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Competition - Portugal

New Guidelines on Pre-notification Merger Procedures

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June 28 2007

[General Provisions](#)
[Timeframe](#)
[Comment](#)

General Provisions

The Competition Authority published guidelines on pre-notification procedures on April 3 2007. They are based on EU Regulations 139/2004 and 802/2004 and best practice guidelines issued by the Directorate General of Competition.

The main purpose of the guidelines is to allow the parties to a concentration to enter into informal and confidential dialogue with the authority about the legal and procedural issues raised by the transaction and, if possible, to identify the most significant competition issues arising from the merger. The guidelines state that pre-notification communications between the parties and the authority are voluntary and confidential.

The authority also indicates that pre-notification contact should be initiated if there are legal uncertainties about the need to submit mandatory notification under the Competition Act (18/2003).

The pre-notification procedure begins with the submission of a request which describes the main aspects of the transaction. It should also set out the possible issues arising from the merger and/or arguments in support of the view that the transaction should not be subject to notification. Parties are encouraged to submit a draft of the notification form, but this is not mandatory.

The request can be submitted by fax, letter or email⁽¹⁾ and must include:

- a brief description of the companies involved in the transaction;
- the legal background to the transaction and the nature of the control to be acquired - parties are encouraged to disclose the draft transaction agreements;
- the turnover of the undertakings concerned (ie, the amounts received by the undertakings in the preceding financial year from the sale of products and the provision of services in Portugal and the rest of the European Economic Area);
- a description of the relevant market(s) involved in the transaction (indicating any potential overlap);
- estimates of the market shares held by the undertakings and their five main competitors for the preceding three financial years; and
- if applicable, a description of barriers to market entry (eg, legal obstacles, distribution agreements and IP rights).

The authority states that the aim of the procedure is to:

- assist undertakings in the drafting of the notification form;
- gather as much information as possible to avoid additional information requests - and the resultant suspension of deadlines - during the formal procedure;
- inform undertakings whether they must notify their transaction; and
- identify possible competition law issues which may arise from the transaction.

Timeframe

Pre-notification contact with the authority must be initiated before the formal notification procedure and within a reasonable timeframe. However, the wording of the guidelines is ambiguous. It could be interpreted to mean that a request for a pre-notification phase must be submitted no later than 15 business days before the termination of the seven working days in which notification is mandatory. Alternatively, it could mean that the request must be submitted no later than 15 business days before notification becomes mandatory. Although the authority has yet to clarify the issue, it seems advisable to follow the latter interpretation and establish pre-notification contact no later than 15 business days before notification becomes mandatory.

Notification becomes mandatory (i) when the main elements of the transaction are settled (ie, when the relevant agreement is concluded), or (ii) where appropriate, on the publication date of the announcement of a takeover bid, an exchange offer or a bid to acquire a controlling interest.⁽²⁾

Following a request for a pre-notification phase, the authority will decide on the form of contact to be initiated. The guidelines require it to do this within "a reasonable period of time", but this term is not specified.

In addition, the authority may require the parties to submit additional elements before pre-notification meetings, in which case it must give at least five days' notice. However, there is no deadline before which the authority is required to clarify its position on the pre-notification request.

Comment

Initiating a pre-notification procedure may be advantageous for both complex and simple transactions, as it allows for a dialogue between the notifying entities and the authority before the formal submission of notification. Furthermore, if there are doubts regarding the fulfilment of the notification criteria set out in the act, the procedure allows companies to ask the authority to assess the need to notify the transaction.

However, a negative factor for companies is that the authority is not bound to decide on their requests within a certain time. The authority views the pre-notification phase as an advantage in complex concentrations, as it may gather information without being constrained by the strict deadlines which the formal notification procedure sets for a final decision.

In general, the guidelines are a significant step towards a more efficient and expeditious appraisal of notifications by the authority. They also offer a means of submitting transactions for the authority's review in cases where the parties are unsure whether they are obliged to notify their transaction. However, the usefulness of pre-notification contact will depend greatly on the authority's practical implementation of the guidelines.

For further information on this topic please contact [Carlos Botelho Moniz](#) or [Mariana de Sousa Alvim](#) at [Morais Leitão Galvão Teles Soares da Silva & Associados](#) by telephone (+351 21 381 7400) or by fax (+351 21 381 7411) or by email (cmoniz@mlgts.pt or msalvim@mlgts.pt).

Endnotes

(1) The email address is 'preconcentracao@autoridadedaconcorrencia.pt'.

(2) See Article 9(2) of the act.

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