Merger Control

The international regulation of mergers and joint ventures in 71 jurisdictions worldwide

Consulting editor
John Davies

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GETTING THE DEAL THROUGH

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

Merger control is governed by Law No. 19/2012, of 8 May 2012 (the Act), which enacted the new Portuguese competition legal regime superseding the previous regime enacted by Law No. 18/2003 of 11 June 2003, as amended (the former Competition Act).

Decree-Law No. 125/2014, of 18 August 2014, adopted and approved the new statutes of the Competition Authority superseding Decree-Law No. 10/2003 of 18 January 2003, which created the Authority and approved its former statutes.

The Competition Authority is entrusted with the mission of implementing competition rules, including those on merger control. It is a public entity endowed with administrative and financial autonomy, management autonomy, and organic, functional and technical independence. It has been granted statutory independence for the performance of its activities, without prejudice to certain acts that are subject to ministerial approval (eg, the budget, the multi-annual plan and the management report and the accounts, including the balance sheet). The member of government in charge of economic affairs (currently the minister of economy) may also be called to intervene in merger control proceedings through an extraordinary appeal (see question 22).

Without prejudice to the competence of the government as regards competition policy, the members of the Board of the Competition Authority shall be heard by the relevant parliamentary committee, whenever they are requested for such purposes, to provide information or clarification on their activities and on competition policy matters.

The Code of Administrative Procedure applies on a subsidiary basis to the procedure to be followed in the area of mergers.

The Code of Procedure in Administrative Courts applies on a subsidiary basis to the judicial review of the Competition Authority's administrative decisions, including merger control.

The General Regime on Quasi-criminal Minor Offences (enacted by Decree-Law No. 433/82 of 27 October 1982) applies on a subsidiary basis to the sanctioning procedure and decisions, and to their judicial review.

2 What kinds of mergers are caught?

Portuguese competition law applies to mergers that occur in Portuguese territory or that may have an effect within it. A concentration is deemed to exist when a lasting change of control over the whole or part of an undertaking occurs, as a result of the following situations:

- two or more previously independent undertakings or parts thereof merge;
- one or more persons or undertakings who already have control of at least one undertaking acquire control, directly or indirectly, of the whole or parts of the capital stock or of assets of one or several other undertakings; or
- two or more persons or undertakings create a joint venture that is intended to perform on a lasting basis the functions of an autonomous economic entity.

However, a concentration is deemed not to exist in case of an acquisition of shareholdings or assets by an insolvency receiver in the framework of an insolvency procedure; the acquisition of a shareholding merely as a guarantee; or the acquisition by credit institutions, financial companies or insurance companies of shareholdings in undertakings with a corporate object different from that of any of these three types of companies, when the acquisition is made with a mere temporary nature and for resale purposes provided that such acquisition is not made on a lasting basis, the voting rights associated with the acquired shareholdings are not exercised with the purpose of determining the competitive behaviour of the concerned undertakings or are solely exercised with the purpose of preparing the total or partial transfer of such undertakings, the assets thereof or the acquired shareholdings, and further provided that such transfer occurs within one year from the date of acquisition (which may be extended by the Competition Authority if the acquirers show that the transfer was not possible within such period due to reason worthy of consideration).

3 What types of joint ventures are caught?

As stated above, merger control provisions apply to joint ventures that are intended to perform on a lasting basis the functions of an autonomous economic entity (full-function joint ventures).

4 Is there a definition of 'control' and are minority and other interests less than control caught?

Under the Act, 'control' is any act of whatever form that confers the ability to exert on a lasting basis, separately or jointly, a decisive influence, in the given legal and factual circumstances, on the activities of an undertaking. In particular, it is the case of the acquisition of the whole or part of the capital, the acquisition of ownership or of the right to use or enjoy the whole or part of the assets of an undertaking, or the acquisition of rights or the conclusion of contracts that confer a decisive influence on the composition or on the decisions of the corporate bodies of an undertaking. So far, nothing has been provided for outside the above boundaries.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Concentrations are subject to prior notification if one of the following conditions occurs:

- as a result thereof a share equal to or higher than 50 per cent of the national market for a particular good or service or for a substantial part of it is acquired, created or reinforced;
- as a result thereof a share equal to or higher than 30 per cent and lower than 50 per cent of the national market for a particular good or service or for a substantial part of it is acquired, created or reinforced, provided that in the preceding financial year the individual turnover in Portugal, net of directly related taxes, of at least two undertakings taking part in the concentration exceeds €5 million; and
- in the preceding financial year, the group of undertakings taking part in the concentration have recorded in Portugal a turnover exceeding €100 million, net of directly related taxes, provided that the individual turnover in Portugal of at least two of these undertakings exceeds €5 million.

In addition, two or more concentrations made within a period of two years among the same individuals or legal entities, which considered

individually would not be subject to prior notification are deemed to be a sole concentration subject to such prior notification when the set of concentrations reaches the turnover figures set out above.

Several rules on the calculation of both market share and turnover are established in the Act.

Only concentrations that meet one of the above conditions and that are therefore subject to prior notification may be investigated under the merger control rules. Concentrations that do not meet any of such conditions may, nevertheless, be investigated as restrictive practices.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Notification to the Competition Authority is mandatory where the statutory thresholds are met. No exceptions are admitted.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

As stated above, the Act applies to mergers that occur in Portuguese territory or that have or may have an effect within it. Accordingly, foreign-to-foreign mergers that have or may have effects within the Portuguese territory (ie, those where the statutory thresholds are met) are subject to the Act.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act is applicable to all economic activities, be they permanent or occasional, in the private, public and cooperative sectors. There are no provisions in the Act relating to specific sectors, other than the indication that the Competition Authority's powers over concentrations in regulated sectors are exercised in cooperation with the corresponding regulatory authorities, from which the Authority, prior to the adoption of a decision within a merger control procedure in the corresponding sector, shall request the position on the notified operation. Such powers do not interfere with the regulatory authorities' own legally attributed powers.

Provisions influencing, directly or indirectly, mergers in specific sectors may also be found in the concerned area's legislation.

With reference to companies, which, by law, are in charge of the management of services of general economic interest, or companies that have the nature of a legal monopoly, they are subject to the provisions of the Act to the extent that the application of such rules does not constitute an obstacle to the fulfilment of the particular mission with which they have been entrusted.

In other contexts too, merger operations must comply with the relevant provisions of the Commercial Companies Code and, as far as the securities market is concerned, with the applicable rules of the Securities Code.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations must be notified after the conclusion of the corresponding agreement and before they are carried out or, whenever relevant, after the date of disclosure of the preliminary announcement of a public takeover bid or of an exchange offer or the date of disclosure of the announcement of the acquisition of a controlling shareholding in a listed company, or, in the case of a public procurement procedure, after the definitive award of the contract and before the closing of the transaction. In these latter cases, the awarding public entity shall, in the public procurement programme, set the rules regarding the interplay between the public procurement procedure and the merger control regime established in the Act.

Furthermore, when the undertakings taking part in the concentration show to the Competition Authority a serious intent of concluding an agreement or, in the case of a public takeover bid or of an exchange offer, the undertakings show the public intent to carry out such bid or offer, the concentration may be notified to the Competition Authority before the above deadlines.

Under the Act, projected concentrations may be the object of pre-notification evaluation by the Authority, which shall be carried out in accordance with the guidelines adopted by the Authority on 27 December 2012.

Failure to make prior notification of a proposed concentration that is subject to such requirement may give rise to a sanctioning procedure launched by the Authority, which shall be subject to the opportunity principle set out in the Act, pursuant to which the Authority may, on public interest grounds, grant different degrees of priority in respect of the matters it is called to assess.

The said failure to notify is punishable with fines, which, for each of the concerned undertakings, cannot exceed 10 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Competition Authority. In cases where under the Act individuals (eg, directors) are held responsible for the infringement, the applicable fine cannot exceed 10 per cent of the corresponding remuneration in the last full year in which the infringement took place.

In addition, the Competition Authority may decide to impose periodic penalty payments, not exceeding 5 per cent of the average daily turnover in the year immediately preceding that of the Competition Authority's decision, per day of delay, counted from the date the decision is notified. Furthermore, an ex officio merger control procedure may be initiated by the Competition Authority.

The above sanctions are, in principle, applied in practice, as shown, notably, in a decision of 26 June 2014, in which the Authority imposed fines of approximately €6,900 and approximately €112,000 on the National Pharmacies Association (ANF) and on Farminveste, respectively, for failure to notify the acquisition of the control over Consiste and Glintt, a transaction where the statutory thresholds for mandatory notification (see question 5) were exceeded. No fine was imposed on a third concerned undertaking, Farminveste 3, since it had no revenues in 2013. The fines imposed resulted from a settlement proposal submitted by ANF and Farminveste, which the Authority accepted, and corresponded to a reduction of the fines by one-third (see 'Update and trends').

10 Who is responsible for filing and are filing fees required?

In the case of full mergers, creation of joint ventures or the establishment of common control over the whole or part of one or several undertakings, notification must be made by the group of undertakings jointly, through a common representative. In other cases notification is filed by the undertaking (or persons) intending to acquire control of the whole or part of one or more undertakings.

Pursuant to the Act, a filing fee shall be due for the assessment of concentrations subject to prior notification. In addition, a notification shall only be effective if filed together with the document that confirms the payment of the due fee.

As regards filing fees, according to Regulation No. 1/E/2003 of 3 July 2003, of the Competition Authority (which having been adopted pursuant to the former Competition Act has not been repealed or replaced), the basic fee payable for the appraisal of concentrations has been established as the following amounts:

- €7,500, when the previous financial year's combined turnover in Portugal for the companies involved in the concentration, calculated according to the relevant provisions of the Act, is equal to or less than €150 million;
- €15,000, when the previous financial year's combined turnover in Portugal for the companies involved in the concentration, calculated according to the relevant provisions of the Act, exceeds €150 million and is equal to or less than €300 million; and
- €25,000, when the previous financial year's combined turnover in Portugal for the companies involved in the concentration, calculated according to the relevant provisions of the Act, exceeds €300 million.

The aforementioned fees shall be doubled when the Competition Authority decides to initiate proceedings in the following cases:

- concentrations of which the Competition Authority becomes aware and that, though subject to mandatory notification, have not been notified;
- concentrations for which the express or tacit decision of non-opposition was grounded on information provided by the participants in the concentration that was false or inaccurate with regard to essential elements for the decision; and

- concentrations in which there has been total or partial disregard of the obligations or conditions imposed at the time of the decision of non-opposition.

Also, if the Competition Authority, during the first phase of the merger control procedure, considers that the transaction is likely to affect competition and decides to proceed with an in-depth investigation (see questions 16 and 17), a further fee of 50 per cent of the basic fee shall be payable.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Act prohibits the implementation of concentrations subject to prior notification before this latter is filed. Furthermore, until tacit or express clearance is granted, a concentration subject to prior notification shall not be put into effect. However, this does not prevent the implementation of a public takeover bid to purchase or an exchange offer that has been duly notified to the Competition Authority, provided that the acquirer does not exercise the voting rights attached to the securities in question. Upon reasoned request from the participant undertakings submitted before or after the notification the obligations of not putting into effect a concentration or of not exercising voting rights may, in exceptional cases, be subject to a derogation granted by the Competition Authority, which may attach conditions or obligations to such derogation to ensure effective competition. Legal transactions carried out in breach of the prior notification or suspension obligations are ineffective.

In addition, and without prejudice to the applicable sanctions, after the notification of a concentration implemented in breach of the above obligations and before a decision is adopted by the Competition Authority the individuals or legal entities that acquired the control must immediately suspend the corresponding voting rights and the management body shall not perform any act outside the normal course of business, the transfer of shareholdings or assets of the acquired undertaking being prohibited. Upon reasoned request from the concerned individuals or legal entities these obligations may, in exceptional cases, be subject to a derogation granted by the Competition Authority, which may attach conditions or obligations to such derogation to ensure effective competition.

Furthermore, the Competition Authority may adopt measures it considers necessary or adequate to restore the situation existing prior to the breach, notably divestment.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

As stated above, until tacit or express clearance is granted, a concentration subject to prior notification shall not be put into effect and legal transactions carried out in breach of such suspension obligation are ineffective. Furthermore, the violation of such suspension obligation is punishable with fines, which, for each of the concerned undertakings, cannot exceed 10 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Competition Authority. So far, the Authority's decision record does not include any case concerning the violation of the suspension obligation. However, this should not allow for the conclusion that the Authority shall not investigate and punish any such violation.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As stated in question 12, so far the Authority's public record of decisions does not include any case concerning the violation of the suspension obligation. As also stated, this should not allow for the conclusion that the Authority shall not investigate and punish any such violation including in cases of foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The law does not specifically address this situation; solutions must therefore be found on a case-by-case basis, and would not differ from those applicable to local mergers.

15 Are there any special merger control rules applicable to public takeover bids?

See questions 9 and 11.

There is no other reference in the merger control rules to public bids specifically. Such bids are, in any event, subject to other rules, notably those provided for in the Securities Code and the Commercial Companies Code.

16 What is the level of detail required in the preparation of a filing?

Notifications must, in principle, be filed according to a 'Regular Notification Form' that has been adopted by the Competition Authority as an attachment to its Regulation No. 60/2013 of 14 February 2013.

Pursuant to said Regulation, the following information must, notably, be provided in a notification:

- a summary of the transaction, which shall be used in the publication referred to in question 30;
- the identity of the parties including the indication of their activities (and, in the case of the notifying party, of the activities of the entities with which it has interdependence links), the indication of their turnovers for the last three years and the submission of their individual and consolidated accounts and reports;
- the indication of other competition authorities to which the transaction is being notified;
- the indication of the activities subject to sectoral regulation;
- the nature (merger, acquisition of exclusive or joint control or joint venture) and the type (horizontal, vertical or conglomerate) of the concentration;
- a description of the concentration, which shall include the submission of the relevant contractual, public bid or public tender documents (as applicable), its economic and financial structure, the estimated timing and required acts, the existing financial support, if any, and the submission of reports, studies or other documents prepared for the purposes of assessment of the notified transaction;
- the control structure of the participant undertakings, including:
  - a list of the undertakings that control, or are controlled by, the participants or are part of the participants' group of undertakings;
  - the turnover in Portugal of such undertakings;
  - the identity of the members of their boards of directors;
  - copies of the articles of association;
  - copies of shareholders' agreements, when relevant for the concentration; and
  - if the transaction will create a joint venture, a detailed description of the decision-making rules and of the demonstration that it shall perform on lasting basis the functions of an autonomous economic entity;
- the personal and financial connections of the participant undertakings (list of undertakings active in the relevant markets in which the directors of the participants hold similar positions or in which the participants hold a minority shareholding);
- a reasoned identification of the relevant product and geographic markets;
- identification of the relevant product and geographic related markets with indication of the estimated market shares of the participant undertakings and of the five major competitors in the past three years in each of such related markets;
- information on the relevant markets, notably, their size in value and in quantity in the last three years and the description of facts that influence the entry in and the exit from the relevant markets;
- the offer structure in the relevant markets (including an indication of the participants' turnovers and market shares in the past three years and of the five major competitors and estimated market shares in the same period);
- the demand structure in the relevant markets by indicating, notably, the consumers' or end-users' preferences as to certain products or brands, after-sales services, network effects and consumption habits;
- information on the participants, which must include the indication of the 10 major suppliers and the 10 major clients; and

- other information that the participants may deem relevant, including the reasons why they consider that the notified transaction should be cleared.

The aforementioned Regulation No. 60/2013 covers in a very detailed manner not only the above information but also other information that may be deemed relevant for the review procedure.

To preserve confidentiality, notifying parties may identify in a reasoned manner the information to be considered confidential and file non-confidential versions of the notification.

Regulation No. 60/2013 also includes, as an innovation vis-à-vis the former regime, a Simplified Notification Form that requires a lower level of information to be provided within each of the above categories of data, as listed in detail in the regulation. The Simplified Notification Form is to be used in concentrations which on a preliminary assessment do not create significant impediments to competition, in accordance with the following criteria established in Regulation No. 60/2013:

- none of the parties to the concentration performs economic activities in either the same relevant geographic or product markets (no horizontal overlap) or in markets which are located upstream or downstream in the production or commercialisation process (no vertical effects), or in neighbouring markets (no conglomerate relationships), in which operate any other parties to the concentration. This criterion also applies to situations of change from joint to exclusive control, in which prior to concentration the party acquiring exclusive control is not active outside the joint venture in markets where this latter is present or in upstream or downstream vertically related markets, or in neighbouring markets. It further applies to situations of change from exclusive to joint control, in which prior to concentration the undertakings acquiring the joint control (other than the undertaking that had exclusive control) are not active outside the joint venture in markets where this latter is present or in upstream or downstream vertically related markets, or in neighbouring markets;
- when the parties to the concentration are engaged in activities in the same relevant geographic or product markets (horizontal overlap) provided that within the geographic scope of the market, as defined by the notifying parties, and in the national territory their combined market share does not exceed 15 per cent; or their combined market share exceeds 15 per cent, but is lower than or equal to 25 per cent, and the corresponding increase of market share does not exceed 2 per cent;
- when the parties are engaged in activities in markets vertically related, provided that the individual or combined market shares at any level of the production or commercialisation process (upstream or downstream) within the geographic scope of the markets, as defined by the notifying party(ies) and in the national territory do not exceed 25 per cent; and
- when the parties to the concentration are engaged in activities in neighbouring markets, provided that the individual or combined market shares in any of these markets, within the geographic scope of the markets, as defined by the notifying parties, and in the national territory does not exceed 25 per cent.

17 What is the statutory timetable for clearance? Can it be speeded up?

The timetable for the merger clearance procedure is as follows:

- if the notification is complete it becomes effective on the date it is filed together with the document that confirms the payment of the due filing fee. If the notification is incomplete or includes inaccurate data the Authority, within seven working days, invites the notifying party to complete the notification and the notification becomes effective on the date the missing elements are filed. The notifying party may at any time withdraw the notification or waive its rights or legitimate interests;
- within five working days from the date on which it is effective, the Competition Authority shall publish the essential elements of the notification in two national newspapers, at the expense of the notifying party, so that any interested third parties may submit their observations within the prescribed time, which may not be less than 10 working days; and
- within 30 working days from the date on which the notification is effective, the Competition Authority shall complete the investigation and shall accordingly decide either:
- the concentration is not subject to prior notification;
- not to oppose the concentration, with or without conditions or obligations attached thereto; or
- to initiate an in-depth investigation when it considers that the concentration in question is likely to create significant impediments to competition in the Portuguese market or in a substantial part of it.

The above 30 working days deadline may be suspended if requests for additional information are made by the Competition Authority. It may also be suspended for 20 working days if the notifying party offers commitments. Prior hearing of the notifying party and of interested third parties that have submitted observations also suspends the deadline.

The lack of a decision within the period of 30 working days referred to above (plus suspensions) shall be considered as a decision of non-opposition to the concentration.

This initial 30-day period may be shortened under the simplified decision procedure, introduced on 24 July 2007. This procedure, which currently is merely an internal guideline, is applied on a case-by-case basis depending on the specifics of each transaction. It may apply, in particular, to transactions that do not result in a significant change in the competitive structure of the market (for example, because they only consist of a transfer of a market share, as opposed to an increase).

If the Competition Authority decides to initiate an in-depth investigation, this must be completed within a maximum of 90 working days from the effective date of the notification. This deadline may be suspended if requests for additional information are made by the Competition Authority. It may also be suspended for up to 20 working days upon request of the notifying party or with this latter's agreement. Prior hearing of the notifying party and of the interested third parties that have submitted observations, which must take place no later than 75 working days from the effective date of the notification, also suspends the deadline.

Until the end of this period, the Competition Authority must either authorise the concentration, with or without conditions or obligations attached thereto, or prohibit the concentration if it considers that the concentration, as initially notified or following the amendments made by the notifying party, is likely to create significant impediments to competition in the Portuguese market or in a substantial part of it. In this latter case, the Competition Authority shall prescribe appropriate measures should the concentration have already been implemented. The lack of a decision within the 90-working-day period referred to above (plus suspensions) shall also be considered as a decision of non-opposition to the concentration.

In the case of concentrations occurred in less than five years of which the Competition Authority becomes aware and that, though subject to mandatory notification, have not been notified, the procedures initiated ex officio by the Competition Authority shall be subject to the above time limits.

The above delays may, to a certain extent, be accelerated if, during a pre-notification assessment (see question 9), all the required data and all relevant competition issues are discussed and clarified with the Authority, thereby avoiding future suspensions and allowing for a more swift response by the Authority. Typically non-complex merger control proceedings may take approximately one month.

18 What are the typical steps and different phases of the investigation?

See question 17.

Substantive assessment

19 What is the substantive test for clearance?

Concentrations falling within the scope of the Act are forbidden if they create significant impediments to competition in the Portuguese market or in a substantial part of it, in particular if such impediments result in the creation or strengthening of a dominant position. Pursuant to the Act, notified concentrations shall be appraised to determine their effects on the competition structure, having regard to the need to

preserve and develop effective competition in the Portuguese market or in a substantial part of it, in the interests of users and consumers.

20 Is there a special substantive test for joint ventures?

Joint ventures, which have as their object or effect the coordination of competitive behaviour between the undertakings that remain independent, shall – as regards those coordination aspects – be assessed under the provisions of the Act governing prohibited agreements and practices.

21 What are the 'theories of harm' that the authorities will investigate?

'Theories of harm' (market dominance, unilateral effects, coordinated effects, conglomerate effects, vertical foreclosure) are considered by the Authority in the assessment of concentration operations.

22 To what extent are non-competition issues relevant in the review process?

The former Competition Act had already eliminated the possibilities contemplated in the previous competition regime of special justification criteria for the approval of concentrations, which inevitably gave room to the application of non-competition criteria and even to possible industrial policy considerations.

Since then, a more rigorous and competition-oriented system of merger control has been in place.

Nevertheless, the statutes of the Competition Authority, adopted and approved by the above-mentioned Decree-Law No. 125/2014, have, in very debatable terms, maintained one possibility, already contemplated in the Competition Authority's former statutes, of application of non-competition criteria, which despite its exceptional nature, may bring about some distortions to the system.

In fact, prohibition decisions adopted by the Competition Authority may be appealed by the notifying parties to the member of the government responsible for the economy (extraordinary appeal), who in turn may, with a duly reasoned decision, authorise the concentration at stake, whenever the resulting benefits to fundamental strategic interests of the national economy are deemed to exceed the inherent disadvantages for competition. The ministerial decision that authorises a concentration, under the extraordinary appeal regime, may contain conditions and obligations that minimise its negative impact on competition. The extraordinary appeal has been used in *Brisa/AEA* (case 22/2005). The terms of the ministerial decision adopted in this case do not remove the concerns that the procedure may raise. In fact, the overall broadness of the vocabulary and grounds of the decision may have set a precedent and an incentive that may be invoked too often whenever the Authority issues a prohibition decision.

23 To what extent does the authority take into account economic efficiencies in the review process?

Besides the basic substantive test, the main criteria for the appraisal of concentrations essentially follow the structure established at EU level. Accordingly, pursuant to the Act, notified concentrations shall be appraised to determine their effects on the competition structure, having regard to the need to preserve and develop effective competition in the Portuguese market, or in a substantial part of it, in the interests of users and consumers. The following shall notably be taken into account:

- the structure of the relevant markets and the existence or absence of competition from undertakings established in such markets or in distinct markets;
- the position of undertakings participating in the relevant market or markets and their economic and financial power, in comparison with their main competitors;
- the potential competition and the existence, in law or in fact, of entry barriers to the market;
- the opportunities for choosing suppliers and users;
- the access of the different undertakings to suppliers and markets;
- the structure of existing distribution networks;
- supply and demand trends for the products and services in question;
- special or exclusive rights granted by law or attached to the nature of the products traded or services provided;
- the control of essential facilities by the undertakings in question and the access opportunities to such facilities offered to competing undertakings;
- technical and economic progress to the extent that it is to the consumer's advantage and does not create an obstacle to competition; and
- the contribution that the concentration makes to the international competitiveness of the Portuguese economy.

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition Authority may prohibit or interfere as follows.

- Prohibit a concentration. If the transaction has already been carried out, appropriate measures to re-establish effective competition may be ordered, including divestment.
- Approve a concentration, subject to conditions and obligations.
- Begin proceedings on its own initiative in the case of concentrations occurred in less than five years of which the Competition Authority becomes aware and that, though subject to mandatory notification, have not been notified, adopting measures necessary or adequate to re-establish, to the extent possible, the situation existing prior to the concentration, notably divestment.
- Revoke its decisions in the cases where the concentration is put into effect in breach of the conditions or obligations attached to the clearance decision or when a decision not to oppose a concentration was based on false information, provided by the concerned undertakings, that was essential to the decision. In these cases the Authority may also adopt measures necessary or adequate to re-establish, to the extent possible, the situation existing prior to the concentration, notably divestment.
- Following a sanctioning procedure (subject to the opportunity principle; see question 9), impose fines of up to 10 per cent of the turnover in the year immediately preceding that of the final decision adopted by the Competition Authority where undertakings fail to give prior notification of concentrations under the Competition Act, execute concentrations that had been suspended or prohibited by the Competition Authority, or do not comply with the conditions or obligations imposed.
- Following the aforementioned sanctioning procedure, impose fines of up to 1 per cent of the turnover in the year immediately preceding that of the final decision adopted by the Competition Authority where undertakings refuse to provide or provide false information.
- Following the aforementioned sanctioning procedure, impose periodic penalty payments of up to 5 per cent of the average daily turnover in the in the year immediately preceding that of the Competition Authority's decision, per day of delay counted from the date the decision is notified, where the undertakings:
  - do not comply with a Competition Authority decision that imposed a sanction or ordered the adoption of certain measures; or
  - fail to give prior notification of concentrations under the Competition Act.

Legal transactions relating to a concentration are null and void if they put into effect operations condemned by an order that prohibited the concentration, if they breach the conditions and obligation attached to a clearance decision or if they disregard measures imposed to re-establish effective competition.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The notifying party may, at any time during the merger control proceedings, offer commitments to preserve effective competition, in which case the review period is suspended (see question 17). Such commitments may include divestment or other structural or behavioural remedies. During the suspension the Authority may request information it deems necessary to assess the commitments offered. Moreover, the authorisation of a concentration may be subject to conditions or obligations designed to maintain effective competition. Furthermore, if a prohibited transaction has already gone ahead, the Competition

Update and trends

In the area of merger control there is only one decision adopted in 2016 by the Competition Authority that requires highlighting.

In the *EDP Renewables/Sociedades Ventinveste* case, notified on 13 November 2015, the former – a subsidiary of EDP, one of the largest Portuguese companies active in the production, purchase, sale, import and export of energy (electricity and natural gas), as well as in its distribution and marketing mainly in Portugal, but also in Spain, Brazil and various other countries – notified the acquisition of the exclusive control over five companies that operate and manage wind farms.

EDP Renewables had previously notified a similar transaction, whereby it had acquired the exclusive control over a number of companies that manage wind farms, a transaction that went to a Phase II in-depth investigation (the EDP Renewables/ENEOP's assets concentration). In order to overcome the competition concerns identified by the Competition Authority in this concentration, which gave rise to the Phase II investigation, EDP Renewables proposed behavioural commitments, which the Authority accepted.

Anticipating that the Competition Authority could raise similar concerns in the *Sociedades Ventinveste* case, EDP renewables offered the same type of behavioural commitments as those proposed in the previous case, which the Competition Authority accepted, clearing the concentration in a Phase I decision adopted on 4 February 2016.

As in the previous case, the commitments are valid for an initial period (the duration of which is kept confidential in the Authority's decision). At the end of such period the commitments shall be reassessed and in case the competition concerns subsist the Authority may order either the divestiture of the acquired assets or, exceptionally, the renewal of the commitments. If the concerns subsist at the end of the renewal period, the Authority shall determine the divestiture of the acquired assets. Divestiture may additionally be ordered if the commitments are due to be reassessed (due to certain events or following a report by the monitoring trustee) and the competition concerns subsist at the time such reassessment is carried out.

Authority may impose appropriate measures to ensure effective competition such as divestment, or the relinquishing of corporate control.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

As stated above (see question 25), at any time during the merger control proceedings, the notifying party may offer commitments, including divestment and other structural or behavioural remedies to preserve effective competition. For this purpose the Authority issued on 28 July 2011 the Guidelines on the Adoption of Commitments in Merger Control, which address the selection, design, execution and monitoring of commitments in merger control proceedings. It is not possible to establish, from the existing case law, a specific pattern of solutions adopted by the authorities. In fact, both structural and behavioural remedies have been implemented (see, notably, *Sonaecom/PT*, Case 8/2006; *BCP/BPI*, Case 15/2006; *Arena Atlântida/Pavilhão Atlântico*Atlântico, SA*, case 38/2012; and *Kento*Unitel*Sonaecom/ZON*Optimus*, Case 5/2013). Behavioural remedies and the corresponding supervision obligations were applied for periods ranging from two to five years (see *Unibetão/Sicóbetão*, Case 30/2005; *TAP/PGA*, Case 57/2006; *Sonae Distribuição/Carrefour*, Case 51/2007; *Pingo Doce/Plus*, Case 01/2008; and *TRPN/Internorte*, Case 49/2010).

Furthermore, as also mentioned above (see question 24), the Authority may adopt measures, notably divestment, necessary or adequate to re-establish effective competition: in case a prohibited concentration was already put in effect (see *TAP/SPdH*, Case 12/2009); in case of ex officio proceedings initiated by the Authority in respect of concentrations, occurred in less than five years, of which the Authority becomes aware and though subject to mandatory notification have not been notified; and in case of revocation, by the Authority, of clearance decisions.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Two cases may be mentioned where remedies were applied in foreign-to-foreign mergers.

In the *Dreger Medical/Hillenbrand* merger (Case 44/2003), the Competition Authority imposed the following conditions:

- the keeping of a second distribution channel in a non-exclusive regime for a period of three years;
- the keeping of non-discriminatory conditions for a period of three years;
- keeping the product available as long as there was demand for a period of three years;
- refraining from directly selling products in Portugal for three years; and
- keeping spare parts available for seven years after the production of the last device.

In *SC Johnson/Sara Lee's Insecticide Business* (case 25/2010), the clearance decision was subject to SC Johnson divesting in a number of assets previously controlled by Sara Lee related to certain insecticide businesses.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Under the Act restrictive provisions directly related and necessary to the implementation of the concentration are presumed to be also covered, within certain terms, by the decision clearing such concentration.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

In the absence of a required notification the Competition Authority may initiate proceedings ex officio, on the basis of information on the transaction it has obtained, which may include facts brought to its attention by third parties.

In addition, all holders of rights or legally protected interests that may be affected by the concentration who submit to the Authority their observations on the notified transaction are eligible to intervene in the concerned merger control proceedings. For these purposes, the Competition Authority publishes the essential elements of a notification in two national newspapers, at the expense of the notifying party, fixing a deadline, which may not be less than 10 working days, for submission of observations. Before the adoption of final decisions by the Competition Authority, any interested parties that have submitted observations shall be heard by the Competition Authority.

Furthermore, during the investigation the Authority may request from any private or public entities the information it may deem necessary for the decision.

As stated above (see question 8), the Competition Authority's powers over concentrations in regulated sectors are exercised in cooperation with the corresponding regulatory authorities, from which the Authority, prior to the adoption of a decision within a merger control procedure in the corresponding sector, shall request the position on the notified operation. Such powers do not interfere with the regulatory authorities' own legally attributed powers.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

As stated above, within five working days from the date the notification becomes effective, the Competition Authority shall publish the essential elements thereof in two national newspapers, at the expense of the notifying parties, so that any interested third parties may submit their observations within the prescribed time, which may not be less than 10 working days. The notifying party may request that parts of the information provided are kept confidential. To preserve confidentiality, the notifying party may file non-confidential versions of the notification or of any further information provided during the procedure.

Under the Act, confidentiality of commercial information provided by third parties within the merger control proceedings may also be protected.

As of 30 December 2009, the Competition Authority allows external access to its merger database, which may be accessed through the Competition Authority's website and provides information on

all concentration cases that have been notified and decided by the Competition Authority since its creation in January 2003. Besides giving access to non-confidential versions of the decisions adopted since the Competition Authority's creation, the merger database also provides other data relating to the procedure, including relevant dates, a description of the undertakings involved and the economic activities in question in the operation.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

According to its statutes, the Competition Authority is responsible notably for keeping contacts with other countries' competition authorities and establishing cooperative links with such authorities, as well as with EU and international authorities, carrying out the tasks conferred upon member states' administrative authorities by EU law in the field of competition, and representing the Portuguese state in the EU or international institutions in competition matters.

As regards the merger control area, the above responsibilities indicate that the Competition Authority is expected to maintain informal contacts with other competition authorities in multi-jurisdiction filings. However, no formal agreements with other competition authorities regarding merger control are publicly known. Nevertheless, at a multilateral level, the Competition Authority participates in various fora and groups, notably the European Competition Authorities and the International Competition Network.

It should also be noted that the notification form includes, as mandatory information, the indication of the other member states' competition authorities with which the notifications are also being filed.

Judicial review

32 What are the opportunities for appeal or judicial review?

Law No. 46/2011 of 24 June 2011 determined the creation of a specialised court to handle competition, regulation and supervision matters (Specialised Court), which was established in the town of Santarém as of 30 March 2012. The Specialised Court is now the exclusive first instance for review of all the decisions adopted by the Competition Authority.

Therefore, decisions of the Competition Authority adopted in merger control proceedings, as well as decisions of the member of government responsible for the economy within the 'extraordinary appeal' proceedings referred to above (see question 22), may be appealed to the new Specialised Court. This court's rulings are subject to review by the Appellate Court of Lisbon, the decisions of which, though limited to matters of law, may be appealed to the Supreme Court of Justice. Appeals of the decisions in question that exclusively involve matters of law are filed directly with the Supreme Court of Justice.

The decisions of the Competition Authority adopted in proceedings initiated regarding infringements of merger control rules (under the Act, these infringements constitute quasi-criminal minor offences) may also be appealed to the Specialised Court. The decisions of this court may be appealed to the Appellate Court of Lisbon, as a court of last resort, if they:

- apply a fine higher than €249.40;
- impose ancillary sanctions;
- acquit the defendant or close the case in situations where either the Competition Authority has imposed a fine higher than €249.40 or such fine has been claimed by the public prosecutor's office; or
- reject the appeal of the Competition Authority's decision.

33 What is the usual time frame for appeal or judicial review?

As regards judicial review, it is not possible to establish a typical time frame until a final decision is adopted since this depends on factors such as the relevant courts' workload and the complexity of the case under review. However, in general terms, one may expect that judicial proceedings might take many months or even several years before they come to an end.

Enforcement practice and future developments

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2016, 63 merger control cases were concluded by the Competition Authority (same number as in 2015), with the following outcomes:

- 59 clearance decisions without conditions or obligations attached;
- one clearance decision with conditions and obligations attached;
- two decisions where it was found that the notified transactions were not subject to prior notification; and
- one decision closing the proceedings following the withdrawal of the notification.

By 22 May 2017, 20 merger control cases had been concluded by the Competition Authority, with the following outcomes:

- 19 clearance decisions without conditions or obligations attached; and
- one decision closing the proceedings following the withdrawal of the corresponding notification.

Competition in specific sectors, such as telecommunications, energy, oil and ports' operations, continues to be a cause for concern of the Competition Authority.

35 Are there current proposals to change the legislation?

Following a long-awaited reform of the competition regime, Law No. 19/2012, of 8 May 2012, enacted the Act superseding the previous regime enacted by Law No. 18/2003 of 11 June 2003 (see question 1). Pursuant to the Act the current regime should be reviewed in accordance with the evolution of the EU competition law regime.

G A _ P

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