Chapter 33

Portugal

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Relevant authorities and legislation

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

Recent and thorough changes occurred in Competition Law in Portugal, with the creation in January 2003 of a new Competition Authority ("*Autoridade da Concorrência*") and the adoption of a new Competition Act (Law No. 18/2003, June 11, 2003).

The Competition Authority replaced both the *Competition Council* ("*Conselho da Concorrência*"), the decision-making authority in competition matters, and *Directorate General for Commerce and Competition* ("*Direcção-Geral do Comércio e da Concorrência*"), competent to investigate anti-competitive behaviours and initiate formal investigative proceedings, after which it would hand over the cases for the Council to decide. With respect to merger control, under the former Competition Act (Decree-Law 371/93, of October 29), the deciding authority was the Minister competent for Economy. Concentrations subject to mandatory notification were notified to the Directorate General, which carried out a preliminary assessment, either recommending to the Minister the non-opposition to the operation or the opening of an in-depth investigation. In the second case, the Competition Council would issue an Opinion, although the decision belonged to the Minister.

Under the new Competition Act, the Competition Authority has exclusive competence to assess and decide on notified concentrations, which is one of the most relevant changes of the new Competition Act, as all stages of the process are now submitted to one single Authority and Government involvement in merger control is much reduced. However, concentrations prohibited by the Authority may still be approved by the Minister for the Economy, under an extraordinary appeal procedure, which will be explained below in answer to question 29.

The Competition Authority is an independent administrative authority, with its own budget and administrative autonomy. The Statutes of the Authority (approved by Decree-Law No. 10/2003, of January 18) clearly stress the independence of the Competition Authority in Portugal concerning its competence in competition matters without prejudice to the extraordinary Governmental appeal procedure described above.

2 What is the merger legislation?

As previously mentioned, a new Competition Act entered into force in June 2003. With regard specifically to merger control, Regulation 2/E/2003 relating to the Notification Form for Concentrations between Undertakings sets out the Form in accordance to which information is to be provided to the Competition Authority when a concentration is being notified. Regulation 1/E/2003 also determines the amounts payable to the Authority by the notifying parties as a fee for the appraisal of concentrations subject to prior notification, as ruled by the Competition Act (in this respect, please see below, answer to question 19).

3 Is there any other relevant legislation for foreign mergers?

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

Following a recent judgement of the European Court of Justice (Case 367/98, *Commission v. Portugal*, judgement of June 4, 2002), Law 102/2003, of November 15, 2003, and Decree-Law 49/2004, of March 10, 2004 repealed all national legal provisions determining limits to the acquisition of shares by foreign companies in re-privatised companies.

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

Under the terms of the previous Competition Act, credit and financial institutions as well as insurance companies were not covered by merger control legislation. As this was one of the most criticized elements on the former competition legislation, with the entry into force of the new Competition Act such provision was revoked.

At present, the Competition Act excludes from the concept of concentration the acquisition by credit institutions of shareholdings in non-financial undertakings, when such acquisition is not covered by the prohibition established in the General Regulation for Credit and Financial Institutions (approved by Decree-Law No. 298/92, December 31) 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. This provision was inspired by a similar provision in the former EC Merger Regulation (Council Regulation (EEC) 4064/89 of 21 December 1989) and is in line with Article 5(a) of the current EC Merger Regulation (Council Regulation (EC) 139/2004, of 20 January 2004).

Transactions caught by merger control legislation

5 Which transactions are caught – in particular, how is the concept of "control" defined?

For the purposes of the Competition Act (and again following the EC Merger Regulation), a concentration between undertakings shall be understood to exist: (i) in case of a merger between two or more hitherto 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, of the whole or parts of one or several other undertakings; and (iii) in case a joint venture is created, inasmuch as it fulfils the functions of a full-functioning independent economic entity 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:

- 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;
- 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 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;
- 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, as mentioned in the previous answer.

6 Are joint ventures subject to merger control?

As previously explained in answer to question 5 and in view of the above, the creation or acquisition of a joint venture constitutes a concentration between undertakings whenever the joint undertaking fulfils the functions of an independent economic entity on a lasting basis. However, if the creation of the joint venture has the object or effect of co-ordinating the competitive behaviour of undertakings that remain independent, such co-ordination is assessed under the rules applicable to prohibited agreements and practices (see Articles 4 and 5 of the Competition Act, which follow closely the wording of Article 81 of the EC Treaty).

7 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 turnover. Therefore, concentrations are 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 (the criteria set forth by the Competition Act to determine the relevant market(s) follow the case law of the European Court of Justice and the practice of the European Commission); or
- If, in the preceding financial year, the group of undertakings taking part in the concentration have 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 exceeds €2 million.

Calculation of the market share and turnover provided shall be calculated by adding together the respective turnovers of the following:

(a) Undertakings taking part in the concentration (the undertakings concerned);
(b) Undertakings in which such undertakings dispose, directly or indirectly, of:
  (i) A majority holding in the share capital;
  (ii) More than half the votes;
  (iii) The ability to nominate more than half the members of the management or supervisory bodies;
  (iv) The power to manage the undertaking's business;
(c) Undertakings which, in the undertakings concerned, separately or jointly, have the rights or powers specified in subparagraph b);
(d) Undertakings in which an undertaking referred to in subparagraph c) has the rights or powers specified in subparagraph b);
(e) Undertakings in which various undertakings referred to in subparagraphs a) to d) jointly dispose, among themselves or with third-party undertakings, of the rights or powers specified in subparagraph b).

If one or more undertakings involved in the concentration jointly dispose of the rights or powers specified in paragraph 1 b), the calculation of the turnover for the undertakings taking part in the concentration:

- Shall not take account of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected to them within the meaning of paragraphs b) to e) above, or the transactions carried out between the controlling undertakings;
- Shall take account of the turnover from the sale of products or provision of services between the joint undertaking and any other third-party undertaking and such turnover shall be attributed to each of the undertakings participating in the concentration in the part corresponding to its division into equal parts for all the undertakings controlling the joint undertaking.

By way of derogation from the provisions of the preceding paragraphs, if the concentration consists of the acquisition of parts, with or without their own legal personality, of one or more undertakings, the turnover to be taken into account with regard to the transferor or transferors shall

solely be that relating to the parts involved in the transaction.

The turnover shall be substituted:

- In case of credit and other financial institutions, by the sum of the following items of income, as they are defined by the applicable legislation: (i) interest and equivalent income; (ii) income from securities (which in turn include; income from shares and other variable-yield securities; income from equity investment); (iii) income from parts of the capital in associated undertakings; (iv) commission received; (v) net profit from financial operations; and (vi) other operating income.
- In the case of insurance undertakings, by the value of gross premiums written, paid by residents in Portugal, which shall include all amounts received or receivable in respect of insurance contracts issued by or on behalf of such undertakings, including premiums paid to re-insurers, except for the taxes or levies charged on the basis of the amount of the premiums or their total volume.

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

Merger control applies in the absence of a substantive overlap if (i) the operation is a concentration, in the meaning of the Competition Act (please see answer to question 5) and (ii) the concerned concentration fulfils one of the two alternative sets of thresholds stressed above in answer to question 7 for prior compulsory notification.

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

Under the Competition Act, national rules on merger control are applicable to all economic activities carried out on a permanent or occasional basis in the private, public or co-operative sectors. With the exception of the international obligations of the Portuguese State, the provisions of the Competition Act are applicable to practices restrictive of competition and concentrations between undertakings, which take place or have, or may have, effects in the territory of Portugal.

Therefore, despite the fact that neither of the undertakings concerned have established offices or any stable establishment in Portugal, the Competition Act shall apply if one or more undertakings meet the criteria set out in question 7 above.

The recently created Competition Authority has shown through its activity in the last 18 months that it is keen to apply national competition rules to every transaction that may produce effects on competition in Portugal. Therefore, it cannot be excluded that a foreign company is fined for failure to notify, if the criteria for mandatory notification described above are met.

10 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, 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 operation that did not have community dimension was referred to the Commission by the Competition Authority under Article 22(4) of the EC Merger Regulation.

Notification and its impact on the transaction timetable

11 Where the jurisdictional thresholds are met, is notification compulsory?

A concentration that meets the jurisdictional thresholds has to be notified to the Portuguese Competition Authority. Pursuant to this obligation, concentrations covered by this compulsory notification must be notified to the Authority within seven working days of conclusion of the agreement or, where relevant, by the publication date of the announcement of a takeover bid, an exchange offer or a bid to acquire a controlling interest. In case the Competition Authority considers that the notification of a concentration is incomplete, the Authority should, within seven working days of the receipt of notification, request the notifying Parties to present the information or documents that are missing.

It should be noted that a concentration subject to mandatory notification cannot be implemented before a non-opposition decision is issued by the Competition Authority (please refer also to questions 15 and 17, below), infringement being seriously punished.

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

Whenever a concentration meet the criteria for prior mandatory notification clearance from the Authority is necessary. In this respect, and as already mentioned above, the Competition Act introduced a provision (not in the former Competition Act) under which, for a concentration to be subject to the notification obligation, at least two of the concerned undertakings must have achieved a turnover in Portugal of at least two million Euro in the preceding financial year. This amendment was introduced to prevent every acquisition by a large company (even if the acquired company had an irrelevant presence in Portugal) having to be notified to the competition authorities.

Notwithstanding the aforesaid, please see answer to question 17, below.

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

A concentration subject to prior notification cannot be put into effect 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 provision depends on the explicit or tacit authorisation of the concentration (see also answer to question 17, below). In addition, if it becomes aware of a concentration that was not notified in infringement of the Competition Act, the Authority can initiate official proceedings, with the following consequences. Failure to notify a concentration subject to prior notification constitutes a misdemeanour ("*contra-ordenação*"), a quasi-criminal offence punishable with fines

up to 1% of the previous year's turnover for each of the undertakings.

Independently from applying a fine, the Authority notifies the undertakings of the position of non-compliance so that they may notify the concentration, within a reasonable period prescribed by the Authority (the fee due for filing a concentration doubles in case of late notification). 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 prior notification.

Execution of concentrations that have been prohibited by the Competition Authority constitute an infringement punishable with fines up to 10% of the previous year's turnover for each of the undertakings participating in the infringement.

Finally, under the Competition Act the holders of 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.

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

As already mentioned above, the Competition Act is applicable to concentrations between undertakings, which take place or have or may have effects in the national territory and concentrations which are subject to mandatory notification cannot produce effects in Portugal previously to the adoption of a non-opposition decision by the Competition Authority. Therefore, it will only be possible to complete in other jurisdictions a concentration notifiable under Portuguese Law, previously to a decision of the Portuguese Competition Authority, if the undertakings concerned assure the Authority that the concentration will not produce effects in Portugal until such time as clearance has been received from the Authority. Therefore, it is convenient to submit the effects of the transaction in Portugal conditional upon the clearance by the Competition Authority.

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

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

As regards the contacts to be held with the Competition Authority previously to the notification of the transaction, it is not usual in Portugal, unlike the practice of the European Commission, for the notifying parties to have informal contacts with the Authority in the pre-notification stage. In general, contacts with the Competition Authority, take place only in phases 1 and 2 of the procedure (please see below, answer to question 16).

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

The procedure for assessing a concentration under the Competition Act encompasses two different 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). It should be mentioned that the lack of a decision within the periods set out by the Competition Act is deemed as a decision of non-opposition to the concentration.

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

In this regard, it should be noted that a notification only produces effects after the payment of the fee due by the parties (see question 19 below). In addition, whenever the notification is incomplete or inaccurate, the Authority invites the notifying parties, in writing and within seven working days, to complete or rectify the notification within the period it stipulates. In this case, the notification shall be effective on the date on which the Authority receives the said information or documents.

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

In Phase 2 of the procedure, the Authority has a maximum of **90 working days** from the date of the Phase 1 decision to carry out the additional inquiries that it considers necessary. By the end of this period, the Authority may decide: (i) not to oppose the concentration; (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.

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 1 and 2 of the procedure.

If in the course of the investigation it becomes necessary for additional information or documents to be provided (or for those already provided to be corrected), the Authority requests the necessary information or corrections to the notifying parties, setting a reasonable time limit for them to supply the information in question or to carry out the essential corrections. This request suspends the referred time periods, which shall resume on the day following the receipt by the Authority of the requested information. The Authority may also request any other

public or private bodies to provide any information that it considers appropriate for the decision on the case. However, this latter request does not suspend the time periods for the Authority to decide.

The Competition Act also provides that, before a decision is adopted by the Authority on the concentration, the notifying parties as well as interested third parties (undertakings which have intervened during the procedure) must be heard, the Authority usually sending a project of the decision and establishing a deadline for the parties to present their views. As mentioned above, the hearing of the parties suspends 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, forgo the opportunity to hear the notifying parties.

Finally, whenever a concentration affects a market that is subject to sectoral regulation, the Competition Authority must hear the opinion of the relevant sectoral authority, which however is not binding.

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

A concentration subject to prior mandatory notification cannot be put into effect before it has been notified and has been the object of an explicit or tacit decision of non-opposition from the Authority.

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 full 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 subsequently to the notification, the Authority may grant derogation from the two above-mentioned obligations, after considering the consequences for the participating undertakings of suspending the concentration or the exercise of voting rights and the negative effects of the derogation for competition. The derogation may, if necessary, be accompanied by conditions and obligations intended to guarantee effective competition.

The validity of any legal transaction carried out in contravention of the provisions of the Competition Act depends on the explicit or tacit non-opposition to the concentration by the Competition Authority. Accordingly, legal acts relating to a concentration are to be null and void insofar as they contravene an Authority decision prohibiting the concentration.

It should be noted that the execution of concentrations in infringement to the rules described above, as well as the disregard of conditions or obligations imposed on undertakings by the Authority when granting a derogation to the suspension obligation, render the notifying parties subject to fines up to 10% of the previous year's turnover for each of the undertakings participating in the infringement.

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

As previously stated in question 2, notifications must be presented in accordance with the form for concentrations approved by the Authority – Regulation 2/E/2003 relating to the notification form for concentrations between undertakings (the Form is available from their website at www.autoridadedaconcorrencia.pt).The purpose of the form is to identify the information and the documents to be provided to the Competition Authority when a concentration is being notified, which should be presented (along with two copies) as complete and accurate as possible.

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 points 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.

In its recent practice (it was created only in January 2003), the Competition Authority has not as a general rule favoured pre-notification contacts with possible notifying parties, as well as the submittal of a draft notification, although meetings are usually held with the notifying parties to discuss the operation during both phases of the procedure.

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). In all cases, however, during appraisal of a concentration the Competition Authority may request information from any of the parties involved in the concentration, in addition to that supplied through the notification form, whenever such is necessary.

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

Prior notification of concentrations shall be presented to the Competition Authority:

- In the case of a merger, by all the companies directly involved in the merger;
- In the case of acquisition of full control, by the person or undertaking assuming control;
- In the case of joint control, by the persons or undertakings assuming control.

Joint notifications must be presented by a common representative empowered to send and receive documents on behalf of all the notifying parties.

According to the Competition Act and to Regulation 1/E/2003, the appraisal of concentrations by the Authority is subject to the payment of a fee by the notifying parties, without which the notification is not considered effective. The fee is proportional to the aggregate turnover of the parties in the year preceding the operation. 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 was notified further to official proceedings by the Authority for failure to notify in the established time period. Finally, if the Authority initiates Phase 2 proceedings, the notifying parties must pay an additional fee, corresponding to 50% of the fee already paid.

Substantive assessment of the merger and outcome of the process

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

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

Concentrations accurately notified 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 market, in the interests of the intermediate and final consumer.

Similarly to what is provided for in the EC Merger Regulation, 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 undertakings participating 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: (x) the control of essential infrastructure by the undertakings in question and the access opportunities to such infrastructure offered to competing undertakings; and (xi) the contribution that the concentration brings to the international competitiveness of the Portuguese economy.

As mentioned above, in the case of establishment or acquisition of a joint undertaking that constitutes a concentration, if the object or effect of creating the joint undertaking is to co-ordinate the competitive behaviour of undertakings that remain independent, such co-ordination is assessed under the rules for prohibited agreements and practices (please refer to question 6 above).

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

Following the publication of a notice of the notification by the Competition Authority within five days of the date on which it became effective, any interested third parties may submit their observations on the concentration, within the deadline established by the Authority (which cannot be less than to 10 working days).

In addition, previously to the adoption of a Phase 1 or Phase 2 decision, the Authority must hold a hearing of the interested third parties (which suspends the time periods for the adoption of the decision), if they intervened in the procedure and expressed a negative opinion on the operation. This usually means that the Authority will send a draft decision to these parties, following which they may present their observations within the time period established by the Authority. As the Administrative Procedure Code is also applicable to merger control procedure, third parties may also access, on request, to the non-confidential versions of key submissions and documents.

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

It was already mentioned above that in case the notification of a concentration is considered incomplete the Authority may ask the notifying parties to provide information in order for it to be considered complete, and that, in addition, notifying parties are requested within a reasonable time limit to provide the Authority with all additional information (or correction of information already provided) that it considers necessary to conduct the assessment of the operation.

In addition, the Competition Act provides that while assessing a concentration, the Authority may request to public and private entities the information it considers necessary to adopt a decision on a concentration, granting the Authority the same rights and powers (and subjecting it to the same duties) as when investigating anti-competitive practices (e.g., cartels), similarly to criminal police. In accordance, the Authority can, in particular:

- question the legal representatives of the undertakings involved and ask them for elements of information that the Authority deems useful or necessary for clarification of the facts;
- question the legal representatives of other undertakings and any other persons whose declarations it deems relevant and request them to supply documents and other information;
- search for, examine, gather, copy or take extracts from documentation, at the premises of the undertakings involved, whether or not such documentation is in a reserved place or not freely accessible to the public,

whenever such inquiries prove necessary for the obtaining of evidence;
- seal the premises of the undertakings in which elements of information are to be, or liable to be, found, for the period and to the necessary extent;
- require any other public administrative services, including criminal police bodies, to provide the co-operation necessary for the full discharge of their duties.

Information and documents requested by the Authority should be provided within 30 days, unless, with a properly substantiated decision, the Authority lays down a different period.

Failure to supply or the supply of false, inaccurate or incomplete information in response to a request by the Authority in the exercise of its powers, as well as failure to co-operate with the Authority or obstruction to the exercise by the same of the powers described above, constitute an infringement punishable with fines up to 1% of the preceding year's turnover for each of the undertakings. 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.

It is worthwhile noting that concentrations for which the decision of non-opposition was grounded on information, provided by the undertakings, which was false or inaccurate with regard to essential circumstances for the decision, are subject to official proceedings by the Authority that may ultimately result in the prohibition of the concentration.

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

If any of the undertakings concerned considers that the notification or the information subsequently provided to the Competition Authority contains commercially sensitive information, which must remain confidential, it may request that such information is not disclosed to third parties. Should the Authority accept the request of confidentiality, the information will therefore not be disclosed to third parties. A summary of the decisions on merger control is usually published in the Competition Authority's website. However, this summary does not include information considered confidential by the parties and the Authority.

In accordance with the investigative powers described in the previous answer, it does not seem possible to withhold any information requested by the Competition Authority, unless it relates to correspondence between a company and its legal advisors.

24 How does the regulatory process end?

The procedure for the assessment of a concentration ends through a grounded decision by the Board of the Competition Authority, within the time periods described above in the answer to question 16. 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, as it will be referred in answer to question 29.

25 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 short practice of the Competition Authority in this respect does not allow for an analysis of the type of remedies preferred. However, the Authority seems to have a more positive approach to behavioural remedies than the practice of the European Commission.

The Authority will then assess the effect of the proposed commitments on the compatibility of the concentration with the competition rules, following which an informal negotiation may take place between the Authority and the notifying parties. If the Authority agrees with the final proposal of commitments, it will include in the non-opposition decision to the operation conditions or obligations in order to ensure compliance with the commitments proposed or accepted by the notifying parties.

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

The undertakings concerned 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).

27 How are any negotiated remedies enforced?

Remedies are usually presented by the notifying parties and accepted or not by the Authority. In case the Authority considers the commitments to be sufficient, it will attach to the non-opposition decision conditions and obligations to ensure that the commitments entered into by the parties are adequately fulfilled. The Authority frequently establishes obligations for periodic reporting on market conditions by the notifying parties in order to be able to monitor future developments in the same markets.

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

28 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.

29 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 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 are subject to judicial review by the Lisbon Commerce Court ("*Tribunal de Comércio de Lisboa*"), which is competent to hear appeals against the Authority's decisions authorising or prohibiting a concentration or applying fines to undertakings. 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 of the Commerce Court can be appealed to the Lisbon Appeal Court ("*Tribunal da Relação de Lisboa*") and ultimately, in case of decisions other than the application of fines, to the Supreme Court ("*Supremo Tribunal de Justiça*"), although limited to points of law (appeals referring only to points of law are lodged directly with the Supreme Court).

30 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 time limits of three and five years, depending on the gravity of the infringement. Similarly, the time limit 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, once this period has elapsed, companies cannot be pursued for not complying with the Authority decision.

Miscellaneous

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

Under the Competition Act and its Statutes, the Authority must coordinate its action with other sectoral regulators in regard to concentrations involving markets under sectoral regulation (such as electronic communications, energy, banking or financial services), which must be heard previously to decisions being issued in both phases of the merger control procedure.

The Authority also co-operates intensely with the European Commission and the Competition Authorities of the other Member States of European Union in the framework of the European Competition Network. Pursuant to what is provided in the EC Merger Regulation and the Implementing Regulation (Commission Regulation (EC) 802/2004, of 7 April 2004), national authorities receive a copy of all notifications filed with the European Commission. The Commission is also regularly informed of concentrations which may have interest at EU level.

Finally, it should be mentioned that a Competition law network has recently been created among the Competition Authorities of the Portuguese-speaking countries (an initiative of the Portuguese and Brazilian Competition Authorities).

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

Our answers are up to date as at August 9, 2004.

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

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