

## Competition - Portugal

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### New guidelines signal Competition Authority's approach to merger remedies

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Following a public consultation launched in November 2010, the Competition Authority adopted a set of merger remedy guidelines at the end of July 2011. These extensive guidelines cover the selection, design, implementation and monitoring of remedies that may be proposed by parties to a concentration in order to remove competition concerns and obtain conditional clearance of a transaction.

The authority has set out its understanding of the legal nature of commitments that parties to a merger may offer. Rather confusingly, it divides them into two categories - conditions and obligations - in addition to the usual distinction between structural and behavioural commitments. 'Conditions' comprise measures that are required to resolve competition concerns, such as the divestiture of assets; 'obligations' refers to instrumental actions with the aim of ensuring performance of conditions, including the appointment of trustees or 'hold separate' obligations.

According to the guidelines, commitments (and particularly conditions) are generally understood to constitute obligations to ensure a result, rather than simply to make best efforts. Therefore, if an undertaking fails to implement a given measure on schedule, this will be construed as a breach of its commitments, regardless of whether the breach was the party's fault or merely the result of objective market circumstances.

The guidelines broadly mirror the European Commission's notice on merger remedies, although they differ in some respects.

Unlike the EU merger rules, the Competition Act (18/2003) does not provide mandatory deadlines within which undertakings must propose commitments, although the recommended time limits are similar. The guidelines merely state that it is advisable for commitments to be submitted by the 20th working day of the merger procedure during the first phase or by the 40th working day after the beginning of the second phase.

On the subject of deadlines for divestiture remedies, the guidelines state that divestments must generally be concluded within nine months of the authority's clearance decision. This period includes a two-stage divestment phase (ie, divestiture by the undertaking concerned, followed by divestiture by the trustee) and a final stage for closing the transaction.

The act also differs from the EU approach in that no provision is made for the authority to issue a formal statement of objections to the parties to explain its competition concerns. In some cases this may introduce substantial uncertainty regarding the design and proposal of commitments, and may harm the interests of notifying parties that submit remedies since they may be unaware of the authority's specific objections.

The guidelines state that the authority's concerns in the first phase will normally be conveyed to the parties in informal 'state of play' meetings. During second-phase investigations, the authority will convey its concerns or objections in writing, as early as possible, in the form of a draft decision. This may be followed by a supplementary hearing period if the initial draft decision is substantially altered as a result of proposed commitments.

Some aspects still need improvement or clarification, but overall the guidelines provide welcome and useful indications of the procedural steps and substantive criteria that the authority intends to follow when assessing commitments in merger procedures.

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