

***Case No COMP/M.3556 -
FORTIS / BCP***

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**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 19/01/2005

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.01.2005

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

**Subject: Case No COMP/M. 3556 Fortis/BCP
Notification of 08/12/04 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 08/12/2004, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertakings Fortis Insurance International N.V. ("Fortis", the Netherlands) belonging to the Fortis Group and Banco Comercial Português ("BCP", Portugal) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of the undertaking Millenniumbcp Fortis Grupo Segurador, SGPS, S.A. ("NHC", Portugal) by way of purchase of shares from BCP.

I. THE PARTIES

2. Fortis is an international banking and insurance group. Its banking activities comprise both retail and corporate/ investment banking, as well as asset management.
3. **BCP** is a banking and financial services group in Portugal offering a complete range of retail banking, private banking and corporate banking products and services. Through its subsidiaries, BCP also offers insurance services and asset management.
4. **NHC** is a vehicle company incorporated by BCP with the purpose of holding 100% of the share capital of four of BCP's insurance companies: (1) Companhia Portuguesa de

¹ OJ L 24, 29.1.2004 p. 1.

Seguros de Vida SA (Ocidental Vida); (2) Sociedade Gestora de Fundos de Pensões SA (Pensõesgere); (3) Companhia Portuguesa de Seguros SA (Ocidental Seguros) and (4) Companhia Portuguesa de Seguros de Saúde SA (CPSS). The four companies are active in different areas of the insurance business in Portugal: Ocidental Vida is the market leader in life insurance products; Pensõesgere manages pension funds; Ocidental Seguros sells non-life insurance products; and CPSS is active in the health insurance business.

II. THE OPERATION

5. The transaction will see BCP transferring the four insurance companies to the newly established company NHC. Following this, Fortis will acquire 51% of the share capital of NHC leaving BCP with the remaining 49%. BCP will also cease to be active in the insurance business and will sell its remaining insurance companies in parallel with the transaction.

III. CONCENTRATION

6. The notified operation consists of each shareholder acquiring a slightly different stake in share capital and voting rights in NHC, a vehicle company holding 100% of share capital in four formerly BCP controlled insurance companies. Considering the various provisions of the Joint Venture Agreement concerning the parties' mutual rights and obligations in the running of NHC and other related agreements entered into between the parties, BCP and Fortis will acquire joint control over NHC as a consequence of the transaction.

Joint control of Fortis and BCP over NHC

7. Control is understood as a possibility of exercising decisive influence over an undertaking. Its existence is determined by both legal and factual considerations.² Joint control exists if the shareholders must reach agreement on major decisions concerning the controlled undertaking.³ Joint control may exist as well in situations where there is no equality between the two shareholders in votes or in representation in decision-making bodies. This is the case where the minority shareholder has additional rights which allow it to veto decisions which are essential for the strategic commercial behaviour of the joint venture.⁴ This strategic veto right must however go beyond the rights accorded to minority shareholders to protect their financial interests.⁵
8. In the present case, Fortis and BCP will acquire different stakes in NHC – BCP 49% and Fortis 51% of share capital and voting rights. The Board of Directors which exercises important influence over the joint venture is composed of seven members, out of whom three members are appointed by BCP and four members are appointed by

² Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 (98/C 66/1), Paragraph 9.

³ Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 (98/C 66/02), Paragraph 18.

⁴ *Ibid* 3, Paragraph 21.

⁵ *Ibid* 3, Paragraph 22.

Fortis. The Board of Directors decides by simple majority of present or duly represented members. After having fulfilled several formalities, Fortis will be able to prevail over BCP in (i) appointment of management; (ii) day-to-day running of NHC; and (iii) the determination of budget and business plan.

9. At the same time however, according to section 7.7 of the Joint Venture Agreement, consent of both parties is required for the so-called reserved matters. The reserved matters comprise not only clauses protecting minority shareholder's investment⁶ but also confer on BCP veto right over other issues such as the incorporation of subsidiaries, and the execution, termination and modification of any reinsurance policies entered into with the Fortis group or BCP group companies.
10. There are also additional veto rights conferred on BCP in relation to distribution of the joint venture's products (both new and existing). In relation to new products of the joint venture, section 3.2 of the Joint Venture Agreement and section 3.1 of the Bancassurance Agreement in effect provide that before a new product may be distributed by BCP to the BCP customer base, BCP has to approve it. Moreover, section 4 of the Bancassurance Agreement (and section 9 of the Joint Venture Agreement) provides that the joint venture may distribute its products (both new and existing) through another bank network only if BCP consents to that.
11. Consequently, if BCP were to disapprove a product (whether new or existing) for distribution to its customer base, the joint venture could distribute the product through another bank distribution network only if BCP gave its consent to that. If BCP denied its consent to such alternative bank distribution, the joint venture would remain free, in principle, to use other non-bank distribution channels, not associated or controlled by banks or financial institutions.⁷
12. However, as distribution via BCP represents some 94% of NHC turnover (alternative non-bank distribution channels – i.e. brokers and others – constitute the remainder of the turnover), these veto rights confer to BCP a decisive influence on the running of the joint venture. It is unlikely that the JV would risk jeopardising the bulk of its current revenues in case of a disagreement with BCP over its activity. The effect is all the more acute for the life insurance part of the JV activities where access to banks networks is crucial for the success of a product. Bancassurance channels of distribution represent 81% of the life insurance Portuguese market.
13. Thus, BCP has an important influence over the kind of products which will be offered to the customers, as well as over the distribution channels used by the joint venture (veto rights over the use of alternative bank distribution channel for both, new and existing products) in a situation where other distribution channels do not constitute currently a viable alternative (and are likely to remain so in the immediate future).

⁶ By providing for veto rights over mergers, changes of bylaws, increases and decreases of share capital, large capital investments and transactions, encumbrances and changes of agreed solvency margin, etc.

⁷ According to the Bancassurance Agreement (Section 4.3) entered into between the parties, the joint venture can use for the distribution of its products (both new and existing) non-bank distribution channels without prior consent of BCP as long as these distributors are not controlled or associated with banks or financial institutions.

14. In these circumstances the fact that Fortis will be able to determine the business plan and the budget of NHC and control the day-to-day running of the business are not the only decisive factors for determination of control over NHC. In the light of the foregoing the Commission concludes that BCP's influence over the joint venture, in the specific circumstances of the present case, is sufficient to result in joint control of BCP and Fortis over NHC.

Full-function joint venture

15. In order to constitute a concentration within the meaning of Council Regulation No 139/2004, a joint venture must perform on a lasting basis all the functions of an autonomous economic entity. For this purpose the joint venture must have management and access to sufficient resources in order to conduct its business activities autonomously and on a lasting basis. The fact that a joint venture makes use of the distribution network of one or more of its parent companies will not disqualify it as "full-function" as long as the parent company is acting only as an agent of the joint venture.⁸
16. The Commission notes that in the present case, the joint venture is comprised of companies pre-existing in the market. As such these companies are endowed with all necessary resources to continue performing functions of autonomous economic entities in the market (own management, financial resources, permits, staff, etc.). The Commission also notes that the joint venture will rely on the banking distribution network of BCP, one of its parent companies. As mentioned above, to distribute its products (both new and existing) through another bank network the joint venture would need consent of BCP. Alternative, non-bank distribution channels for the joint venture's products are in principle available, but, as explained above, distribution through a bank network remains in this case crucial for the success of the bancassurance business. This is so also due to the fact that at present the joint venture predominantly uses bank distribution for its products.
17. The Commission notes that BCP will act as an agent for the joint venture in distribution of the joint venture's insurance products. Under the Bancassurance Agreement executed between the parties and the joint venture companies, BCP will be remunerated for the distribution of the joint venture's products in the form of a commission. Differences over the revision of the commission between the parties will be submitted before an independent expert whose findings should be binding between the parties. As an agent for the joint venture BCP is obliged to promptly transfer all executed policies as well as all collected premiums to the joint venture. The management of claims as well remains a responsibility of the joint venture.
18. Considering the foregoing the Commission concluded that the proposed joint venture is full-function.

⁸ Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 (98/C 66/1), Paragraph 13.

IV. COMMUNITY DIMENSION

19. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion⁹ (Fortis EUR 47 972 million, BCP EUR 4 185 million). Each of the undertakings have a Community-wide turnover in excess of EUR 250 million (Fortis EUR 39 145 million, BCP EUR 3 962 million), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

V. COMPETITIVE ASSESSMENT

Product market definition

20. The joint venture will be active in both the life and non-life insurance market offering mostly standardised products¹⁰ to customers primarily through the bank distribution channel (Bancassurance). In previous decisions the Commission has made a distinction between life and non-life insurance products.¹¹ The Commission has also taken the view that, from a demand side perspective, life and non-life insurance can be divided into as many product markets as there are different kinds of risks covered. As their characteristics, premiums and purposes are distinct and there is typically no substitutability for the consumer between the different risks insured. The Commission has found that from the supply side perspective, the conditions for insurance of different risk types are quite similar and most large insurance companies are active in several risk types. It therefore concluded that many different types of non-life insurance might be included in the same product market.¹²
21. As the transaction does not give rise to competition concerns, the exact delineation of the product market may be left open.

Geographic market definition

22. The Commission has previously considered markets for both life and non-life insurance to be principally national in scope.¹³ The parties submit that although the move is towards increased inter-community selling, the market for most products remains national with the exception of the Marine and Transport insurance market which has been described as international.

⁹ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

¹⁰ The share of customised products offered by the parties was below 5% of gross written premiums of the joint venture. Customised products are made for larger corporate clients in the areas of pension fund management services and employee benefits.

¹¹ Case COMP/M.2676 Sampo/ Varma/ If Holding/ JV

¹² Case COMP/M.2676 Sampo/ Varma/ If Holding/ JV

¹³ Case COMP/M.2225 Fortis/ ASR

23. However, since the transaction does not give rise to competition concerns, the exact delineation of the geographic market may be left open.

Assessment

Life insurance products

24. The impact of the proposed concentration on competition is assessed below on the basis of the narrowest hypothetical market definition. According to the notifying parties, the life insurance products can be further divided into (i) retirement products (pension plans, education plans and joint pension and education plans); (ii) risk and annuities products (products offering protection against death and disability); and (iii) capitalisation products.
25. The joint venture had a market share just in excess of 15% in the hypothetical market with retirement products in Portugal in 2003, however the market share related to BCP activities is negligible (0.13%) and as such will not give rise to any competition concerns. The Commission also notes that there are a number of competitors present in the hypothetical market with retirement products in Portugal, such as Tranquilidade-Grupo Espírito Santo (31% in 2003) or Grupo Caixa Geral de Depósitos (28% in 2003). Santander, AXA, Allianz and BPI Vida were also present but each with shares below 5%.
26. As regards the hypothetical market for risk and annuities products in Portugal, the joint venture had a market share of 19% in 2003. Several competitors are active in this hypothetical market, such as Caixa Geral de Depósitos (13% in 2003), Tranquilidade (10% in 2003) and Allianz (9% in 2003). As regards the hypothetical market for capitalisation life insurance products, the joint venture had a market share of 23% in 2003. There are a number of competitors present in this market, such as BPI Vida (16% in 2003), Caixa Geral de Depósitos (16% in 2003), Santander (12% in 2003) and Tranquilidade (11% in 2003).
27. Fortis does not carry out any activities in the field of life insurance and pension funds management in Portugal. In addition, BCP will cease to be active in all the insurance markets in Portugal, with the exception of some limited activity in the retirement products market (0.13% market share in 2003). Considering the above, the transaction raises no competition concerns in relation to any of the hypothetical markets with life insurance products in Portugal.

Non-life insurance products

28. The hypothetical health insurance market in Portugal is the only hypothetical non-life insurance market where the joint venture's market share exceeded 15% (22% in 2003). In this hypothetical market there are a number of competitors, in particular Caixa Geral de Depósitos (market share 19% in 2003), Victória (13% in 2003), Allianz Portugal, Tranquilidade, Lusitânia, Axa Portugal and number of other international insurance companies. The Commission notes in this respect that Caixa Geral de Depósitos' position in this hypothetical market will be substantially strengthened following the

completion of its acquisition of Império Bonança (its market share in 2003 accounted for 19%) from BCP.¹⁴

29. Fortis does not carry out any activities in the field of non-life insurance.
30. In relation to the Marine and Transport insurance, the activities of the joint venture and Fortis thus do not overlap in Portugal. The Commission has previously stated that for Marine and Transport insurance the geographic market could be wider than national.¹⁵ However, Fortis' market share in the hypothetical EEA-wide market with Marine and Transport insurance was less than 5 % in 2003. The additional market share of the joint venture would be negligible considering that its market share in the Marine and Transport insurance in Portugal, and consequently as well in the EEA, accounted for less than 1% in 2003.
31. The Commission as well notes that in conjunction with the transaction, BCP will cease to be active in the non-life insurance market in Portugal. Considering the above, the transaction raises no competition concerns in relation to any of the hypothetical markets with non-life insurance products both in Portugal and EEA-wide.

Pension funds management

32. The joint venture will be active in this hypothetical market with a focus on corporate schemes. Its market share on this hypothetical market in Portugal accounted for 27% in 2003. In spite of its market leadership it was facing competition from number of parties present in this hypothetical market, such as Grupo CGD (17%), Grupo BPI (13%), Previsão (11%), Grupo BES (10%), Futuro (7%), SocGest BdP (6%), Santander (5%) and a number of other funds.
33. Fortis does not carry out any activity in the field of pension funds management in Portugal. In addition, BCP will in conjunction with the transaction cease to be active in this hypothetical market in Portugal. Considering the above, the transaction will raise no competition concerns in this hypothetical market.

Vertical relationship between the joint venture and BCP

34. As BCP is, and will continue to be, active in the distribution of NHC's insurance products there will be a vertical relationship between one of the parents, BCP, and the joint venture. In this respect the Commission notes that this vertical link pre-existed to the notified operation. The only change brought about by the operation is the inclusion of Fortis as a parent company. As Fortis was previously absent of the Portuguese insurance markets, it can be excluded that the notified operation would have a negative impact on competition via vertical effects.
35. In any event, as regards bank distribution of insurance products (bancassurance) in Portugal, the BCP's bank network accounted for 21% of the total insurance products

¹⁴ The Caixa Geral de Depósitos acquisition of Império Bonança – Companhia de Seguros S.A. was notified to the Portuguese National Competition Authority on 27 July 2004, under case No. 28 – Caixa Seguros/ NHC (BCP Seguros).

¹⁵ Case COMP/M.2676 Sampo/ Varma/ If Holding/ JV.

distributed through bank networks (bancassurance) in Portugal (21% in terms of number of branches).

36. For life insurance products the bancassurance distribution is the main distribution channel in Portugal, accounting for 81% (in terms of gross written premium) in 2003. BCP's share of the bancassurance distribution of life insurance products accounted for 20% in 2003. The most important distribution channel for non-life insurance is distribution through agents and brokers, which accounted for 77% in 2003. The bancassurance distribution of non-life insurance products is an important distribution channel accounting for 12% (in terms of gross written premium) in 2003. BCP's share of the bancassurance distribution of the non-life insurance products accounted for 29% in 2003.
37. The Commission therefore concludes that the vertical relationship between the parties has in these specific circumstances no significant impact on the structure of the market.

VI. CONCLUSION

38. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission

Neelie KROES (signed)
Member of the Commission