

The Portuguese Competition Authority clears a merger between a pharmacist and a wholesale and retail pharmacy group (Alliance/Unichem)

Portugal, Mergers, Interim measures, Relevant market, Notification (mergers), Market definition, Merger (notion), Change of control, Price regulation, Substantive test (mergers), Control (notion), Distribution/Retail, Pharmaceutical, Healthcare

Portuguese Competition Authority (Autoridade da Concorrência), 31 January 2007, Case Ccent 80/2005, Alliance Santé Europe, S.A. / Farminústria - Investimentos, Participações e Gestão, S.A. / José de Mello Participações II, SGPS, S.A. / Alliance Unichem Farmacêutica, S.A.

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I. Introduction

On December 23, 2005, the Portuguese Competition Authority (PCA) was notified of a concentration under which *Alliance Santé Europe, S.A. (Alliance Santé)*, *Farminústria - Investimentos, Participações e Gestão, S.A. (Farminústria)* and *José de Mello Participações II, SGPS, SA (JMP)* notified the acquisition by *Farminústria* and *JMP* of 49% and 2%, respectively, of the share capital of *Alliance Unichem Farmacêutica, S.A. (Alliance Unichem)*. *Farminústria* is controlled by the Portuguese Association of Pharmacies (ANF) (“*Associação Nacional de Farmácias*”), which comprises 97% of all pharmacies active in the Portuguese territory, numerically speaking approximately 2700 pharmacies.

The notification was made following a decision adopted by the authority, dated July 22, 2005, determining that the acquisition of the referred share capital was subject to mandatory notification under the rules of the Portuguese Competition Act [em], as such transaction reflected a modification of the control of *Alliance Unichem*: from sole control by *Alliance Santé* to joint control by *Alliance Santé*, *Farminústria* and *JMP* over *Alliance Unichem*. The target company carries its activity in wholesale distribution of medicines and other health products in continental Portugal.

The transaction met the applicable notification criterion based on turnover, as the parties to the transaction held jointly a turnover above 150 million euros in Portugal. This criterion is established in Article 9(1a) of the Portuguese Competition Act.

II. The parties to the transaction maintained that the acquisition of a 51% stake in the share capital of Alliance Unichem did not constitute a concentration

Farmindústria and the remaining shareholders of *Alliance Unichem*, prior to the formal submission of the notification form, maintained before the authority that the transaction did not grant the new shareholders the joint or exclusive control over *Alliance Unichem* and therefore did not constitute a concentration pursuant to Article 8 of the Portuguese Competition Act. The authority did not accept *Farmindústria*'s legal reasoning, as it considered that *Farmindústria* and *JMP* would jointly hold, along with *Alliance Santé*, the control of *Alliance Unichem* and consequently it opened an *ex officio* procedure on July 22, 2005, forcing *Farmindústria*, *Alliance Santé* and *JMP* to notify the transaction. Several legal actions were lodged by the parties before courts, including three interim measures requests aimed at suspending the effects of the authority's decision, but all interim measures requests were dismissed, first by the Lisbon Commerce Court and afterwards, on appeal, by the Lisbon Court of Appeal. Thus, on December 23, 2005 the parties, compelled, notified the transaction to the authority.

The following reasons led the authority to conclude that the transaction constituted a concentration: (i) prior to the transaction, *Alliance Unichem* was 99,99% owned by *Alliance Santé*; (ii) following the transaction, *Farmindústria* acquired 49% and *JMP* 2% of *Alliance Unichem*'s share capital, therefore, owning both, jointly, the majority of the company's share capital; (iii) pursuant to the shareholders agreement, each of the three companies holds relevant veto powers on decisions to be adopted by *Alliance Unichem*'s board of directors, including decisions on strategic commercial issues of the company; (iv) the shareholders agreement also establishes a settlement system for potential deadlock situations between two shareholders blocks: *Alliance Santé* on one side and *Farmindústria* with *JMP*, jointly, on the other side. As a consequence, the authority concludes that there is a modification in the control structure of *Alliance Unichem*, from sole control by *Alliance Santé*, to joint control by the latter with *Farmindústria* and *JMP* -these two latter entities also have in addition, according to the authority, a wide range of common interests, including interests in other companies.

III. The relevant markets

Alliance Unichem is active in the wholesale distribution of medicines and health products in the Portuguese territory, notably acquiring medicines from pharmaceutical companies and selling them to pharmacies and para-pharmacies - we highlight that para-pharmacies can only acquire and sell medicines not subject to a medical prescription, the so-called over-the-counter medicines (*OTC medicines*).

In a nutshell, the authority's investigation led to the identification of three relevant markets:

► (i) the market of wholesale distribution (including acquisition and storage) of medicine subject to medical prescription and OTC medicine benefiting of reimbursement by the National Health System (*NHS*) - as medicines subject to prescription can only be sold in pharmacies and OTC medicines (in the cases in which these are reimbursed) can only be reimbursed when sold in pharmacies (the reimbursement by the *NHS* is not available in para-pharmacies). In addition, these two types of medicines have their price regulated and determined administratively.

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- ▶ (ii) the market of wholesale distribution (including acquisition and storage) of OTC medicines not benefiting of reimbursement by the NHS - as this type of OTC medicines can also be sold (in addition to pharmacies) in para-pharmacies. The price of OTC medicines which are not reimbursed by the NHS is not regulated.
 - ▶ (iii) The market of wholesale distribution (including acquisition and storage) of other health products.

All the three aforesaid markets are defined as having a dimension equivalent to the territory of continental Portugal, as the price conditions applied by each wholesaler are homogenous in the continental territory - excluding the Portuguese Autonomous Regions of Madeira and Azores.

IV. Substantive effects of the transaction

The authority considered that the transaction had a horizontal nature, as *Farminústria* was already active in the relevant markets, but the effects were negligible, with a market share post-concentration between 20%-25%, and a *HHI* and *delta* [em] of less than 2000 and 50, respectively, in the wholesale market of medicines subject to medical prescription and OTC medicines subject to reimbursement by the NHS.

In the wholesale market of OTC medicines, the other sensitive market, the combined market share of the parties following the execution of the transaction would not exceed 15%-20%, also with a *HHI* and *delta* of 2000 and 50, respectively.

V. Comments

This 2005 merger case was the first concentration in which the authority appraised comprehensively and exhaustively, not only the wholesale activity of the distribution of medicines in Portugal, but also the applicable regulatory framework and a significant part of the interactions that can occur between the players of the medical industry - doctors, pharmaceutical companies, distributors, pharmacies, para-pharmacies and patients.

[em] At the time it was in force the Competition Act enshrined in Law no. 18/2003, June 11, as amended. A new Portuguese Competition Act, Law 19/2012 was published on 8 May 2012, which replaces the Competition Act of 2003.

[em] In order to measure concentration levels, the authority, in the same way as the European Commission, often applies the Herfindahl-Hirschman Index (HHI). While the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger, the change in the HHI (known as the 'delta') is a useful proxy for the change in concentration directly brought about by the merger. The authority, as the European Commission, is unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1000 and 2000 and a delta below 250, or a merger with a post-merger HHI above 2000 and a delta below 150, except in very special circumstances.

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