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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Portugal --

25 February 2014

This note is submitted by Portugal to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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Executive Summary

1. The Portuguese Competition Act foresees a mandatory notification system of mergers based on a twofold threshold of market shares and companies turnover in Portugal. The law also imposes a stand-still obligation to merging parties until the Portuguese Competition Authority reaches a decision.

2. However, the Portuguese Competition Authority may not initiate *ex officio* proceedings for reviewing mergers falling below notification thresholds.

3. Regarding mergers which meet the notification thresholds and were not duly notified, the failure to comply with such legal duties may be sanctioned with fines. In addition, the Portuguese Competition Authority has the power to initiate *ex officio* proceedings to review the merger. The Portuguese Competition Authority has made use of its powers to assess such mergers and sanction the failure to meet the legal obligation to notify the merger.

1. Mandatory pre-merger notification system in Portugal

4. Portugal has a mandatory pre-merger notification system which is based on two different types of thresholds: market shares and undertakings' turnover in Portugal. This twofold criterion has been foreseen in the Portuguese competition legislation since 1988.

5. Transactions which meet the thresholds cannot be implemented before the Portuguese Competition Authority (hereinafter referred to as "PCA") approves the merger. Therefore, as a general rule, there is a standstill obligation.

6. The standstill obligation may only be derogated in exceptional circumstances. The exemptions include the implementation of a takeover bid or a public exchange offer that has been notified to the PCA. In addition, the PCA may authorize the derogation of the standstill obligation on a case by case basis, following a reasoned request from the undertakings concerned. In these cases, the PCA takes into account the consequences of suspending the operation or of suspending the exercise of voting rights by the undertakings concerned, as well as the possible negative impact on competition deriving from the derogation. If necessary, the PCA may add conditions or obligations to the derogation in order to ensure effective competition.

7. On May 8, 2012, the Portuguese Parliament approved a new Competition Act, Law No. 19/2012. The legislative process followed from one of the measures set out in the Memorandum of Understanding on Specific Economic Conditionality between Portugal and the European Commission, the European Central Bank and the International Monetary Fund¹ (MoU), which envisaged the increased effectiveness of competition law enforcement in Portugal. As set out in the MoU, the new competition law should "(...) *establish the necessary procedures for a greater alignment between Portuguese law on merger control and the EU Merger Regulation, namely with regard to the criteria to make compulsory the ex-ante notification of a concentration operation*" (May 2011).

¹ *Memorandum* presented by the Portuguese Government in the context of the on-going Economic and Financial Assistance Program ("PAEF").

8. The 2012 Competition Act incorporates the experience of nine years of enforcement by the PCA since its creation in 2003 and the latest developments in European Union competition law, decisional practice and jurisprudence.

9. Amongst other important amendments, the 2012 Competition Act brought significant changes to the pre-merger notification rules, both regarding the market share and the turnover thresholds.²

10. These new thresholds resulted from a critical reflection during the preparation of the 2012 Competition Act, aiming to strike a balance between two main factors: the specificities of the Portuguese economy, namely the small scale of many markets, and the need to exclude transactions from merger review which are unlikely to result in significant negative effects on competition.

11. The market share threshold, in particular, responds to the need to take into account the scale of markets in Portugal, acting as an effective “filter” of whether a transaction is likely to raise competitive concerns, even if this threshold may cause difficulties when undertakings are determining their own share in the relevant market.

12. Also, drawing on the PCA experience of reviewing over 500 mergers, it was clear that a relevant part of significant transactions would run the risk of falling outside the scope of PCA review if the notification criteria were limited to turnover thresholds. As an example, if the legislator opted for a single criterion for company turnover, nearly 15 per cent of the transactions notified that raised competition concerns would not need to be notified³.

13. The thresholds are, thus, designed to increase legal certainty, avoid unnecessary costs associated with merger filing and delays for undertakings, while enabling the PCA to focus its resources on reviewing mergers which are more likely to raise competition concerns.

2. Mergers falling below notification thresholds and *ex post* intervention in cleared mergers

14. The 2012 Portuguese Competition Act does not foresee the possibility of *ex officio* assessment of mergers which do not meet the legal thresholds for notification.

15. As mentioned above, the Portuguese notification thresholds were revised in 2012 in order to cover transactions most likely to significantly impede effective competition, thereby decreasing the eventual need for a mechanism of intervention concerning non-notifiable mergers.

16. However, the undertakings resulting from mergers are subject to the general antitrust provisions.

² The following circumstances are now 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 (registered in Portugal) 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. The combined aggregate turnover threshold of all undertakings taking part in the concentration in Portugal was lowered from €150 million to €100 million, while the individual turnover threshold of two of them (at least) was raised from € 2 million to €5 million.

³ For these purposes transactions that raise competition concerns include phase 1 decisions with commitments and phase 2 decisions.

17. As a result of an antitrust investigation, the PCA may impose behavioral or structural remedies necessary to bring an end to the prohibited practice or its effects. Structural remedies may be imposed only when there is no behavioral remedy that would be equally effective or, should it exist, be more burdensome for the party concerned. Thus far, the PCA has never imposed structural remedies in an antitrust case.

18. In addition, the PCA does not have the power to re-open merger reviews of previously approved mergers, with or without remedies. In these cases, the PCA may only re-open the administrative proceedings to review the merger under two circumstances:

- a. if its clearance decision was based on false or inaccurate information concerning essential circumstances of the merger provided by the parties, whether in terms of the assessment of meeting the notification criteria, or during the merger review itself;
- b. if the merger was implemented without complying with a decision which imposed conditions or obligations.

19. The PCA may also simultaneously initiate an infringement proceeding for the administrative offence, whether it be the non-compliance with a non-opposition decision imposing commitments or obligations, or providing false or inaccurate information. Both are punishable with fines, of up to 10% and 1% of the turnover of the undertaking, respectively.

20. During the procedure to re-assess the merger which has already been consummated, the PCA may order measures that are appropriate to restore effective competition, namely the separation of the undertakings or of any aggregated assets, including reversal of the operation or the cessation of control. The power to use of these measures was clarified in the 2012 Competition Act.

3. Failure to notify – the powers of the PCA

21. The failure to notify consummated mergers which meet the notification thresholds constitutes an administrative offense and renders the undertakings liable for fines of up to 10% of the turnover of their respective group in the year preceding the decision of the PCA.

22. Moreover, the 2012 Competition Act provides for administrative sanctions for individuals. More precisely, directors and individuals heading or supervising the departments of undertakings involved in the infringement may be deemed liable for that infringement if the breach was, or should have been, of their knowledge, and are subject to fines.

23. In addition to pecuniary sanctions, failure to notify a merger which meets the notification thresholds may result in the opening of an *ex officio* proceeding by the Authority, forcing the parties to submit a notification within a mandatory deadline imposed by the PCA. The fee due for filing a concentration doubles in case of an *ex officio* notification.

24. In this case, the Authority may also decide, when justifiable, to apply a periodic penalty payment of up to 5% of the average daily turnover of the last year, for each day of delay.

25. Equally important is the fact that a transaction implemented in this situation does not produce any legal effects.

26. Furthermore, if these mergers are challenged, the PCA can order measures such as the separation of the undertakings or of any aggregated assets, including reversal of the operation or the cessation of control.

27. In practice, when the PCA initiates an investigation in order to assess whether a transaction failed the mandatory notification, in the majority of cases undertakings readily decide to notify the consummated merger in order to avoid the *ex officio* procedure (and the notification fee).

28. Regarding non notified mergers, even if the consummated merger does not have negative effects on competition and is approved by the PCA following an *ex officio* procedure, it may be subject to an infringement proceeding for failure to notify before consummation and be subject to a penalty.

29. In December 2012, the PCA punished pharmaceutical companies and a trade association for failing to notify a concentration. In this case, the PCA considered that the National Pharmacy Association (*Associação Nacional de Farmácias - ANF*), Farminveste 3 and Farminveste failed to notify the acquisition of control of ParaRede/Glitt and initiated an *ex officio* merger control procedure. The concentration was approved, but the failure to notify led to the application of €150,000 in fines, corresponding to 0.05 per cent of the turnover of ANF and Farminveste⁴.

30. The implementation of merger transactions subject to mandatory notification without the prior notification and clearance by the PCA hinders its power of *ex ante* intervention, which aims to avoid the creation or reinforcement of impediments to effective competition in the national economy, sometimes difficult to eliminate.

31. The non-notification of merger transactions that meet the legal thresholds for mandatory notification to the PCA prevents the timely assessment of the effects of such operations on the markets concerned. These effects might potentially be difficult to reverse, which would increase the costs of regulatory intervention. Therefore, such infringements are considered by the PCA as a serious infringement.

32. Lastly, it should be noted that there is a statute of limitation of five years, counting from the consummation of the non-notified merger, to open an *ex officio* administrative proceeding to force the due notification or to start infringement proceedings. This rule aims at striking a balance between the scope of intervention of the PCA and legal certainty.

4. Final remarks

33. The 2012 Portuguese Competition Law provides for a system of mandatory pre-merger notification. Mergers that do not meet notification thresholds are not assessed as such by the PCA, under its merger review powers.

34. Regarding mergers that were not notified, although the notification thresholds are met, the PCA has powers both to review mergers *ex officio* and to sanction non-notification. These powers were clarified in the legislative review in 2012 and have been already been put into practice by the PCA.

⁴ This case was appealed to the Court and it is still pending.