

LEGAL ALERT

THE PORTUGUESE COMPETITION AUTHORITY PUBLISHES ITS BEST PRACTICE GUIDE ON GUN-JUMPING

Introduction

The Portuguese Competition Authority (PCA) published, on the 27th of December, a guide for best practices regarding the precautions to be adopted, by companies participating in mergers subject to prior notification, in order to avoid the risks of breach of the duty to suspend the implementation of the operation before the approval by the PCA (also known as “gun-jumping”).

Mandatory notification to the PCA

The [Law no. 19/2012, of 8 May](#) – the Portuguese Competition Law –, provides that prior notification is required, by the parties involved to the PCA, which: (i) constitute “concentrations of undertakings”; and (ii) meet, at least, one of the notification criteria put forward in the law.

The **definition of “concentration”** is very broad and consists of a change of control in the whole or part of one or more undertakings, in particular as a result of mergers, acquisitions of control (sole or joint) over an undertaking or parts of an undertaking (including certain assets) or the creation of a joint venture with an autonomous market presence. Consequently, **control** corresponds to the possibility of exercising, having regard to all relevant factual or legal circumstances, **determining influence** over the activity of an undertaking or asset generating turnover.

Concentrations which meet, at least, one of the following notification thresholds are subject to compulsory notification to the PCA, when:

- i. The undertakings concerned, together, had a turnover in Portugal of at least 100 million euros in the previous year, provided that, at least, two of those undertakings individually had a turnover in Portugal of EUR 5 million in the same period;
- ii. The operation results in the creation, strengthening or transfer of a share of 50% or more of a product market in Portugal;
- iii. The operation results in the creation, strengthening or transfer of a share of between 30% and 50% in a product market in Portugal, provided that at least two of the companies concerned individually had a turnover of 5 million euros in Portugal in the previous year.

Prohibition of gun-jumping

The early implementation of a concentration, subject to prior notification, is prohibited and the parties have the duty to suspend the implementation of the transaction until the adoption of a non-opposition decision, express or implied, by the PCA.

Gun-jumping, meaning the violation of the standstill obligation, is an administrative offence punishable by a **fine of up to 10% of the total worldwide turnover** comprising each of the infringing companies. The members of the management body of the offending companies or those responsible for their management or supervision may also be subject to a fine of up to 10% of their annual gross income.

In addition, and considering that this is a prohibited practice, **legal transactions** implemented in the context of *gun-jumping* will be **ineffective**, and the PCA may, at any time, adopt any **precautionary measures** deemed necessary to restore the situation that existed before the anticipated operation (including the reversal of the operation), and subject all non-notified transactions that have taken place less than five years ago to an *ex-officio* **procedure**.

Among the **Competition Policy Priorities of the Portuguese Competition Authority for 2023**, there is a focus on the investigation of concentrations not notified or implemented prior to their approval by the PCA. In fact, **between 2017 and 2022**, the PCA sanctioned **six cases of gun-jumping**, and in **2021** alone, it adopted **three condemnatory decisions** and conducted **four investigations** for suspected *gun-jumping* or concentrations not notified to the PCA. In light of the PCA's priorities for 2023, a continued focus on these cases is expected.

The PCA's Best Practices Guide

The [Guide](#) now made available by the PCA – which is comparable with similar recommendations, namely the [Guide prepared by CADE, the Brazilian competition authority](#) – provides useful indications on: *(i)* the concept and contours of *gun-jumping*; and *(ii)* the procedures and precautions to be adopted in order to obviate the risk of early implementation.

Early implementation of a concentration

Apart from the most obvious cases (such as the transfer of ownership of shares or ownership of assets), the PCA recalls that the early implementation of a concentration may result from several and less obvious circumstances, such as:

1. **The exchange of commercially sensitive information**, including strategic corporate information (*e.g.*, on prices, costs, investments or strategic plans) going beyond what is strictly necessary to enable “*the process of acquisition of control*”, but, rather, demonstrating the exercise of decisive influence over the target company/asset;
2. **Contractual rights (such as rights of approval or veto) allowing the acquirer to interfere in *(i)* strategic matters of the activity (*e.g.*, budget or business plan) or *(ii)* the current or daily management of the target company/asset**, by having the possibility to interfere in operational decisions and day-to-day relationships of the target company/asset with its staff, clients and suppliers and with other third parties. Even in the absence of an express contractual provision, *gun-jumping* may occur if the seller subjects to the acquirer’s approval decisions on strategic matters or relating with the daily management of the target company, in practice;
3. **The premature integration into practice of the target company’s assets and/or business**, including its facilities, customer base, or profits.

Recommendations to avoid the risk of gun-jumping

The Best Practices Guide presents a set of safeguards that should be adopted as part of an “**Antitrust protocol**”, intended to regulate the relations between the parties during the process of

acquisition of control, and which the PCA considers particularly pressing in transactions involving actual or potential competitors.

These safeguards include recommendations relating to:

1. **Drafting of the relevant contractual clauses, in order to safeguard the legitimate objective of preserving the full value of the assets and of the target company**, in particular during the interim period between the signing and the closing of the transaction, which may include the obligation not to make investments beyond a certain amount or the obligation not to introduce material changes in the business or activity of the target company, however being prohibited unjustified restrictions on the commercial autonomy of the target company/asset;
2. **Conduct of the parties**, which shall not go beyond what is allowed by the **contractual clauses governing the relationship between the parties**;
3. **Exchange of commercially sensitive information**, only being allowed the sharing of information strictly necessary to verify the value of the target company/asset (due diligence) and/or to plan the integration of the target assets being securely shared.

Taking into account the importance of safeguarding access to information in the scope of concentration procedures, the PCA recommends the adoption of one or more of the following safeguards, which should be assessed on a case-by-case basis depending on the circumstances of the particular transaction:

- Celebration of **confidentiality agreements** for members who need access to commercially sensitive information, regulating the terms under which access is granted as well as the prohibition of its disclosure to third parties;
- **Creation** of a **“data room”**, as an exclusively dedicated physical space or digital platform where the information is gathered, processed and accessed;
- **Circumscription of access to the data room by a “clean team”**, consisting of independent consultants or employees of the parties not involved in the definition of the parties’ commercial policy, and with responsibility for handling (confidential) information strictly necessary to conclude the transaction, in line with the PCA’s recommendations;

- **Processing of the information** (transmitted in a confidential manner, using techniques of data aggregation, anonymisation or even de-identification of commercially sensitive information), after which it may be shared with the teams of the acquiring company responsible for the **analysis and evaluation, planning and integration of the target company**, which should meet specifically for the purpose, in a dedicated room (**parlor room**).

The [European law and competition team](#) closely follows the PCA's decision-making practice and recommendations, to keep its clients informed and provide advice on various matters.

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