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The International Comparative Legal Guide to:

Merger Control 2006

A practical insight to cross-border merger control issues

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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 in January 2003 and replaced the two former competition authorities in Portugal, the *Conselho da Concorrência* ("*Competition Council*"), the decision-making authority in competition matters, and *Direcção-Geral do Comércio e da Concorrência* ("*Directorate General for Commerce and Competition*"), 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 specifically to merger control, under the former Competition Act (Decree-Law 371/93, of 29 October 1993), 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 final decision rested with the Minister.

Under the new Competition Act (Law 18/2003, of 11 June 2003), 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 Economy, under an extraordinary appeal procedure (see question 5.6 below).

The Competition Authority is an independent administrative authority which has financial and administrative autonomy. The Statutes of the Authority (approved by Decree-Law No. 10/2003, of 18 January 2003) 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.

1.2 What is the merger legislation?

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 EU Chapter above). If these thresholds are not met, Portuguese law may apply.

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

Relevant legislation on merger control is also contained in the Statutes of the Authority, as well as in Regulation 2/E/2003 of the Authority, of 3 July 2003, which sets out the Notification Form to be filled by the notifying parties to a concentration (see question 3.8 below), and in Regulation 1/E/2003 of the Authority, of the same date, which determines the fees due to the Authority for the merger review procedure (see question 3.9 below).

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.

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v. Portugal*, judgement of June 4, 2002), Law 102/2003, of 15 November 2003, and Decree-Law 49/2004, of 10 March 2004 repealed all national legal provisions determining limits to the acquisition of shares by foreign companies in re-privatised companies.

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

Although mergers in the financial sector are covered by the Competition Act (a welcomed change from the former Act, which excluded such operations from merger control), there are special rules on the review of operations in this sector by the competent regulatory authorities under prudential rules.

Irrespective of the notification to the Competition Authority under the Competition Act, the acquisition or strengthening of a qualified shareholding 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 in a credit institution must be notified to 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.

Operations concerning public companies must be notified to the securities regulator (*Comissão do Mercado dos Valores Mobiliários*) under the provisions of the Securities Code (Decree-Law 486/99 of 13 November 1999, as amended).

Mergers in the media sector must be notified to the *Alta Autoridade para a Comunicação Social* ("*High Authority for the Media*"). Under the Media Law (Law 2/99, of 13 January 1999, as amended), this Authority must issue a binding Opinion, which will effectively block the operation if it is deemed to threaten the freedom of speech or the plurality of the media.

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

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

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

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

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

2.2 Are joint ventures subject to merger control?

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

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

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

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

- their implementation creates or reinforces a *share exceeding 30% in the national market for a particular good or service or in substantial part of it* (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 *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 of the EC Merger Regulation.

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

Yes. Merger control rules apply if (i) the operation constitutes a concentration, in the meaning of the Competition Act (see question 2.1 above); and (ii) it meets one of the two alternative sets of jurisdictional thresholds (see question 2.3 above), even in the absence of a substantive overlap.

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

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

This is confirmed by the recent practice of the Competition Authority, as the Authority has adopted a broad interpretation of the legal provisions determining its jurisdiction. In DBAG/SAF (case 7/2004, Decision of 20 April 2004), the Authority considered itself competent to review the operation, even though the acquiring company DBAG did not have any turnover in Portugal and the acquired company SAF was not established in Portugal, selling its products through an agent. The Authority recently confirmed this understanding in a similar case, *Florimond Desprez/Advanta Lambda* (case 27/2005, Decision of 19 May 2005).

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

The Competition Act does not provide for any mechanism in this regard. However, Articles 9 and 22(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).

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 that meets the jurisdictional thresholds must be notified to the Portuguese Competition Authority *within seven working days* of the conclusion of the agreement or, where relevant, *by the publication date* of the announcement of a takeover bid, an exchange offer or a bid to acquire a controlling interest. In case the Competition Authority considers that the notification is *incomplete*, it may, within seven working days of the receipt of notification, request the notifying parties to present the information or documents that are missing.

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.

Whenever a concentration meets the criteria for prior mandatory notification, a clearance decision from the Authority is necessary before the operation can be implemented.

In this respect, the Competition Act introduced a *de minimis* provision (not contained in the former Competition Act) under which, for a concentration to be subject to the notification obligation, at least two of the undertakings concerned 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 Authority, as was the case with the previous Competition Act.

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

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 participating in the infringement. If such concentration is implemented or if a concentration that has been prohibited by the Authority is put into effect, the undertakings concerned are liable to fines reaching up to 10% of the previous year's turnover for each of the undertakings participating in the infringement.

Further, any legal transaction carried out to implement the concentration in breach of the above provisions is void and may be so declared by a court (following, for instance, an action brought by a competitor or a client of the parties).

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

- the *Authority is not bound by any deadline* to close the investigation and issue a Decision;
- the *filing fees increase* to double the amount originally

due in case of an *ex officio* investigation; and

- the Authority may also decide, when justifiable, to apply a *periodic penalty payment of up to 5% of the average daily turnover* in the preceding year, for each day of delay.

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

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

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

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

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

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

There are no guidelines as to the concept of *conclusion of agreement* in the meaning of the Competition Act. The Authority has already accepted notifications without a final binding agreement being signed, basing its assessment on a promissory agreement (cases 10/2004, *Nortesaga/Motortejo et al.* Decision of 27 April 2004 and more recently 35/2005 *Modelo Continente/Pinto Ribeiro Supermercados*, Decision of 16 June 2005). It is however 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 regulatory body? What are the main stages in the regulatory process?

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

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

A notification only becomes effective after the payment of the fee due by the parties (see question 3.9 below) and if it is considered complete. Whenever the notification is incomplete or inaccurate, the Authority invites the notifying parties, in writing and within seven working days, to complete or correct 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; (ii) not to oppose the concentration; or (iii) to initiate an in-depth investigation (and open Phase 2 of the procedure), when, in view of the evidence gathered, the Authority has serious doubts that the concentration will create or strengthen a dominant position that may result in significant barriers to effective competition in the Portuguese market or in a substantial part of it.

The practice of the Authority shows that Phase 2 proceedings are relatively frequent in Portugal: in 2004, the Authority sent to Phase 2 inquiries 18% of the notified concentrations.

In **Phase 2** of the procedure, the Authority has a maximum of **90 working days** from the date of the Decision to open Phase 2 to carry out the additional inquiries that it considers necessary. No statement of objections is issued by the Authority, the only document available to the parties on the objections of the Authority to the operation is the Decision to initiate Phase 2. Access to the Authority's file is given to the notifying parties on request, as well as to other interested parties (these will only have access to the non-confidential version of the file).

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

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.

Additional information requests

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

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

Hearing of the notifying parties and of third parties

The Competition Act provides that, before a decision is adopted by the Authority on the concentration, the notifying parties as well as interested third parties (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. 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. The opinion of the regulatory authorities does not suspend the time periods mentioned above and is not binding on the Authority, with the exception of the regulatory authority for the media sector (see question 1.4 above).

In case of *ex officio* proceedings initiated by the Authority, the Authority is not bound by any time limits to decide (see question 3.3 above).

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

A concentration subject to prior mandatory notification cannot be put into effect before it has been notified and must be suspended until it is the object of a non-opposition decision from the Authority (or the time limits for the Authority to decide have elapsed). Agreements should therefore condition the completion of the transaction to the clearance of the concentration under the Competition Act.

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

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

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. In accordance, agreements relating to a concentration are to be null and void insofar as they contravene the provisions of the Competition Act prohibiting the implementation of the concentration before clearance is granted. Undertakings in breach of these rules are also subject to heavy fines (see question 3.3 above).

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

Notifications must be lodged in accordance with the Form approved by the Authority and set out in Regulation 2/E/2003 (available from the Authority's website at www.autoridadedaconcorrencia.pt). The purpose of the Form (which should be lodged along with two complete copies of the notification and supporting documentation) is to identify the information and the documents to be provided to the Competition Authority when a concentration is being notified.

The Authority may waive the requirement for certain information or documents to be presented if it considers them unnecessary for appraisal of the concentration. It is however up to the notifying parties to assess whether or not it is necessary to complete all the 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 information about:

- the undertakings participating in the Concentration;
- the transaction, except for information related to the identification of members of the administrative boards of the undertakings taking part in the concentration;
- 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
- the factors influencing entry in and exit of the relevant market, as well as identification of potential competitors who may enter the relevant market within a reasonable period of time.

When supporting documentation is in a foreign language, translation may be required, although documents in English are usually accepted.

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 any event the Competition Authority may always request additional information from any of the parties involved in the concentration.

Until recently, the Competition Authority did not favour pre-

notification contacts with notifying parties. Authority officials have recently stated that the Authority is available to hold pre-notification discussions, but this is not yet considered to be a common practice.

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

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

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

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

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

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

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

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

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

4 Substantive Assessment of the Merger and Outcome of the Process

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

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

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

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

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

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

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

In addition, previously to the adoption of a Phase 1 or Phase 2 decision the Authority must hold a hearing of the interested third parties. Under the Competition Act, third parties are only heard if they 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 may also access, on request, the non-confidential version of the Authority's file.

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

Whenever the notification is considered incomplete the Authority may ask the notifying parties to provide information in order for the notification to be considered complete (see question 3.6 above).

In addition, under the Competition Act the Authority may request from all public and private entities the information it considers necessary to decide, holding the same rights and powers (and being subjected to the same duties) as when investigating anti-competitive practices (e.g., cartels). The Authority may, in particular:

- question the legal representatives of the undertakings involved and ask for information considered 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 are necessary for the

obtaining of evidence. The Authority must previously obtain a warrant from the competent judiciary authority in order to conduct such searches;

- 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 extent necessary to carry out the investigations described above; and/or
- require any other public or administrative entities, including criminal police, to provide the necessary co-operation for the full discharge of the Authority's duties.

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 no longer than 10 working days for the parties to provide the required information.

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 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. The powers to impose fines have not been used to date.

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

It is not possible to withhold any information from the Competition Authority, unless it relates to correspondence between a company and its legal advisors.

The Authority is however aware that much of the information provided by the notifying parties is commercially sensitive and should be considered confidential. For this reason, notifying parties must identify information contained in the notification and in response to additional information requests that should be considered confidential. Should the Authority accept the request of 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.

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 grounded 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. Although dating only from 2003, the practice of the Competition Authority in this respect seems to reflect a more positive approach to behavioural remedies than the practice of the European Commission, especially regarding periodic monitoring of market conditions.

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 usually takes 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. Most of Phase 2 cases are approved by the Authority subject to conditions and/or obligations.

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 commitments, although it is common practice to present commitments in a letter duly signed by representatives of the notifying parties.

5.4 How are any negotiated remedies enforced?

Remedies are usually presented by the notifying parties and 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 *ex-officio* proceedings by the Authority, all legal acts relating to it being null and void insofar as they contravene the Authority's decision. In addition, infringement of conditions and/or obligations imposed by a decision of the Authority renders the undertakings part of the infringement subject to fines up to 10% of the previous year's turnover for each of the undertakings taking part in the infringement.

5.5 Will a clearance decision cover ancillary restrictions?

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

5.6 Can a decision on merger clearance be appealed?

Concentrations prohibited by the Authority may nonetheless be authorised by the Minister for the Economy under an extraordinary appeal mechanism set out in the Statutes of the Competition Authority (a similar solution also exists in other European competition legislations, such as the German Competition Act). Parties to a concentration that has been prohibited by the Authority can therefore lodge an appeal with the Minister within 30 days of the notification of the prohibition decision. The Minister may authorise the operation when it benefits *fundamental national economic interests*, which compensate the restrictions of competition arising from its implementation. This Decision must be duly grounded and may contain conditions and obligations in order to mitigate its negative impact on competition. Since the Act was enacted, no such appeal was lodged.

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).

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

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

6 Miscellaneous

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

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 media, electronic communications, energy, banking, insurance, securities, financial services or air transport), which must be heard previously to decisions being issued in both phases of the merger control procedure (see question 1.4 above).

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, national authorities receive a copy of all notifications filed with the European Commission. The Commission is also regularly informed of concentrations which may have an interest at EU level. It is also relevant to mention that notifying parties must state in the Notification Form in which Member States of the EU the operation is being notified.

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).

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

Our answers are up to date as of July 29, 2005.

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