

Pre-Merger Notification Survey

PORTUGAL
Morais Leitão, Galvão Teles, Soares da Silva & Associados

CONTACT INFORMATION
Carlos Botelho Moniz and Luis Nascimento Ferreira
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Portugal
Telephone: 351.21.381.74.00
Email: cmoniz@mlgts.pt and lnferreira@mlgts.pt

1. Is there a regulatory regime applicable to mergers and similar transactions?

Law No 18/2003, 11 June (Competition Act) applies to all concentrations that take place or may produce effects in the Portuguese territory.

Regulation No 120/2009, 17 March, sets out the form in accordance to which a concentration subject to notification should be filed with the Competition Authority. Regulation 1/E/2003, 3 July, determines the amounts of filing fees payable to the Authority by the notifying parties.

2. Identify Applicable National Regulatory Agency/Agencies.

The Competition Authority (Autoridade da Concorrência) is the regulatory agency with competence to enforce competition law in Portugal.

The Authority was created in 2003 by Decree-Law No 10/2003, 18 January, and replaced the former two competition bodies: Competition Council (Conselho da Concorrência) and Directorate-General for Commerce and Competition (Direcção-Geral do Comércio e da Concorrência).

Under the Competition Act, the Authority has competence to assess and decide on concentrations subject to mandatory filing. In case of prohibition of a given merger, the parties are provided with an extraordinary appeal procedure to the Minister of Economy as we will see below.

3. Is there a supranational regulatory agency (e. g., the European Commission) that has, or may have exclusive competence? If so, indicate.

Concentrations having community dimension in the meaning of Article 1 of Regulation (EC) No 139/2004, 20 January, are subject to exclusive review by the European Commission, even if they fulfil the thresholds for notification in the light of the Competition Act.
This is however without prejudice to the possibility of a referral by the Commission to the Competition Authority pursuant to Articles 4(4) and 9 of the EC Merger Regulation.

4. Are there pre-merger filing requirements; if so, where are they published?

Following an amendment to the Competition Act made by Decree-Law No 219/2006, 11 June, the Authority approved in 2007 a notice with guidance on pre-notification of concentrations. Only the press release is available in English (see www.concorrencia.pt).

The guidelines on pre-notification are largely inspired by the decision practice of the European Commission.

Pre-notification contacts are thus voluntary, confidential and informal and are considered especially relevant when the parties to the transaction seek to clarify
i) whether the operation is subject to notification,
ii) the amount of information needed to file a complete notification and
iii) the eventual existence of competitive constraints arising from the transaction.

The parties should approach the Authority as early in the proceedings as possible and, in any case, at least 15 days prior to notification (there is a 7 days deadline for notification, as we will see below).

5. What kinds of transactions are "caught" by the national rules? (Identify any notable exceptions)

Concentrations that fulfil the thresholds set by Article 9 of the Competition Act (please see the answer to the following point) are subject to review by the Competition Authority.

For the purposes of the Competition Act (and again following the EC Merger Regulation and European Commission's practice on the concept of concentrations), a concentration between undertakings shall be understood to exist:
i) in case of a merger between two or more independent undertakings;
ii) in case that one or more individuals who already have control of at least one undertaking or of one or more undertakings acquire control, directly or indirectly, over the whole or parts of one or several other undertakings; and

iii) in case a joint venture is created, inasmuch as it is deemed as a full-functioning independent economic entity and performs its activities 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, implies the ability to exercise a determining influence on an undertaking's activity, in particular:

i) acquisition of all or part of the share capital;
ii) acquisition of rights of ownership or use of all or part of an undertaking's assets;
iii) 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:

i) the acquisition of shareholdings or assets under the terms of a special process of corporate rescue or bankruptcy;
ii) the acquisition of a shareholding merely as a guarantee;
iii) the acquisition by credit institutions of shareholdings in non-financial undertakings, when such acquisition is not covered by the prohibition in the General Regulation for Credit Institutions and Financial Institutions of these undertakings to hold, directly or indirectly, on a temporary basis (for a maximum period of 3 years), securities which confer to them more than 25% of the voting rights.

6. Is there a "size of transaction" threshold?

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 turnover. Therefore, concentrations are subject to prior notification if:

i) their implementation creates or reinforces a share exceeding 30% of the relevant market, or where the market is wider than national in scope in the part of that market corresponding to the Portuguese territory; or
ii) if, in the preceding financial year, the undertakings concerned achieved in Portugal a net turnover in excess of €150 million, provided that the individual turnover achieved in Portugal in the same period by at least two of those undertakings exceeds €2 million.

Calculation of the market share and turnover refer to the whole economic groups to which the undertakings concerned belong to.

7. Is there a "size or turnover of the parties" test; if so, what is it and how are size and turnover to be calculated?

Please refer to the preceding question.

8. Is geographic scope/national market effect of transaction an issue with respect to filing or approval requirements? If so, specify.

Regarding the filing requirements, and as previously stated, the Portuguese Competition Act is applicable to concentrations between undertakings which take place, or have or may have effects, in the territory of Portugal, whether in the whole or part of it.

The approval of a concentration by the Authority is dependent on the effects of the concentration on the relevant markets. If a market is wider than national in scope, the Authority will typically limit its analysis to the impact of the concentration in the Portuguese territory.

9. Is the filing voluntary or mandatory? What are the penalties for non-compliance?

A concentration that meets the jurisdictional thresholds referred above must be notified to the Competition Authority.

Failure to notify a concentration meeting the above-described criteria within the time-limits prescribed by law renders the undertakings concerned subject to heavy fines, as it will be explained below.

10. Time in which a filing must be made.

Concentrations covered by the Competition Act are to be notified to the Competition Authority within seven working days of
i) conclusion of the agreement,
ii) disclosure of the preliminary announcement of a takeover bid or of an exchange offer or
iii) disclosure of the announcement to acquire a controlling interest in a public company.

11. Form and Content of Initial Filing.

Notifications must be presented in accordance with the form for concentrations approved by the Authority. The most recent one is enclosed to Regulation No 120/2009, 17 March.

The new notification form was approved subsequently to a public consultation launched by the Authority between May and June 2008.
Some of the most relevant innovations of the new notification form relate to the possibility of submitting the notification and respective annexes by electronic means, the inclusion of a more detailed list of definitions and instructions and also the adjustment of the optional nature of the information to the complexity of mergers.

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 up to the notifying parties to assess whether or not it is necessary to complete all the

sections on the form, on the basis of the seriousness of the competition concerns raised by the operation, although the Authority may later decide that all or part of the information omitted must be supplied.

In any case, notifying parties must always provide the following information:
i) general information on each of the undertakings participating in the concentration;
ii) description of the concentration, except for some aspects related to the identification of members of the administrative boards of the undertakings taking part in the concentration;
iii) elements regarding the relevant market, except for the indication of related markets, substitutable products or services and information on the structure of supply of the relevant market; and
iv) information on the factors influencing entry and exit in the relevant market, as well as identification of potential competitors who may enter the relevant market within a reasonable period of time.

Whenever the notification is considered incomplete or inaccurate, the Competition Authority invites the notifying parties, within seven working days, to complete or rectify the notification within the period it stipulates (the notification only being effective after it is considered complete by the Authority).

12. Are filing fees required?

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.

Thus, the fee due 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.

These amounts double if the operation is notified further to official proceedings by the Authority for failure to notify in the established time period.
Also, if the Authority initiates an in-depth investigation the notifying parties must pay an additional fee, corresponding to 50% of the initial one.

13. Is There An Automatic Waiting Period? If so, specify.

Under the Competition Act, a concentration subject to mandatory notification cannot be implemented before being the object of an express or tacit clearance decision by the Authority. Breach of this provision may result in the imposition of heavy fines (up to 10% of the companies' turnover).

However, in the case of public bids implementation pending approval is possible provided that the acquirer does not exercise the voting rights inherent to the shareholdings or exercises those rights only to protect the value of its investment on the basis of a derogation granted under the terms described hereunder.
Upon a reasoned request by the notifying parties, prior or subsequently to the submission of the notification, the Authority may waive the mandatory waiting period after considering the pros and cons for the participating undertakings and for competition.

The Authority has been very strict in interpreting this provision. So far, the Authority has always refused to waive the stand-still obligation, stating that this waiver shall only be granted in very exceptional circumstances, in particular when the non-implementation of the transaction results in serious consequences to the parties, such as imminent bankruptcy.

14. Are There Time Limits Within Which The Regulatory Agency Must Act? Can they be shortened by the parties or be extended by the regulatory agency?

Merger proceedings may encompass two stages.

Phase 1 initiates in the day after the notification is effective. In the first 5 days of Phase 1 the Authority shall promote the publication of the essential elements of the notification in two national newspapers and invite any interested third parties to submit their observations within the time limit prescribed. In Phase 1 of the procedure, the Authority has 30 working days from the date when the notification becomes effective to adopt one of the following decisions:

i) declare that the transaction is not subject to notification;
ii) adopt a non-opposition decision, subject or not to commitments;
iii) initiate an in-depth investigation (i.e., Phase 2) if it considers that the concentration is likely to create or reinforce a dominant position that may result in significant impediments to effective competition.

If no decision is issued by the Authority in the term of the 30 days, a tacit non-opposition decision is deemed to have been adopted.

It should be taken into account that the 30-days deadline is suspended whenever the Authority requests additional information from the notifying parties and hears the interested parties (notifying parties and opposing parties).

In Phase 2 of the investigation the Authority has a maximum of 90 working days from the date the notification becomes effective to carry out the necessary diligences. By the end of the Phase 2 deadline, the Authority must adopt one of two decisions: (i) not to oppose the concentration with or without commitments; (ii) oppose the concentration and, if necessary, adopt the necessary measures to re-establish effective competition, particularly order the de-merger of the undertakings concerned or the assets grouped together or the cessation of control.

During the course of Phase 2, as in Phase 1, the Authority may ask the notifying parties to provide additional information, which shall stop the clock. There are no limits to the numbers of requests of information in Phase 1. As regards Phase 2, the law states that the suspensions shall be limited to an overall limit of 10 working days. However, the Authority, in a very controversial interpretation, considers that this limitation applies to each information request and not to the whole of the suspensions.

15. What is the substantive test for clearance?

Concentrations notified to the Authority shall be appraised in order to determine their effects on the competition structure, having regard to the need to preserve and develop effective competition in the Portuguese territory, in the interests of the intermediate and final consumers.

The Competition Act adopts the dominance test of the former EC Merger Regulation (Council Regulation (EEC) 4064/89, of 21 December 1989). In accordance, authorisation is granted to concentrations that neither create nor strengthen a dominant position from which may result significant barriers to effective competition in the national territory or in a substantial part of it, whereas a prohibition shall be imposed on concentrations that create or strengthen a dominant position that may result in significant barriers to effective competition.

This appraisal shall take into account the following factors in particular:

i) the structure of the relevant markets and the existence or absence of competition from undertakings established in such markets or in distinct markets;
ii) the position of the parties in the relevant market or markets and their economic and financial power, in comparison with their main competitors;
iii) the potential competition and the existence, in law or in fact, of entry barriers to the market;
iv) the opportunities for choosing suppliers and users;
v) the access of the different undertakings to supplies and markets;
vi) the structure of existing distribution networks;
vii) supply and demand trends for the products and services in question;
viii) special or exclusive rights granted by law or attached to the nature of the products traded or services provided;
ix) technical and economic progress provided that it is to the consumer's advantage and does not create an obstacle to competition.

The Competition Act also introduces two additional factors, which do not exist under EC rules:

i) the control of essential infrastructure by the undertakings in question and the access opportunities to such infrastructure offered to competing undertakings; and
ii) the contribution that the concentration may bring to the international competitiveness of the Portuguese economy.

It should also be mentioned that in case the Authority prohibits a concentration, the parties may appeal to the Minister of Economy, which may revert the decision if the

fundamental interests of the national economy so impose. This has happened only once so far.

16. What are the common Post-Filing Procedures: Requests for further information, etc?

Please refer to the above question regarding the time limits of the Regulatory Agency to assess the transaction.

17. Describe the sanctions for not filing or filing and incorrect/incomplete notification.

Failure to notify a concentration subject to prior notification constitutes an administrative offence punishable with a fine up of to 1% of the previous year's turnover for each of the undertakings participating in the infringement.

In addition to pecuniary sanctions, failure to notify a concentration may result in the opening of an ex officio procedure by the Authority, forcing the parties to submit the notification within the prescribed deadline (the fee due for filing a concentration doubles in case of late notification).
In this case, the Authority may also decide, when justifiable, to apply a periodic penalty payment of up to 5% of the average daily turnover in the last year, for each day of delay, in case of failure to notify a concentration subject to notification.
Finally, under the Competition Act the directors of undertakings found to infringe competition law 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 specially attenuated.

18. Describe the procedures if the agency wants to challenge the transaction?

Under the Competition Act, the Competition Authority has competence to issue a grounded decision authorizing or prohibiting a concentration due to its conformity or incompatibility with the competition rules.

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.

Parties to a concentration that has been prohibited by the Authority can therefore lodge an appeal before the Minister within 30 days of the notification of the prohibition decision. The Minister may, through a grounded decision, authorise the operation when it benefits fundamental national economic interests, which exceed the restrictions of competition arising from its implementation. This decision may contain conditions and obligations in order to mitigate its negative impact on competition.

Independently from the extraordinary appeal procedure described above, the Authority's decisions authorising or prohibiting a concentration or applying fines are subject to judicial review by the commerce section of the competent county court or,

if the latter does not exist, the commerce section of the competent district court or, if this does not exist either, the Lisbon Commerce Court.

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. Judgements from first instance courts 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 questions of law.

19. Describe the penalties applicable to the implementation of a merger before clearance or of a prohibited merger?

A concentration subject to prior notification shall not be implemented before it has been notified and has been the object of an explicit or tacit decision of non-opposition. Therefore, the validity of any legal transaction carried out in contravention of this obligation depends on the explicit or tacit authorisation of the concentration.

Legal acts relating to a concentration are to be null and void insofar as they contravene an Authority's decision which has prohibited the concentration. Additionally, the implementation of concentrations prior to its approval or in contravention of an opposition decision constitutes an administrative offence subject to a fine of up to 10% of the previous year's turnover for each of the undertakings taking part in the infringement.

However, this does not prevent the implementation of a public bid to purchase or an exchange offer that has been notified to the Authority, provided that the acquirer does not exercise the voting rights attached to the securities in question or exercises them solely to protect the full value of its investments on the basis of a derogation granted by the Authority, as explained in question 13 above.

20. Describe, briefly, your assessment of the regulatory agency's current attitudes/activities.

The Competition Authority was created in 2003, the same year of publication of the current Competition Act. These two events brought thorough modifications to competition law in Portugal, both from a procedural and substantive point of view. Among those changes, merger control procedures are probably the area in which the new culture has been more visible and gathered more attention. This is mainly because of the importance of some of the sectors involved in the transactions that were referred to the Authority during the last years. Some of those sectors, such as banking and insurance, were even excluded from the scope of application of the previous competition provisions.

During the first six years of its operations the Authority had to deal with a large number of merger cases, some of them highly complex. There has been a growing effort to improve several aspects of the law and the decision-practice of the Authority.

21. Other Important Information: