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The International Comparative Legal Guide to:

Merger Control 2009

A practical insight to cross-border Merger Control issues

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Portugal

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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 ("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, Mr. Manuel Sebastião, and two (in theory up to four) other members. The present Board was appointed by the Government in March 2008 for a (once renewable) 5-year term. A summary of the Authority's decisions on merger control is available at www.concorrencia.pt.

Under the Competition Act (Law 18/2003, of 11 June 2003, as amended), 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 the Economy pursuant to an extraordinary appeal procedure. All decisions issued by the Authority can also be appealed to the commerce courts (see question 5.8 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. The Act was amended by Decree-Law 219/2006, of 2 November 2006, which altered the deadlines to notify concentrations made pursuant to a public bid (see question 3.1 below), reduced the procedural deadlines the Authority is bound by when analysing a concentration (see question 3.6 below) and introduced a new "pre-notification" procedure (see question 3.5 below). The Act was most recently amended by Law 52/2008, of 28 August 2008, which introduced changes on the judicial review of the Authority's decisions (see question 5.8 below).

In March of 2008, the Authority announced the intention to propose a profound reform of the Competition Act to the Government by October 2008. Although the precise terms of the proposed reform are not known at the time of writing, the main amendments on merger control being contemplated appear to be the abolition of the market share notification threshold (see question 2.4 below) and the alignment of the substantive test with the Significant Impediment of Effective Competition ("SIEC") test of the EC Merger Regulation (see question 4.1 below).

Guidelines from the Authority are available on the changes brought by Decree-Law 219/2006 ("Interpreting Guidelines", of 1 February 2007), on the pre-notification procedure ("Pre-notification Guidelines", of 3 April 2007), and on the "simplified decision" procedure ("Simplified Decision Statement", of 24 July 2007).

Relevant legislation on merger control is also contained in the Statutes of the Authority, as well as in Regulation 1/E/2003 of the Authority, of 3 July 2003, which determines the fees due to the Authority for the merger review procedure (see question 3.10 below) and in Regulation 2/E/2003 of the Authority, of the same date, which sets out the Notification Form to be filed by the notifying parties to a concentration. A public consultation on the revision of Regulation 2/E/2003 was recently launched by the Authority, and comments to a draft revised Notification Form were due by 30 June 2008. However, the revised Regulation and Form have not yet been approved (see question 3.8 below). All the above documents 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 and may follow very closely the proceedings before the Authority (see for instance the prominent role of telecoms regulator ANACOM in case 8/2006, *Sonae/PT*, Decision of 28 December 2006).

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. In principle, acquisitions by credit institutions meeting these criteria are not deemed to constitute concentrations in the meaning of the Competition Act (for exceptions, see question 2.1 below).

Acquisitions of shareholdings in companies of the media sector must be notified to the media sectoral regulator (*EntidadeReguladora para a Comunicação Social*) under the Press and Television Acts (Laws 2/99, of 13 January 1999 and 32/2003, of 22 August 2003, both as amended). In addition, if the transaction is notified to the Competition Authority, the media sectoral regulator 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. Under the Radio Act (Law 4/2001, of 23 February 2001, as amended), changes of control over radio companies must also be notified to, and approved by, the media regulator.

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 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. However, if there are no provisions for the transfer of the stock exceeding the 25% threshold upon the expiry of the 3 years transitional period, the transaction will likely be considered a concentration and may be subject to filing (see case 70/2005, *CGD/Sumolis/Compal*, decision of 9 January 2006).

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes, but only insofar as the minority shareholding being acquired confers on the acquiring company the right to exercise, alone or (more probably) jointly with other companies, namely through a shareholders' agreement or a similar arrangement, control over the acquired company. The definition of "control" under the Competition Act follows closely with the European Commission's practice under the EC Merger Regulation and is inferred from a number of legal and factual circumstances that confer the ability to exercise decisive influence on the target's activity (see question 2.1 above).

2.3 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 the thresholds set out in question 2.4 below are met.

Where the creation of the joint venture has the object or effect of coordinating 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).

2.4 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 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*).
- In the case of a joint venture having a 30%-plus share in a relevant product market in Portugal, the acquisition by one of the parents (formerly exercising joint control) of sole control over the company is perceived by the Authority as a "reinforcement" of its market share (see decision of 1 July 2005 in case 34/2005, *CTT/Mailtec*).
- 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*).

In March 2008 the previous Chairman of the Authority proposed to abolish the market share notification threshold in the framework of a proposed reform of the Act, arguing that this provision raises considerable doubts in practice as to whether the filing requirements are met and also goes against the International Competition Network ("ICN")'s best practices, which recommend the existence of turnover thresholds only for notification purposes. Although at the time of writing there is no further information on the precise content of the proposed reform, the current Chairman recently confirmed that a proposal will be sent to the Government by October 2008.

2.5 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 2.4 above), even in the absence of a substantive overlap.

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

Foreign mergers are caught by the Competition Act to the extent that they *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 Act may apply whenever both parties or the target alone (in the case of the market share notification threshold; see question 2.4 above) achieve, directly or indirectly, sales in Portugal. This is confirmed by the 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 2.4 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. This understanding was confirmed in subsequent cases (see *inter alia*, case 27/2005, *Florimond Desprez/Advanta Lambda*, decision of 19 May 2005). "Foreign to foreign" transactions still represent a significant proportion of the caseload of the Authority (approximately 40% in 2004, 20% in 2005 and 18% in 2006, according to the 2004, 2005 and 2006 Annual Reports, respectively, available from the Authority's website).

2.7 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 4(4) and 4(5), 9 and 22(4) 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(4) of the EC Merger Regulation (case 11/2003, *GE/AGFA*, decision undated, which became case COMP/M.3136, Commission decision of 5 December 2003). More recently, during 2006 five transactions without community dimension and subject to notification under the Act were ultimately notified to the Commission pursuant to the Article 4(5) procedure (see 2006 Annual Report). Article 22(4) referral requests by the Authority have already been rejected by the Commission (see decision of 27 October 2005 on the *Gas Natural/Endesa* proposed merger, IP/05/1356).

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The Authority follows the case law of the European Courts and the practice of the European Commission on interrelated transactions and considers two or more transactions to constitute a single concentration for the purposes of the Competition Act when there are "sufficient legal or economic links" between them, such as (i) the transactions are linked by mutual conditionality; (ii) one transaction is associated with and ancillary to the other; and/or (iii) the transactions "stand or fall together" (see decision of 10 April 2008 in case 15/2008, *Top Atlântico/Activos Policarpo/Activos Portmar*).

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 (i) the conclusion of the agreement; (ii) the publication date of the preliminary announcement of a takeover bid or of an exchange offer; or (iii) the publication of the announcement to acquire a controlling interest in a public company (see also question 3.5 below). Notification deadlines for transactions involving public companies were amended by Decree-Law 219/2006 to clarify the original provision, whose interpretation was uncertain.

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 (in special circumstances) to 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.

Heavy fines may be imposed

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 participating undertakings. 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 participating undertakings.

The Transaction may be declared null and void

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*. 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). In contrast, under the Act the validity of any legal transaction carried out to implement an un-notified concentration *is dependent upon the issuance of a non-opposition decision*, although the Authority has claimed in legal proceedings before the Supreme Court that such transactions (if subject to notification and not notified) are equally void. Parties to a concentration subject to notification will therefore only enjoy legal certainty as to its validity following an express or tacit clearance from the Authority.

Ex Officio Investigation results in additional delays and costs

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 and order the parties to notify. The Supreme Court and the Lisbon Appeals Court, ruling on the transaction which later became case 80/2005, *Alliance Santé et al./Alliance Unichem*, confirmed the broad powers of the Authority to open *ex officio* investigations (see Judgments of 6 and 12 July 2006, respectively, available at www.dgsi.pt). Such investigations 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, and 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 (although there is no record that a penalty payment has ever been imposed by the Authority).

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?

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 in Portugal only would therefore have to be analysed on a case-by-case basis and appears to be very difficult in practice, since the parties would have to convince the Authority that the concentration would not produce *any* effects in Portugal until clearance had been received.

Nevertheless, the obligation to suspend the implementation of the concentration prior to clearance may be exceptionally 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?

Notifications may only be formally filed with the Authority after the "*conclusion of an agreement*" or subsequent to the announcement to the market of takeover bids, exchange offers or acquisitions of control over public companies (see question 3.1 above). Prior to notification parties are now encouraged to initiate informal contacts with the Authority's staff under a new "pre-notification" procedure.

Pre-notification contacts

Subsequent to the amendment of the Competition Act by Decree-Law 219/2006, the Authority issued in April 2007 the Pre-Notification Guidelines, which are inspired by the practice of the European Commission and allow for informal, confidential contacts between the parties and the Authority staff prior to notification in

order to attain the following objectives: (i) determine whether the transaction is subject to notification (although it is not certain that the Authority will confirm to the parties that a transaction does not meet the jurisdictional requirements previously to filing, especially when the issue is about the market share threshold); (ii) guide notifying parties in filling in adequately the Notification Form, therefore avoiding subsequent information requests, which stop the clock; and (iii) whenever possible, to identify potential competition issues raised by the transaction.

Interested parties should contact the staff at least 15 working days before notification by sending a Memorandum briefly describing the essential elements of the transaction and a tentative market definition and analysis. Whenever possible this should be accompanied by a draft notification Form. The case handling staff will then decide on the format of the pre-notification contacts: in straightforward cases, a voluntary information request will be sent to the parties detailing the information necessary to complete the Form or to complement it, whereas in more complex cases one or more meetings between the Authority and the parties may take place for a preliminary discussion of the issues raised by the transaction.

According to the Authority, in 2007 pre-notification contacts were initiated only in 13 cases and originated 8 notifications. Although this represents less than 10% of the number of cases decided in 2007, it is expected that the use of pre-notification contacts will be intensified in the future as a useful tool to ensure complete notifications and a flexible and expedited review of notified transactions.

Triggering the obligation to notify

In case of agreements, the Authority considers that an obligation to notify exists when the parties agree to be bound to the "essential elements" of the transaction, whether through a final agreement or a merely promissory one. Significantly, in its practice the Authority has occasionally accepted notifications based on promissory agreements (cases 10/2004, *Nortesaga/Motortejo et al.* decision of 27 April 2004, 35/2005 *Modelo Continente/Pinto Ribeiro Supermercados*, decision of 16 June 2005, and 60/2005, *Enernova/Tecneira et al.*, decision of 30 November 2005), although with the pre-notification procedure this issue has become less relevant in practice. 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.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

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 set deadlines, 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 3.10 below) and if it is not considered incomplete by the Authority within 7 working days of the Notification. In this case, the Authority asks the notifying parties to complete or correct the notification and the notification will only be effective on the date the Authority receives the missing information.

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, it has serious doubts that the concentration will create or strengthen a dominant position that may result in significant impediments to effective competition in the Portuguese market or in a substantial part of it. In straightforward cases the Authority may use the "simplified decision" procedure introduced in July 2007 and decide the case under less than 30 working days (see question 3.9 below).

Phase 2 investigation

In Phase 2 the Authority has a maximum of **90 working days** from the date of notification to carry out the additional inquiries that it considers necessary. This deadline, reduced by Decree-Law 219/2006, already incorporates the working days used by the Authority during Phase 1 and therefore in reality the Authority's deadline in Phase 2 is reduced (i.e., if all of the 30-day deadline was used in Phase 1, in Phase 2 the Authority will only have 60 working days), although deadlines can always be suspended by information requests (see below).

No statement of objections is issued by the Authority and the only document available to the parties on the objections of the Authority to the operation is the Decision to initiate Phase 2. This may harm the parties' interests, especially if remedies are submitted, since the Authority is not formally bound to state its objections to the transaction until the issuance of a draft final decision, usually near the end of the procedure, and parties may have to conduct remedies negotiations without a clear picture of the Authority's objections (see also question 5.2 below).

Access to the Authority's file is given to the notifying parties on request in both phases of the procedure. 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 the Phase 2 deadline, the Authority must 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 within a few months' timeframe: *Arriva/Barraqueiro* (case 37/2004, decision of 25 November 2005), judicial appeal still 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 5.8 below). In all but four of the sixteen 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. These time limits are also considerably extended whenever the Authority initiates *ex officio* proceedings (see question 3.3 above).

Additional information requests

The Authority can request the notifying parties to provide all the additional information and documents considered necessary for its analysis. 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 cases 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.

Decree-Law 219/2006 limited to 10 working days the suspensions to the Phase 2 deadline due to information requests, with the express purpose of reducing the (sometimes considerable) extensions to the deadline caused by these requests. However, in the Interpreting Guidelines the Authority has controversially interpreted this limitation as applying to each information request. This means that in practice each request must be answered within 10 working days and that the Authority has no restriction on the number of requests it issues during Phase 2, which arguably frustrates the central objective of the reform. However, the Authority may be reluctant in testing this interpretation. Since the issuance of the Guidelines several complex cases were decided after unusually long Phase 1 investigations (see cases 30/2007, *Bencom/NSL*, decision of 30 October 2007, 51/2007 *Sonae/Carrefour*, decision of 27 December 2007, 1/2008 *Pingo Doce/Plus*, decision of 24 April 2008, and 2/2008 *EDP/Pebble Hydro* and 6/2008 *EDP/Alqueva*, both of 25 June 2008), suggesting that the Authority might be willing to suspend the phase 1 deadline for longer periods in order to close the case without initiating phase 2.

The Authority may also request any other public or private bodies to provide any information deemed necessary for the decision on the case (see also question 4.3 below). 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 in both phases of the procedure, the notifying parties as well as interested third parties (as long as they have expressed themselves to be against the transaction) must be heard. For this purpose the Authority issues a draft decision and establishes 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).

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

A concentration subject to prior mandatory notification cannot be put into effect before it has been notified and cleared by the Authority (or the time limits for the Authority to decide have elapsed) and parties implementing a concentration before clearance may face serious sanctions (see question 3.3 above). 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 stand-still obligation*, 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. The Authority is very 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 (see *inter alia* case 11/2006, *Ibersuizas et al./UEE*, decision of 27 April 2006).

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. In May 2008 the Authority released a draft revised Notification Form for public consultation (inviting comments to be submitted up to 30 June 2008), and it is expected that the revised Form will be approved in the coming months.

At present, the Form must be submitted with supporting documentation, along with two complete copies. 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, especially in the context of the new pre-notification procedure (see question 3.5 above). Under Regulation 2/E/2003 however it is up to the notifying parties to assess whether or not it is necessary to complete all the sections on the Form. Certain information specified in the Regulation is considered essential to the Form and must always be provided; submitting an incomplete form prevents the notification from becoming effective (see question 3.6 above).

3.9 Is there a short form or accelerated procedure for any types of mergers?

There is no short notification form, although certain information may be waived (see question 3.8 above). Straightforward cases may enjoy early clearance pursuant to the new "Simplified Decision" procedure (see Press Statement 12/2007, of 24 July 2007), which allows for a shortened clearance decision to be issued without using the entire available Phase 1 deadline.

Amongst the candidate transactions for a simplified decision are those: (i) which do not constitute a concentration (see question 2.1 above) or do not meet the jurisdictional thresholds (see question 2.3 above); (ii) where clearly no overlaps exist between the parties; or (iii) whose

effects in Portugal are *de minimis* or from which no significant horizontal or vertical effects arise. This procedure will not be used when it is necessary to ask the parties for additional information or when a hearing of the interested parties must be conducted (see question 3.6 above). Although the Authority did not commit itself to a specific reduced deadline, the six cases decided under this procedure in 2007 were reviewed within an average of 19 working days.

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

Notification of a full merger must be jointly made by the merging companies. 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 effectiveness of the notification is dependent on the payment of a fee by the notifying parties, which 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 initiates *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 (see also question 3.3 above).

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 the "dominance test" of Article 2 of the former EC Merger Regulation (Council Regulation (EEC) 4064/89). 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.

In the draft revised Competition Act scheduled to be submitted to the Government in the coming months, the Authority is expected to propose replacing the dominance test with the SIEC test set forth by the current EC Merger Regulation; in March this year the Authority stated that the existence within the EU of different substantive criteria is not advisable, and that a number of past cases (such as cases 28/2004, *Caixa Seguros/NHC(BCP Seguros)*, decision of 30 December 2004 and 15/2006 *BCP/BPI*, decision of 31 March 2007) could have had a different analytic framework under the SIEC test, and possibly a different outcome, although this is far from certain.

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 three 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;
- the contribution brought by the concentration to the international competitiveness of the Portuguese economy; and
- in case the Minister for the Economy decides to review a prohibition decision by the Authority, the fundamental interests of the national economy should be taken into account (see question 5.8 below).

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 its object or effect is the co-ordination of 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 a notice of the notification by the Competition Authority in two national newspapers (which should be made within five days after the date it became effective) and on its website, 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, prior 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). Third parties expressing themselves against the transaction may also access a non-confidential version of the Authority's file in both phases of the procedure.

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 anticompetitive 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 noted 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 in merger cases.

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 (see question 5.3 below). If the final proposal is agreed upon, the Authority will include conditions and/or obligations in the final decision in order to ensure compliance with the commitments submitted by the notifying parties.

Although the Authority has stated that divestitures are in principle preferable to behavioural commitments, its practice in this respect seems to reflect a more positive approach to behavioural remedies than the practice of the European Commission: in all but one (case 38/2006, *Lactogal/International Diaries*, decision of 15 January 2007) of the twenty-two cases approved subject to commitments since 2003, behavioural remedies were imposed. However, in *Arriva/Barraqueiro* (case 37/2004, decision of 25 November 2005), the first merger prohibited by the Authority, a large 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. This appears to be a stand-alone case in an area where the Authority seems to enjoy considerable discretion, since all subsequent clearance decisions with commitments (including those in which divestitutes are imposed) contain large and complex sets of behavioural remedies (see cases 8/2006, *Sonae/PT*, decision of 28 December 2006, 15/2006, *BCP/BPI*, decision of 16 March 2007, 57/2006, *TAP/Portugália*, decision of 5 June 2007, *Bencom/NSL*, *Sonae/Carrefour*, *Pingo Doce/Plus*, *EDP/Pebble Hydro* and *EDP/Alqueva*, referred in question 3.6 above, and 22/2008, *Sumolis/Compal*, decision of 14 August 2008).

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 still set by the Authority on a case-by-case basis.

In two recent cases, *Sonae/PT* and *BCP/BPI* (see question 5.2 above), press reports indicated that remedies negotiations lasted more than five months (in *Sonae/PT* the Phase 2 investigation lasted for nearly seven months and in *BCP/BPI* almost eight months), suggesting that in complex cases remedies negotiations may be both exhaustive and protracted. Market inquiries may be conducted by the Authority to collect views of competitors and sectoral regulators can also be heavily involved in the negotiations (see for instance case *Sonae/PT*).

During remedies negotiations, the Authority may issue several additional information requests (all of which stop the clock). This mechanism, which is used frequently in complex cases, in reality allows the Authority to extend the decision deadline indefinitely, thereby prolonging remedies negotiations. The present system and practice may significantly harm the interests of notifying parties submitting remedies, since parties cannot have any legitimate expectation as to the conclusion of remedies negotiations, in contrast for instance with the practice of the European Commission, where both the Commission and parties know the date when a final (agreed) proposal must be submitted. In addition, under the Act no statement of objections is issued during a Phase 2 inquiry, and accordingly negotiations may be conducted without the parties knowing the specific content of the Authority's objections (see question 3.5 above).

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

There are no guidelines as to the format of commitments to be submitted to the Authority. However, in several recent cases where

divestiture and behavioural commitments were accepted by the Authority (see question 5.2 above), documents submitted followed closely the European Commission's model texts for divestiture commitments and trustee mandates and were extremely detailed as to the scope and implementation schedule of the remedies, as well as to its monitoring, which suggests that this practice will continue in the future. In the *Arriva/Barraqueiro* case (see question 5.2 above), the Authority imposed an up-front buyer for the divested assets, but ultimately rejected the proposed remedy partly because it was not certain the proposed buyer would be a credible competitor to the parties.

5.5 Can the parties complete the merger before the remedies have been complied with?

Transactions approved by the Authority subject to conditions and/or obligations can be completed before remedies have been completely complied with, since the implementation of both divestures and behavioural commitments (especially periodic reporting obligations) may take several years following the clearance decision.

Failure to comply fully and timely with conditions or obligations attached to a clearance decision will expose the Parties to serious negative consequences: (i) all legal acts relating to the transaction are null and void insofar as they contravene the Authority's decision; and (ii) parties are subject to fines up to 10% of the previous year's turnover for each of the undertakings taking part in the infringement. The Authority enjoys broad investigatory powers in this respect (see question 4.3 above).

5.6 How are any negotiated remedies enforced?

Until 2006, the Authority usually established obligations for periodic reporting on the implementation of remedies by notifying parties. Monitoring was also directly conducted by the Authority, even in case of divestitures (see case 28/2004 *Caixa Seguros/NHC(BCP Seguros)*, decision of 30 December 2004).

The trend is for an increasing sophistication in remedies enforcement. As from late 2006, practically all cases decided subject to remedies (see questions 5.2 and 5.4 above) contemplated very detailed provisions on the appointment and mandate of independent trustees to monitor the implementation of remedies and carry out divestitures in case the parties had not been able to do so within the agreed timetable (a notable exception is case 38/2006, *Lactogal/International Diaries*, decision of 15 January 2007). In these cases, drafts of the mandate agreements and proxies (based on European Commission mandate models and adapted to the specificities of Portuguese law) were also submitted to the Authority, discussed in the framework of remedies negotiations and annexed to the decision. In this context the Authority assumes essentially a supervisory role, although it retains of course its broad investigatory and sanctioning powers to enforce remedies (see questions 4.3 and 5.5 above).

5.7 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), including non-compete obligations whose duration exceeds the three years prescribed by the guidelines of the European Commission (see *inter alia* cases 52/2006, *Mota Engil/RL*, decision of 27 December 2006, and 31/2007, *Mota Engil/Multiterminal*, decision of 25 June 2007).

5.8 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 overturned for the first (and only) 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. Until recently, the Lisbon Commerce Court ("*Tribunal de Comércio de Lisboa*") had exclusive jurisdiction to hear appeals against the Authority's decisions clearing or prohibiting a concentration or applying fines to undertakings. Law 52/2008, of 28 August 2008, recently amended the Competition Act's rules on jurisdiction, and from 5 January 2009, applicants shall bring appeals before the commerce court ("*Tribunal de Comércio*") with jurisdiction over the place of their main headquarters (in case of decisions imposing fines, the place where the offence was committed), although the Lisbon Commerce Court will retain subsidiary jurisdiction, in particular for applicants headquartered abroad.

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 competent Appeals Court ("*Tribunal da Relação*") 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. A 2005 appeal against the Authority's first prohibition decision (in case *Arriva/Barraqueiro*) is still pending.

5.9 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. Those limitation periods may be suspended or interrupted according to the

provisions of the Misdemeanours Act. However, the nullity of a concentration implemented in breach of the Act (see question 3.3 above) can be invoked before the Portuguese courts by any person with standing without any limitation in time.

6 Miscellaneous

6.1 To what extent does the merger authority in Portugal 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 EU Member States in the framework of the European Competition Network (ECN), especially with Spanish Competition Authorities. The Authority is also an active Member of the International Competition Network (ICN) and of the European Competition Authorities (ECA) and is a founding member of the Ibero-American Forum on the Protection of Competition (which includes Portugal, Spain and most Southern American countries) and of the network for competition authorities of the Portuguese-speaking countries.

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

Our answers are up to date as of August 29, 2008.

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Pedro joined the firm in September 2002 and was admitted to the Portuguese Bar in 2004. During 2007 he was seconded to Latham & Watkins LLP in its Washington, D.C. office, where he worked in US and international Antitrust law matters. 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.