

Competition - Portugal

Unusual fine imposed on non-authorised concentration

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Like the EU system, the Portuguese merger control regime is based on an *ex ante* assessment system, whereby a concentration that meets the relevant thresholds is subject to prior mandatory notification and cannot be implemented before the respective authorisation has been issued by the Competition Authority. Non-compliance with this requirement is subject to a heavy fine (up to 10% of the previous year's turnover) and other financial penalties, and the underlying transaction is considered by law to be deprived of legal effect. The Competition Authority is entitled to initiate *ex officio* investigations regarding non-notified concentrations and to order the parties to present (late) notifications.

Over the past 10 years, the filing of notifications triggered by *ex officio* proceedings has been a common feature of the Portuguese competition landscape. In contrast, the imposition of fines for failure to notify has remained rare: the last reported fines for failure to notify were issued in 2003/2004 and concerned breaches of the notification duties arising from the Competition Act 1993 (in force until June 2003). The fines applied have ranged from €1,000 to €75,000.

In this context, the Competition Authority's recent decision to fine the National Pharmacy Association (ANF) and two subsidiaries a total of €149,278.79 for implementing a concentration without the necessary prior authorisation is of interest.

The concentration dated back to 2008 and concerned the indirect acquisition of control over Glintt (previously named ParaRede) by ANF via its subsidiary Farminveste – Investimentos, Participações e Gestão, SA by way of the merger of Farminveste's subsidiary Consiste into publicly listed ParaRede/Glintt. Even though, post-merger, Farminveste did not gain the majority of share capital and voting rights in Glintt (in absolute terms), in the Competition Authority's view it had sole control over the latter. The authority reached this conclusion based on:

- Farminveste's high percentage of share capital and voting rights (respectively, 49.73% and 49.83%) when compared to all remaining qualified stakeholdings in Glintt (less than 3%);
- the fact that the majority of the members appointed to the board of directors were directly or indirectly linked to ANF; and
- the board's powers to vote on strategic matters.

Following an *ex officio* investigation by the Competition Authority, Farminveste notified the transaction in November 2009 and it was cleared by the authority in May 2010.

However, in early 2012 the Competition Authority decided to initiate an administrative offence procedure against ANF and its subsidiaries for breach of the duty not to implement a transaction without the necessary preliminary authorisation. This procedure ended in the imposition of a fine of €149,278.79.

It is unclear whether ANF's recidivist behaviour played a role in the authority's decision to bring the administrative offence procedure, as this was not the first time that ANF had failed to file a preliminary notification with the authority (that was rather its acquisition of joint control over Alliance Healthcare in 2005, which resulted in Case 80/2005). In addition, in 2010 Glintt had been subject to an *ex officio* notification procedure for two concentrations which it had failed to notify, one of which occurred in November 2008 – a time when Glintt was already under the control of Farminveste (resulting in Case 30/2010).

In its announcing the decision, the Competition Authority disclosed that the percentage of turnover applied to punish the infringement was 0.05% for each company involved, and clarified that the absence of any irreparable damage to competition stemming from the concentration played a role in its assessment.

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The authority's decision comes at a time when – following the adoption of the new Competition Act in July 2012 – its powers to detect and punish non-notified concentrations have been somewhat reduced, with *ex officio* proceedings now being limited to concentrations that occurred in the preceding five years. However, this change has not resulted in a relaxation of the authority's enforcement powers, as this decision shows. The punishment of parties to a transaction for implementing the transaction without the necessary authorisation – albeit uncommon – signals the authority's intent to strictly enforce compliance with merger control rules. This is apparent from the content of the authority's own announcement, which stated that breaches of the rules on *ex ante* assessment of concentrations are considered a serious infringement of competition law and their punishment is a priority for the Competition Authority.

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