GLG

Global Legal Group

The International Comparative Legal Guide to:

Merger Control 2007

A practical insight to cross-border merger control issues

Published by Global Legal Group with contributions from:

Advocacia José Del Chiaro
Ali Budiardjo, Nugroho, Reksodiputro
Ashurst
Bonelli Erede Pappalardo
Bredin Prat
Castrén & Snellman, Attorneys Ltd.
CHSH Cerha Hempel Spiegelfeld Hlawati
Cleary Gottlieb Steen & Hamilton LLP
CVD s.r.o.
De Brauw Blackstone Westbroek
Djingov, Gouginski, Kyutchukov & Velichkov
Domanski Zakrzewski Palinka
Elias Paraskevas Attorneys 1933
Esguerra, Barrera, Arriaga, Miranda, Piquero, González y Jaramillo S.A.
Esin Lokmanhekim İçtem Gürkaynak (ELIG)
Fenech & Fenech Advocates
G. Breuer
Ghellal & Mekerba Law Firm
Hengeler Mueller
Homburger
Imery Urdaneta Calleja Itriago & Flamarique
Jonsson & Hall
Kaye Scholer LLP
Kim & Chang
Law Firm Valters Gencs
Lellos P. Demetriades Law Office
Lovells
Martínez Lage & Asociados
Matheson Ormsby Prentice
Michael Shine & Co.
Minter Ellison
Minter Ellison Rudd Watts
Miranda & Amado Abogados
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Musat & Asociatii
Nagashima, Ohno & Tsunematsu
Nielsen & Norager
Norcous & Partners
Olaniwun Ajayi
O'Melveny & Myers LLP
Oostvogels Pfister Roemers
Pepeliaev, Goltsblat & Partners
Premnath Rai Associates
Ritch Mueller, S.C.
Rizvi, Isa, Afridi & Angell
Salans
Schönherr
Slaughter and May
Stamford Law Corporation
Steptoe & Johnson LLP
Stikeman Elliott LLP
Szecskay Attorneys at Law
Tamme & Otsmann
Vasil Kisil & Partners
Vinge
Webber Wentzel Bowens
Wiersholm, Mellbye & Bech, advokatfirma AS
Žurić i Partneri

Portugal

Carlos Botelho Moniz

Morais Leitão, Galvão Teles, Soares da Silva & Associados

Pedro Gouveia e Melo

1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The *Autoridade da Concorrência* ("Competition Authority") is the competent authority to enforce competition law in Portugal, including rules on merger control. The Competition Authority was created by Decree-Law 10/2003, of 18 January 2003 (the "Statutes of the Authority") and is an independent administrative authority with financial autonomy, which has broad investigative, regulatory and sanctioning powers in merger control. The Authority is headed by the *Conselho* ("Board"), currently composed of the Chairman and two (in theory up to four) other members, all of which are nominated by the Government for a (once renewable) 5-year term. A summary of the Authority's decisions on merger control is available at www.autoridadedaconcorrencia.pt.

Under the Competition Act (Law 18/2003, of 11 June 2003), the Competition Authority has exclusive competence to assess and decide on notified concentrations (before 2003 the competition authorities had only an advisory role and mergers were approved by the Government). However, a concentration which is prohibited by the Authority may still be approved by the Minister for Economy pursuant to an extraordinary appeal procedure. All decisions issued by the Authority can also be appealed to the Lisbon Commerce Court (see question 5.6 below).

In addition to approval by the Authority under the Competition Act, mergers in certain sectors must be also approved by the competent regulatory authority (see question 1.4 below).

1.2 What is the merger legislation?

With Portugal being a Member State of the European Union, mergers having effects in Portugal may be subject to the EC Merger Regulation and to the exclusive jurisdiction of the European Commission where the relevant thresholds are met (see the EU Chapter above). If these thresholds are not met, Portuguese law may apply.

The main piece of legislation regarding merger control is the Competition Act, which entered into force on 16 June 2003.

Relevant legislation on merger control is also contained in the Statutes of the Authority, as well as in Regulation 2/E/2003 of the Authority, of 3 July 2003, which sets out the Notification Form to be filed by the notifying parties to a concentration (see question 3.8 below), and in Regulation 1/E/2003 of the Authority, of the same date, which determines the fees due to the Authority for the merger review procedure (see question 3.9 below). English versions of the Competition Act and of the referred Regulations are available at the Authority's website.

Further legislation is applicable on a subsidiary basis: the Administrative Procedure Code (approved by Decree-Law 442/91, of 15 November 1991, as amended) applies on a subsidiary basis to merger control procedures conducted by the Authority and the Code of Procedure in the Administrative Courts (approved by Law 15/2002 of 22 February 2002, as amended) is applicable to the judicial review of the Authority's Decisions regarding merger control (see question 5.6 below). The Misdemeanours Act (approved by Decree-Law 433/82 of 27 October 1982, as amended) applies on a subsidiary basis to the procedures conducted by the Authority involving penalties and to the judicial review of the Authorities' decisions in that respect.

1.3 Is there any other relevant legislation for foreign mergers?

There is no Portuguese relevant legislation specifically applicable to foreign mergers currently in force.

1.4 Is there any other relevant legislation for mergers in particular sectors?

In merger cases taking place in industries subject to sectoral regulation (such as banking and financial services, securities markets, insurance, energy, telecoms, media or air, rail and road transport) the relevant regulator(s) must, upon request of the Authority, issue a non-binding opinion on the merger previously to a final decision being adopted in both phases of the procedure.

In addition to approval by the Competition Authority under the Competition Act, mergers in the financial, insurance and media sectors must also be approved by the competent regulatory authorities.

The acquisition or strengthening of a qualified shareholding (20%, 33% or 50%) in an insurance company must be notified to the *Instituto de Seguros de Portugal* ("*Portuguese Insurance Institute*") under Decree-Law 94-B/98, of 17 April 1998 (as amended), which may oppose the operation if it considers that a prudent management of the merged entity cannot be ensured. Similarly, the acquisition or strengthening of a qualified shareholding (5%, 10%, 20%, 33% or 50%) in a credit institution must be notified to and approved by the *Banco de Portugal*, the Portuguese Central Bank and banking regulator (see Decree-Law 298/92, of 31 December 1992, as amended). It should also be noted that credit institutions are prevented from holding more than 25 per cent of the voting rights in a commercial company for one or more periods totalling 3 years.

Mergers in the media sector must be notified to the media sectoral regulator (*Entidade Reguladora para a Comunicação Social*). Under the Press, Radio and Television Laws (Laws 2/99, of 13 January 1999, 4/2001, of 23 February 2001 and 32/2003, of 22 August 2003 and all as amended), this authority must issue a binding Opinion, which will effectively block the operation if it is deemed to threaten the freedom of speech or the plurality of the media.

Finally, the securities regulator (*Comissão do Mercado dos Valores Mobiliários*) must be previously informed of operations concerning public companies under the provisions of the Securities Code (Decree-Law 486/99 of 13 November 1999, as amended). Pursuant to this Code, mergers consisting of public bids must also be previously registered with, and subject to a formal review by, the securities regulator.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

The Competition Act applies to concentrations between undertakings that meet the jurisdictional thresholds (see question 2.3 below).

The concept of concentration contained in the Competition Act follows closely with the EC Merger Regulation. The following operations are therefore deemed to constitute a concentration between undertakings: (i) a *merger* between two or more hitherto independent undertakings; (ii) the *acquisition of control*, by one or more individuals or undertakings, over of the whole or parts of one or several other undertakings; and (iii) the *creation of a full-functioning joint venture on a lasting basis*.

For the purposes above, *control* shall be constituted by any act, irrespective of the form which it takes, which, separately or jointly and having regard to the circumstances of fact or law involved, confers the ability to exercise a *decisive influence on an undertaking's activity*, in particular:

- acquisition of all or part of the share capital;
- acquisition of rights of ownership or use of all or part of an undertaking's assets; and
- acquisition of rights or the signing of contracts, which grant a decisive influence over the composition or decision-making of an undertaking's corporate bodies.

On the contrary, the following operations are *not* held to constitute a concentration between undertakings:

- the acquisition of shareholdings or assets under the terms of a special process of corporate rescue or bankruptcy;
- the acquisition of a shareholding merely as a guarantee; and
- the acquisition by credit institutions of shareholdings in non-financial undertakings, when such acquisition does not confer more than 25% of the voting rights of the latter, or if the acquisition is limited to a maximum period of 3 years.

2.2 Are joint ventures subject to merger control?

The creation of or the acquisition of control over a joint venture is subject to the Competition Act whenever the joint undertaking fulfils the functions of an independent economic entity on a lasting basis and meets the thresholds set out in question 2.3 below.

Where the creation of the joint venture has the object or effect of co-ordinating the competitive behaviour of undertakings that remain independent, such co-ordination is assessed under the rules applicable to prohibited agreements and practices (see Articles 4 and 5 of the Competition Act, which follow closely the wording of Article 81 of the EC Treaty).

2.3 What are the jurisdictional thresholds for application of merger control?

The Competition Act provides *two alternative sets of thresholds* for notification of a concentration to be mandatory, the first based on the share of the undertakings concerned in the relevant market(s) and the second on their aggregate turnover. Concentrations are therefore subject to prior notification:

- if their implementation *creates* or *reinforces* a *share exceeding 30% in the "national market" for a particular good or service or in substantial part of it*; or
- if in the preceding financial year, the group of undertakings taking part in the concentration *achieved in Portugal a turnover exceeding €150 million*, after deduction of taxes directly related to turnover, provided that the individual turnover achieved in Portugal in the same period by *at least two of these undertakings exceeded €2 million*.

The Competition Act sets forth detailed provisions on the calculation of the market share and turnover of the undertakings taking part in the concentration (including special provisions for financial and insurance institutions). These follow closely with the provisions on turnover calculation of the EC Merger Regulation.

The Authority's practice has construed the provisions on the market share threshold in very broad terms. In particular:

- Although the Authority's practice on relevant market definition follows the case law of the European Courts and the practice of the European Commission, for the purpose of determining its jurisdiction the Authority will consider the share of the undertakings concerned in the relevant product market *in Portugal*, even if the geographic market is wider in scope (see *inter alia* Decision of 27 April 2006 in case 11/2006, *Gestores UEE-Ibersuizas-Vista/UEE*).
- The mere transfer of an undertaking's position in a given market (i.e., when the acquiring economic group was not active in the same relevant market(s) as the acquired company previously to the merger) is understood by the Authority as the "*creation*" of a market share for jurisdictional purposes. Therefore, if one acquires control over a company with a 30%-plus share in a relevant product market *in Portugal*, this operation must be notified to the Authority even though, pre-merger, the acquirer had no activity in that market or in any market related to it (see Decision of 20 April 2004 in case 7/2004, *DBAG/SAF*).
- If the acquired company, previously to or at the time of the acquisition, had no activity in the relevant market, the Authority will consider, for the purposes of determining its jurisdiction, *the estimated market share of such company in the future*, taking into account *inter alia* its estimated capacity (see Decisions of 12 July 2004 in case 18/2004 *Secil Britas/Carcubos*, and of 11 November 2005 in case 16/2005, *Enernova/Ortiga-Safra*).

2.4 Does merger control apply in the absence of a substantive overlap?

Yes. Merger control rules apply if (i) the operation constitutes a concentration, in the meaning of the Competition Act (see question 2.1 above); and (ii) it meets one of the two alternative sets of

jurisdictional thresholds (see question 2.3 above), even in the absence of a substantive overlap.

2.5 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign to foreign" transactions) would be caught by your merger control legislation?

The provisions of the Competition Act are applicable to practices restrictive of competition and concentrations between undertakings, *which take place or have, or may have, effects in the territory of Portugal*. Therefore, despite the fact that neither of the undertakings concerned is established in Portugal, the Competition Act may be applicable.

This is confirmed by the recent practice of the Competition Authority, which as already stated has adopted a broad interpretation of the legal provisions determining its jurisdiction. In the *DBAG/SAF* case (see question 2.3 above), the Authority considered itself competent to review the operation, even though the acquiring company DBAG did not have any turnover in Portugal and the acquired company SAF was not established in Portugal, selling its products through an agent. The Authority recently confirmed this understanding in a similar case, *Florimond Desprez/Advanta Lambda* (case 27/2005, Decision of 19 May 2005).

2.6 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

The Competition Act does not provide for any mechanism in this regard. However, Articles 9 and 22 of the EC Merger Regulation are potentially applicable. The Competition Authority has already demonstrated its intention to ask for the referral of concentrations with a community dimension under Article 9 of the EC Merger Regulation, whereas at least one concentration notified to the Authority under the Competition Act was referred to the European Commission under Article 22(3) of the former EC Merger Regulation (case 11/2003, *GE/AGFA*, Decision undated, which became case COMP/M.3136, Commission Decision of 5 December 2003). The Commission recently declined an Article 22(1) request by the Portuguese Competition Authority (to which the Italian Competition Authority later adhered) on the *Gas Natural/Endesa* proposed merger (Decision of 27 October 2005, IP/05/1356).

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

A concentration meeting the jurisdictional thresholds must be notified to the Portuguese Competition Authority within *seven working days* of the conclusion of the agreement or, where relevant, *by the publication date* of the announcement of a takeover bid, an exchange offer or a bid to acquire a controlling interest (see also question 3.5 below).

A concentration subject to mandatory notification cannot be implemented before a non-opposition decision is issued by the Competition Authority, infringements being seriously punished (see question 3.3 below).

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

There are none. Whenever a concentration meets the criteria for prior mandatory notification, a clearance decision from the Authority is necessary before the operation can be implemented.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

Failure to file a concentration subject to prior notification may have serious negative consequences, such as (i) the *threat of heavy fines* to undertakings concerned and to (in special circumstances) its representatives; (ii) the *risk of the transaction being declared null and void* by a court; and (iii) a *considerable delay and additional costs* in the review of the transaction by the Authority in case it initiates an *ex officio* investigation.

Failure to notify a concentration meeting the jurisdictional thresholds constitutes a misdemeanour ("*contra-ordenação*"), a quasi-criminal offence punishable with fines up to 1% of the previous year's turnover for each of the undertakings participating in the infringement. If such concentration is implemented or if a concentration that has been prohibited by the Authority is put into effect, the undertakings concerned are liable to fines reaching up to 10% of the previous year's turnover for each of the undertakings participating in the infringement.

Negative consequences facing the validity of the Transaction itself differ whether there was simply a *failure to notify* or if the Parties *breached a decision prohibiting the merger*. The validity of any legal transaction carried out to implement an un-notified concentration is dependent upon the issuance of a non-opposition decision by the Authority. Parties to a concentration of a concentration subject to modification will therefore only enjoy legal certainty as to its validity of the Operation following an express or tacit clearance from the Authority. In contrast, a concentration implemented in breach of a prohibition decision by the Authority is void and may be so declared by a court (following, for instance, an action brought by a competitor or a client of the parties).

If the Authority becomes aware of a concentration that was not notified, in infringement of the Competition Act, it may initiate an *ex officio investigation*. This investigation may also be opened when the Authority's clearance decision was based on false or incorrect information provided by the parties or when parties disregarded conditions or obligations imposed by the Authority. In the event of lack of notification, the Authority gives notice to the undertakings of the situation of non-compliance so that they may lodge the notification. The opening of this investigation may entail the following negative consequences to the undertakings concerned:

- the *deadlines* for the Authority to decide are *significantly increased* to 90 working-days for Phase I and an additional 90 working-day deadline for Phase II (see question 3.6 below);
- the *filing fees increase* to double the amount originally due in case of an *ex officio* investigation (see question 3.9 below); and
- the Authority may also decide, when justifiable, to apply a *periodic penalty payment of up to 5% of the average daily turnover* in the preceding year, for each day of delay.

Finally, under the Competition Act *persons holding managing positions* in undertakings found infringing the competition rules may also be deemed liable for the infringement if it was (or should have been) to their knowledge, and are subject to the same fines as

the managed undertakings, although subject to a special reduction.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

It is only possible to complete a concentration subject to mandatory notification under Portuguese Law in other jurisdictions, prior to the adoption of a clearance decision by the Portuguese Competition Authority, if the undertakings concerned assure the Authority that the concentration will not produce *any* effects in Portugal until such time as clearance has been received from the Authority. There are no guidelines from the Authority as to the type of corporate structure needed to achieve such objective nor does a decisional practice exist in this regard. The possibility of suspending the completion of a global transaction only in Portugal would therefore have to be analysed on case-by-case basis and appears in any event to be very difficult in practice.

Nevertheless, the obligation to suspend the implementation of the concentration prior to clearance may be waived by the Authority, following a reasoned request from the Parties (see question 3.7 below).

3.5 At what stage in the transaction timetable can the notification be filed?

Concentrations covered by the Portuguese Competition Act are to be notified to the Competition Authority within seven working days of *conclusion of the agreement* or, where relevant, by the *publication date* of the announcement of a takeover bid, an exchange offer or a bid to acquire a controlling interest.

There are no guidelines as to the concept of *conclusion of the agreement* in the meaning of the Competition Act. The Authority has already accepted notifications without a final binding agreement being signed, basing its assessment on a promissory agreement (cases 10/2004, *Nortesaga/Motortejo et al.*, Decision of 27 April 2004 and more recently 35/2005 *Modelo Continente/Pinto Ribeiro Supermercados*, Decision of 16 June 2005). The Authority enjoys great latitude in this respect, and will probably not accept a notification of a transaction that is not in the final stages of negotiation. In any event, it is doubtful that a legal obligation to notify exists before an agreement through which the parties are irrevocably bound to the operation is entered into.

Recent experience also suggests that in case of a public bid the Authority will consider the triggering event to be the lodging of the request for the registration of the bid with the Securities Regulator ("*CMVM*").

Until recently, the Competition Authority did not favour pre-notification contacts with notifying parties. Although it is not yet commonplace, in some recent cases pre-notification discussions have already taken place.

3.6 What is the timeframe for scrutiny of the merger by the regulatory body? What are the main stages in the regulatory process?

The procedure for assessing a concentration under the Competition Act encompasses two stages: an *initial investigation* (Phase 1) following which, if the Authority considers that there are serious concerns that the concentration is incompatible with competition rules, it initiates an *in-depth investigation* (Phase 2). The Authority is bound in both phases of the procedure by tight deadlines. If no decision is issued within the deadlines set by the Competition Act, a non-opposition decision is deemed to have been adopted. However, since these time limits are suspended whenever the Authority requests additional information from the parties and hears the notifying parties and other interveners, deadlines are invariably extended. All deadlines set by the Competition Act on merger control procedure are expressed in *working days*.

Phase 1 investigation

Within five working days of the date on which the notification is effective, the Authority publishes a summary of the notification in two national newspapers, at the expense of the notifying parties, so that any interested third parties may present their comments within the time period set by the Authority (which must not be less than 10 days).

A notification only becomes effective after the payment of the fee due by the parties (see question 3.9 below) and if it is not considered incomplete by the Authority within 7 working days of the Notification. In this case, the Authority will invite the notifying parties to complete or correct the notification within the period it stipulates and the notification shall only be effective on the date on which the Authority receives the said information or documents.

In Phase 1 of the procedure, the Authority has **30 working days** from the date when the notification becomes effective to decide: (i) that the concentration is not covered by the obligation of prior notification; (ii) not to oppose the concentration; or (iii) to initiate an in-depth investigation (and open Phase 2 of the procedure), when, in view of the evidence gathered, the Authority has serious doubts that the concentration will create or strengthen a dominant position that may result in significant barriers to effective competition in the Portuguese market or in a substantial part of it.

Phase 2 investigation

In Phase 2 of the procedure, the Authority has a maximum of **90 working days** from the date of the Decision to open Phase 2 to carry out the additional inquiries that it considers necessary. No statement of objections is issued by the Authority, the only document available to the parties on the objections of the Authority to the operation is the Decision to initiate Phase 2. Access to the Authority's file is given to the notifying parties on request. As concerns interested third parties, the recent practice of the Authority has been quite strict: access to (a non-confidential version of) the file is only given to a third party when it has expressed itself to be against the operation.

By the end of this period, the Authority may decide: (i) not to oppose the concentration (with or without commitments offered by the notifying parties); or (ii) to prohibit the concentration, prescribing appropriate measures, should the concentration have already gone ahead, to re-establish effective competition, particularly the de-merging of the undertakings or the assets grouped together or the cessation of control.

From its creation in 2003, the Authority has issued only three prohibition decisions, all of which recently and within a few months' timeframe: *Arriva/Barraqueiro* (case 37/2004, decision of 25 November 2005), judicial appeal currently pending; *Petrogal/Esso* (case 45/2004, Decision of 14 December 2005), not appealed; and *Brisa/AEO/AEE* (case 22/2005, Decision of 7 April 2006), appealed to the Minister for Economy, who overturned the Authority's prohibition and cleared the merger subject to remedies (see question 5.6 below). In all but one (case 17/2005, *Controlinveste/Lusomundo Media*, Decision of 10 August 2005) of the twelve phase 2 clearance decisions issued to date the Authority required remedies to clear the transaction (see question 5.2 below).

The above-referred time periods are suspended in two cases: (i) *if the Authority asks for additional information from the notifying parties*; and (ii) *when the Authority consults the notifying parties and other interested parties* before the adoption of a decision in

both phases of the procedure.

Additional information requests

If in the course of the investigation it becomes necessary for additional information or documents to be provided (or for those already provided to be corrected), the Authority requests the necessary information or corrections to the notifying parties, setting a reasonable time limit for them to comply with the request. All additional information requests stop the clock, which shall resume on the day following the receipt by the Authority of the requested information. In most notification procedures, the Authority sends one or more additional information requests to the parties. As a result, the time periods set out in the Competition Act are invariably extended.

The Authority may also request any other public or private bodies to provide any information deemed necessary for the decision on the case. However, this latter request does not suspend the time periods for the Authority to decide.

Hearing of the notifying parties and of third parties

The Competition Act provides that, before a decision is adopted by the Authority on the concentration, the notifying parties as well as interested third parties (as long as they have expressed themselves to be against the transaction) must be heard, the Authority usually sending a draft decision and establishing a deadline of no less than 10 working days for the parties to present their views. This hearing also stops the time periods for the Authority to decide. In case of non-opposition decisions not accompanied by conditions and obligations, the Authority may, in the absence of opposing third parties, choose not to hear the notifying parties.

Hearing of regulatory authorities

Whenever a concentration affects a market that is subject to sectoral regulation, the Competition Authority must hear the opinion of the relevant regulatory authority before issuing a final decision (either in Phase 1 or Phase 2). The opinion of the regulatory authorities does not suspend the time periods mentioned above and is not binding on the Authority, with the exception of the regulatory authority for the media sector (see question 1.4 above).

In case of *ex officio* proceedings initiated by the Authority, the time limits are considerably extended (see question 3.3 above).

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended?

A concentration subject to prior mandatory notification cannot be put into effect before it has been notified and cleared by Authority (or the time limits for the Authority to decide have elapsed). Agreements should therefore condition the completion of the transaction to the clearance of the concentration under the Competition Act.

There are, however, two exceptions to this rule. A *public bid* to purchase or an exchange offer that has been notified to the Authority can be implemented, provided that the acquirer does not exercise the voting rights attached to the securities in question or exercises them solely to protect the financial value of its investments on the basis of a derogation granted under the terms described below.

In addition, following a reasoned request by the notifying parties, presented prior to or subsequent to the notification, the Authority may waive the above-mentioned obligations, after considering the consequences for the undertakings concerned of suspending the concentration or the exercise of voting rights and the negative effects of the derogation to competition. The derogation may, if necessary, be accompanied by conditions and obligations to ensure effective competition.

Recent experience suggests that the Authority is considerably restrictive in waiving the suspension obligation, as it considers that such waiver can only be granted in very exceptional circumstances and in particular when the non-implementation of the transaction causes grave consequences to the parties, such as imminent bankruptcy.

3.8 Where notification is required, is there a prescribed format?

Notifications must be lodged in accordance with the Form approved by the Authority and set out in Regulation 2/E/2003 (available from the Authority's website), along with two complete copies of the notification and supporting documentation. When supporting documentation is in a foreign language, translation may be required, although documents in English are usually accepted.

The Authority may waive the requirement for certain information or documents to be presented if it considers them unnecessary for appraisal of the concentration. It is however up to the notifying parties to assess whether or not it is necessary to complete all the sections on the Form. Under Regulation 2/E/2003 certain information is considered essential to the Form and must always be provided.

3.9 Who is responsible for making the notification and are there any filing fees?

Notification of a full merger must be jointly made by all the companies directly involved in the merger. In case of acquisition of control over one or more undertakings, the notification must be filed by the undertakings (or persons) acquiring control. Joint notifications must be presented by a common representative empowered to send and receive documents on behalf of all the notifying parties.

According to the Competition Act and to Regulation 1/E/2003, the appraisal of concentrations by the Authority is subject to the payment of a fee by the notifying parties, without which the notification is not considered effective. The fee is proportional to the aggregate turnover of the parties in the year preceding the operation. The base fee is:

i) €7,500 if the aggregate turnover is below or equal to €150 million;

ii) €15,000 if the turnover is more than €150 million and below or equal to €300 million; and

iii) €25,000 if the turnover is more than €300 million.

If the Authority initiates Phase 2 proceedings, an additional fee is due, corresponding to 50% of the base fee.

These amounts *double* when the Authority initiated *ex officio* proceedings for one of the following reasons:

- the Authority became aware of a concentration subject to mandatory notification which was not notified;
- the notifying parties provided false or inexact information upon which the Authority based its clearance Decision; or
- the notifying parties fully or in part disregarded the conditions or obligations imposed by the Authority in the clearance Decision.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The substantive test under the Portuguese Competition Act follows Article 2 of Regulation (EEC) 4064/89 of 21 December 1989, as authorisation is granted to concentrations that do not create or strengthen a dominant position from which results a significant impediment to effective competition in the national market or in a substantial part of it, whereas concentrations which create or strengthen a dominant position from which results the above-mentioned impediment are prohibited.

Concentrations are reviewed in order to determine their effects on the structure of competition in the relevant market(s). The Competition Act follows closely with Article 2(1)(b) of the EC Merger Regulation with regard to the criteria to be taken into account to analyse the structure of the relevant markets. In addition, the Competition Act introduces two criteria to assess the effects of the concentration on the relevant markets, which do not exist under EC rules:

- the control over essential infrastructure by the undertakings in question and the opportunities offered to competing undertakings to access such infrastructure; and
- the contribution brought by the concentration to the international competitiveness of the Portuguese economy.

Again, when the concentration consists of the creation or acquisition of a full-function joint venture, the operation is also assessed under the rules on restrictive agreements and practices if the object or effect of creating the joint undertaking is to co-ordinate the competitive behaviour of undertakings that remain independent.

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Following publication of the notification by the Competition Authority in two national newspapers (which should be made within five days after the date it became effective), any interested third party may submit observations to the concentration within the deadline established by the Authority, which cannot be less than 10 working days.

In addition, previously to the adoption of a Phase 1 or Phase 2 decision the Authority must hold a hearing of the third parties which have already intervened in the procedure and expressed a negative opinion on the operation. This hearing suspends the time periods for the adoption of the decision (see question 3.6 above). Until recently, all third parties showing interest in a concentration could access, on request, the non-confidential version of the Authority's file. The recent practice by the Authority appears to be considerably stricter, as it has only granted access to the file to those third parties that have expressed themselves to be against the Operation.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The Authority enjoys broad investigative powers in the course of a merger control procedure.

Usually the Authority sends one or more additional information requests to the parties (even in most Phase 1 cases). In more complex cases competitors, trade associations and regulators are also questioned. Under the Competition Act the Authority may request from all public and private entities the information it considers necessary to decide (the only exception being legally privileged information), holding the same rights and powers (and being subjected to the same duties) as when investigating anti-competitive practices (e.g., cartels).

Although such actions are not common in the course of merger control procedures, the Authority may in particular:

- question the legal representatives of the undertakings involved or of other undertakings and any other persons whose declarations it deems relevant and request them to supply documents and other information; and
- provided that a warrant is previously obtained from the competent judiciary authority, search the premises of the undertakings involved, seal them and/or collect all documents deemed relevant for the investigation. The Authority may require any other public or administrative entities, including criminal police, to provide the necessary co-operation.

Information and documents requested by the Authority should be provided within 30 days, unless the Authority states otherwise. Given the time constraints of merger control procedures, the Authority usually establishes a deadline for reply no longer than 10 working days. As referred above, all information requests to the notifying parties stop the clock.

Failure to supply or the supply of false, inaccurate or incomplete information in response to a request by the Authority, as well as failure to co-operate with the Authority or obstruction to the exercise by the same of the powers described above, constitute misdemeanours punishable with fines up to 1% of the preceding year's turnover for each of the undertakings involved. The Authority may also decide to apply a periodic penalty payment of up to 5% of the average daily turnover in the preceding year, for each day of delay. These powers have not been used to date.

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

Notifying parties must identify in the notification and in responses to additional requests information that in their view should remain confidential. It is common practice to provide a non-confidential version of the Notification and the Authority usually asks for a non-confidential version of responses to additional requests. Should the Authority accept the request for confidentiality, the information will not be disclosed to third parties. Authority officials are furthermore subject to obligations of professional secrecy under the Statutes of the Authority.

A non-confidential version of the decisions on merger control is usually published in the Competition Authority's website. In more complex cases, the Authority has also made available non-confidential versions of certain documents in the file, such as economic reports.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The procedure for the assessment of a concentration ends through a reasoned decision by the Board of the Competition Authority within the time periods described above (see question 3.6 above). The lack of a decision within the referred periods shall be deemed as a tacit decision of non-opposition to the concentration. The Competition Authority's decisions can be appealed (see question 5.6 below).

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The notifying parties (on their own initiative or following an informal invitation) may submit to the Authority commitments with a view to rendering the concentration compatible with the common market. These commitments may be of a *structural* or of a *behavioural* nature. The Authority will then assess the sufficiency and adequacy of the proposed remedies to eliminate the identified competition concerns, following which an informal negotiation usually takes place between the Authority and the notifying parties. A market inquiry may be conducted by the Authority to collect views of competitors and regulators. If the final proposal of commitments is agreed upon, the Authority will include in the non-opposition decision to the operation conditions or obligations in order to ensure compliance with the commitments proposed or accepted by the notifying parties.

Until recently, the practice of the Competition Authority in this respect seemed to reflect a more positive approach to behavioural remedies than the practice of the European Commission (especially regarding periodic monitoring of market conditions). In the eleven cases approved subject to commitments from 2003 (the year of its creation) up to date the Authority accepted behavioural remedies in all eleven cases and only imposed a divestiture commitment in one of these (case 28/2004 *Caixa Seguros/NHC (BCP Seguros)*, Decision of 30 December 2004). However, recent practice indicates a more restrictive approach by the Authority towards behavioural remedies. In *Arriva/Barraqueiro* (case 37/2004, Decision of 25 November 2005), the first merger prohibited by the Authority, a set of behavioural remedies was outright rejected, the Authority clearly stating that behavioural remedies were not capable *as such* of eliminating the competition concerns resulting from the merger.

5.3 At what stage in the process can the negotiation of remedies be commenced?

The notifying parties may present commitments to the Authority in both phases of the procedure, and there is no specific time period set by the Competition Act for commitments to be offered (as long as it is done previously to the Authority's decision). There are no guidelines as to the procedure to be followed by the parties when presenting remedies and at present requirements are set by the Authority on a case-by-case basis, although it is common practice to present commitments in a letter duly signed by representatives of the notifying parties.

5.4 How are any negotiated remedies enforced?

Remedies are usually presented by the notifying parties and (if accepted) incorporated by the Authority in the clearance decision by way of conditions and obligations to ensure that the commitments entered into by the parties are adequately fulfilled. The Authority frequently establishes obligations for periodic reporting on market conditions by the notifying parties in order to be able to monitor future developments in the same markets. Monitoring has been up to present conducted by the Authority itself, although there are indications that in the future trustees will be appointed to monitor compliance with behavioural and structural commitments.

Concentrations in which there has been total or partial disregard for the obligations or conditions imposed by the clearance decision are subject to *ex officio* proceedings by the Authority, all legal acts relating to it being null and void insofar as they contravene the Authority's decision. In addition, infringement of conditions and/or obligations imposed by a decision of the Authority renders the undertakings part of the infringement subject to fines up to 10% of the previous year's turnover for each of the undertakings taking part in the infringement.

5.5 Will a clearance decision cover ancillary restrictions?

Under the Competition Act, a decision that authorises a concentration also covers the restrictions directly related and necessary to the implementation of the same concentration.

The Authority has in several cases cleared ancillary restraints, such as non-compete obligations (see cases 47/2003, *PPTV/PT Conteúdos/Sport TV*, Decision of 8 April 2004, and 3/2004, *Lusomundo/Ocasião-Anuncipress*, Decision of 19 April 2004).

5.6 Can a decision on merger clearance be appealed?

Concentrations prohibited by the Authority may nonetheless be authorised by the Minister for the Economy under an extraordinary appeal mechanism set out in the Statutes of the Competition Authority (a similar solution also exists in other European competition legislations, such as the German Competition Act). Parties to a concentration that has been prohibited by the Authority can therefore lodge an appeal with the Minister within 30 days of the notification of the prohibition decision. The Minister may authorise the operation when it benefits *fundamental national economic interests*, which compensate the restrictions of competition arising from its implementation. This Decision must be duly reasoned and may contain conditions and obligations in order to mitigate its negative impact on competition. The Minister recently overturned for the first time a prohibition decision of the Authority in case 22/2005, *Brisa/AEO/AEA* (Authority's Decision of 7 April 2006, Ministerial Decision of 8 June 2006).

Independently from the extraordinary appeal procedure described above, all Authority's decisions producing external effects are subject to judicial review by the Lisbon Commerce Court ("*Tribunal de Comércio de Lisboa*"), which is competent to hear appeals against the Authority's decisions clearing or prohibiting a concentration or applying fines to undertakings. The same Court is also competent to hear appeals against the Minister's Decision ruling on the extraordinary appeal procedure described above. Only appeals against decisions applying a fine suspend the effect of the same decision. However, the undertakings concerned or other interested third parties may ask for the Court to order interim measures, amongst them the suspension of the effects of the

decision. Judgments of the Commerce Court can be appealed to the Lisbon Appeal Court ("*Tribunal da Relação de Lisboa*") and ultimately, in case of decisions other than the application of fines, to the Supreme Court ("*Supremo Tribunal de Justiça*"), although limited to points of law (appeals referring only to points of law are lodged directly with the Supreme Court).

Since the Competition Act was enacted, no appeal was ever lodged against a Decision clearing a merger. An appeal against the Authority's first prohibition Decision (in case *Arriva/Barraqueiro*) is currently pending.

5.7 Is there a time limit for enforcement of merger control legislation?

Proceedings for pursuing undertakings found in infringement of the competition rules are subject to limitation periods of three and five years, depending on the gravity of the infringement. Similarly, the limitation period set out for fines is three to five years (depending on its value) from the date on which the decision determining its application becomes final or *res judicata*, meaning that in principle, once this period has elapsed, companies can no longer be pursued for not complying with the Authority decision. Time limitation periods may however be suspended or interrupted according to the provisions of the Misdemeanours Act.

6 Miscellaneous

6.1 To what extent do the regulatory authorities in your jurisdiction liaise with those in other jurisdictions?

The Authority co-operates intensely with the European Commission under the EC Merger Regulation and the Competition Authorities of the other Member States of European Union in the framework of the ECN (European Competition Network), especially with Spanish Competition Authorities.

The Authority is also an active Member of the ICN (International Competition Network) and of the ECA (European Competition Authorities) and is a founding member of the Ibero-American Forum on the Protection of Competition (which includes Portugal, Spain and most Southern American countries). Following a joint initiative of the Portuguese and Brazilian Competition Authorities, a network for competition authorities of the Portuguese-speaking countries was set up in 2004.

6.2 Please identify the date as at which your answers are up to date.

Our answers are up to date as of July 26, 2006.

Carlos Botelho Moniz

Morais Leitão, Galvão Teles, Soares da Silva & Associados
R. Castilho, 75
1250-068 Lisbon
Portugal

Tel: +351 21 381 74 57
Fax: +351 21 381 74 11
Email: cmoniz@mlgts.pt
URL: www.mlgts.pt

Carlos Botelho Moniz is a partner of Morais Leitão, Galvão Teles, Soares da Silva & Associados (MLGTS) and the Head of the EU and competition law practice group. The practice of Carlos Botelho Moniz focuses on EU and Competition Law. His experience includes advising and representing clients in competition cases, both before the European Commission and the Portuguese Competition Authority, in the areas of anti-trust, merger control and state aids. He has a vast experience in representing both the Portuguese authorities and private parties in its relations with EU Institutions, as well as in representing private parties and the Portuguese State before the Community Courts. He is widely published on the various aspects of EC and competition law and participates regularly in working sessions, seminars and conferences on problems of European integration.

Admitted in the Portuguese Bar in December 1980, Carlos Botelho Moniz joined the firm in 2001. Previously he was a partner at Botelho Moniz, Magalhães Cardoso, Marques Mendes e Ruiz Sociedade de Advogados till 1999 and at PMBGR - Sociedade de Advogados from 1999 to 2001. Carlos Botelho Moniz completed his Law degree at the *Universidade de Lisboa* (1976) and a Masters degree in Economic Law from the same University (1989). He graduated from the College of Europe, Bruges in 1979. He lectures on EU law in the Law School of the Portuguese Catholic University.

Pedro Gouveia e Melo

Morais Leitão, Galvão Teles, Soares da Silva & Associados
R. Castilho, 75
1250-068 Lisbon
Portugal

Tel: +351 21 381 74 09
Fax: +351 21 381 74 11
Email: pgmelo@mlgts.pt
URL: www.mlgts.pt

Pedro Gouveia e Melo is an Associate with the EU and Competition Law Practice Group. Pedro advises clients in competition law cases in a wide range of industries and has worked extensively in the energy sector. His experience includes cases before the European Commission and the Portuguese Competition Authority, and he has been involved in litigation before the European Court of Justice, the European Court of First Instance and Portuguese courts. He also advises clients on EU Law, especially on internal market rules, the Common Agricultural Policy and on rules on structural funds. In addition he has also worked in cases before the European Court of Human Rights.

Pedro joined the firm in September 2002 as a Junior Associate and has become an Associate with the Group following his admission to the Lisbon Bar in November 2004. He received an LL.M. degree from the College of Europe in Bruges in 2002 and a Law degree from the Catholic University Law School (Lisbon) in 2001. He has written several articles on European and Portuguese Competition Law.

MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA
& ASSOCIADOS
SOCIEDADE DE
ADVOGADOS

Morais Leitão, Galvão Teles, Soares da Silva & Associados (MLGTS) is an independent full-service law firm and one of the leading law firms in Portugal, with almost 130 lawyers and offices in Lisbon, Porto and Funchal (Madeira). We have a significant international practice in all major areas of law and represent multinational corporations, international financial institutions, sovereign governments and their agencies, as well as domestic corporations and financial institutions. We maintain close contacts with major law firms in Europe, United States and South America and are the sole Portuguese member of Lex Mundi, the world's leading association of independent law firms.

Our 12-member EU and competition law team, based in Lisbon and Porto, is widely recognised for its in-depth knowledge in all aspects of EU Law and European and Portuguese competition law. We provide comprehensive advice on merger control, dominance, horizontal and vertical restraints and state aids, ensuring expert assistance before the European Commission and the Portuguese Competition Authority, as well as before the European Courts. We have an extensive experience representing clients on a wide range of industries, such as energy, financial services, communications, broadcasting, advertising, air, land and air transportation, logistics, mining, food and beverages, tourism, agriculture.