may reallocate their employees to their previous activities, bound to the obligation of confidentiality.

### 3.3 Data treatment

As previously mentioned, one of the objectives for the establishment of the clean team is the treatment of confidential information to be transmitted to the executive committee members, as shown in the table below.

| | |
|---|---|
| **Treatment of the strictly necessary information** | Protecting the identity of customers, suppliers and business partners |
| | Data aggregation |
| | Use of historical information whenever possible |

The clean team's report to the executive committee shall contain truncated, aggregated and/or historic versions of the commercially sensitive information, which may be subject to review by an external lawyer prior to its disclosure.

According to the Guidelines on horizontal cooperation agreements, there is no predetermined threshold when data becomes historic or old enough not to pose risks to competition.

Whether data is genuinely historic depends on the specific characteristics of the relevant market and in particular the frequency of price re-negotiations in the industry.

For example, data can be considered as historic if it is several times older than the average length of contracts in the industry if the latter are indicative of price re-negotiations.

Moreover, the threshold when data becomes historic also depends on the data's nature, aggregation, frequency of the exchange, and the characteristics of the relevant market (for example, its stability and transparency).

The information shall be treated in such a way as not to allow, namely, disclosure of the target's actual trading conditions or indications on the target's future behavior.

The commercially sensitive information may only be shared with the executive committee's members after it has been treated as explained above.

It may also make sense, depending on the volume of information to be accessed to, the merger degree of sensitivity and the risks posed by the merger, to submit the treated information by the clean team to an external consultant for review.

It is recommended that the antitrust protocol contains concrete rules on the treatment of the commercially sensitive information.

### 3.4 Executive Committee

An executive committee, formed by qualified staff of the Parties, may be set up for the purposes of the analysis of the treated information (due diligence) and for the evaluation, planning and preparation of the target's integration. The executive committee shall meet specifically for this purpose, in its own place (parlor room), as shown in the following table:

| | |
|---|---|
| **EXECUTIVE COMMITTEE** | Meetings in private room |
| | Information analysis |
| | Preparation of integration |
| | Meetings monitoring |

Notwithstanding the clean team treatment of commercially sensitive information, if some sensitive information is transmitted to the executive committee, the members of the executive committee shall also be bound by duties of confidentiality, particularly in relation to the Party that appointed them, even after the conclusion of their duties.

It is recommended that all activities of the executive committee be documented and supervised by an independent member.

### 3.5 Confidentiality agreements

As mentioned above, a central aspect of the antitrust protocol is the conclusion of confidentiality agreements binding the clean team's and executive committee's members, as set out in the following table:

| | |
|---|---|
| **CONFIDENTIALITY AGREEMENTS** | Clean team members |
| | Executive committee members |

The confidentiality agreement shall prohibit the disclosure of commercially sensitive information, namely to the Parties' employees in the commercial and marketing departments, even after the termination of those functions.

It is strongly recommended that no data or information may be used, copied, transferred, published or mentioned without the Parties' express consent.

In this context "information" means any data originating from the company, original or copy, in paper or electronic form, in text, spreadsheet, graphic or image form.

## SECTION IV. CONSEQUENCES OF EARLY IMPLEMENTATION

### 1. Ineffectiveness of legal contracts

The legal contracts celebrated in breach of the obligation not to implement the merger before the clearing decision by the Competition Authority are ineffective.

### 2. Admissible interim measures

Regarding the implementation of a merger prior to the clearing decision, the AdC may, at any time, take the necessary and appropriate measures to re-establish the situation which existed before the early implementation, namely the separation of the undertakings or of the joint assets, including the reversal of the operation or the cessation of control.

### 3. *Ex officio* proceedings

The merger implemented without prior notification, which occurred in the preceding five years, and of which the AdC becomes aware of, will be subject to *ex officio* assessment proceedings.

*Ex officio* proceedings are initiated by a communication from the AdC to the natural or legal persons who are at fault, so that they can submit a merger notification within a reasonable time limit in accordance with the provisions of the Competition Act.

### 4. Imposition of fines

The implementation of a merger before the issuing of a clearing decision constitutes an infringement punishable by a fine.

This fine may amount to 10% of the aggregate worldwide turnover of all persons who are part of each of the offending undertakings, in the year immediately prior to the final decision rendered by the AdC.

The members of the board of directors of the infringing company, as well as those responsible for the management or supervision of the areas of activity where there has been an administrative offence, are liable to a fine which may amount to 10% of their annual gross income, including business and professional income, in the last full year when the prohibited practice occurred.

For the purposes of the abovementioned, the AdC opens an investigation, initiating a sanctioning proceeding, which, once the infringement is demonstrated, will end with a decision imposing the mentioned fine(s).