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Pre-Merger Notification

Portugal

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

Law No. 18/2003, June 11, 2003 (*The Competition Act*) applies to all concentrations that take place or may produce effects in Portuguese territory, in accordance with the criteria set out below.
In addition, Regulation 2/E/2003 of the Authority sets out the Form in accordance to which a concentration subject to mandatory filing should be notified to the Portuguese Competition Authority and also determines the amounts of filing fees payable to the Authority by the notifying parties.

Identify Applicable National Regulatory Agency/Agencies

The *Autoridade da Concorrência* (Competition Authority) is the regulatory agency with competence to enforce the Competition Act.

Additional Comments

The Competition Authority enacted by Decree-Law No. 10/2003, January 18, 2003 replaced both the Conselho da Concorrência (Competition Council), and Direcção-Geral do Comércio e da Concorrência (Directorate General for Commerce and Competition).
Under the new Competition Act, the 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 (formerly, the deciding authority was the Minister for the Economy and the Competition Council had merely an advisory role), and Government involvement in merger control is much reduced.

Nevertheless, an extraordinary appeal procedure to the Minister is provided to the parties of a concentration blocked by the Authority, as we will see below.

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

Concentrations having community dimension in the meaning of Article 1 of Council Regulation (EC) No. 139/2004, of 20 January 2004, on the control of concentrations between undertakings (the "EC Merger Regulation") are subject to exclusive review by the European Commission (see Article 21 of the EC Merger Regulation), despite also fulfilling the criteria established by the Portuguese Competition Act.

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

There are no legal requirements previously to the filing of the concentration.
In its recent practice (it was created in January 2003), and unlike the practice of the European Commission, the Competition Authority has not 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, following notification.

As previously stated above, notifications must be presented in accordance with the form for concentrations approved by the Authority – Regulation 2/E/2003 (the Form is available from the Authority's website at www.autoridadedaconcorrencia.pt). Filing fees must also be paid before the notification is considered effective (please refer to the below point *relating to the requirement of filing fees*).

Additional Comments

Please refer to the below said in point Form and Content of Initial Filing.

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

Concentrations that fulfil the *thresholds* set by Article 9 of the Competition Act (please see the answer to the following point) are subject to review by the Competition Authority.
For the purposes of the Competition Act (and again following the EC Merger Regulation and European Commission's Notice on the concept of concentrations), 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 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;

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.

Is there a "size of transaction" threshold?

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

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 take into account the *whole economic groups* to which the undertakings taking part in the concentration belong, under article 10 of the Competition Act, which follows closely the European Commission's Notice on the calculation of turnover.

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

Please refer to the preceding point.

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

Regarding the **filing requirements**, and as previously stated, the Portuguese Competition Act is applicable to concentrations between undertakings which take place, or have or may have effects, in the territory of Portugal and which fulfil the criteria set out above.

The approval of the concentration by the Authority is dependent on the effects of the concentration on one or more national relevant markets, as it will be explained below in point *substantive test to clear the transaction*.

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

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

Failure to notify a concentration meeting the above-described criteria within the time-limits set out below renders the participating undertakings subject to heavy fines, as it will be explained below in point *sanctions for not filing or filing an incorrect/incomplete notification.*

Time in which a filing must be made

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.

Form and Content of Initial Filing

As previously stated, 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 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.

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.

Are filing fees required?

According to the Competition Act and to Regulation 1/E/2003, the appraisal of concentrations by the Authority is subject to the payment of a fee by the notifying parties, without which the notification is not considered effective. The fee is proportional to the aggregate turnover of the parties in the year preceding the operation. Thus, the fee due is: (i) €7,500 if the aggregate turnover is below or equal to €150 million, (ii) €15,000 if the turnover is more than €150 million and below or equal to €300 million, and (iii) €25,000 if the turnover is more than €300 million.
These amounts *double* if the operation was notified further to official proceedings by the Authority for failure to notify in the established time period. Finally, if the Authority initiates an in-depth investigation, the *notifying parties must pay an additional fee*, corresponding to 50% of the fee already paid.

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

Under the Competition Act, a concentration subject to mandatory notification *cannot be implemented before being cleared by the Competition Authority*. If the Competition Authority does not issue a decision within the prescribed time limits, the concentration is to be deemed approved.

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

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. 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.

What is the substantive test for clearance?

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

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

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.

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

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

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

Failure to notify a concentration subject to prior notification constitutes an administrative offence punishable with **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.

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.

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

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

Concentrations prohibited by the Authority may nonetheless be authorised by the Minister for the Economy under an **extraordinary appeal mechanism** set out in the Statutes of the Competition Authority (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 *Tribunal de Comércio de Lisboa* (Lisbon Commerce Court)**, 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 *Tribunal da Relação de Lisboa* (Lisbon Appeal Court) and ultimately, in case of decisions other than the application of fines, to the *Supremo Tribunal de Justiça* (Supreme Court), although limited to points of law (appeals referring only to points of law are lodged directly with the Supreme Court).

Additional Comments

On 21 October 2005, the Competition Authority issued its first decision, prohibiting the acquisition of joint control over the company Arriva Transportes da Margem Sul by the Barraqueiro Group and Arriva Group. The decision was taken on the grounds that the decision would be liable to create a dominant position that may result in significant barriers to competition in the market for public road and rail passenger transport covering all the Setúbal / Lisbon routes crossing the "25 de Abril" bridge. According to the Competition Authority's Press Release No. 12/2005, available on the Authority's website www.autoridadedaconcorrencia.pt, the operation would lead to the elimination of competition by reducing the number of effective competitors from 2 to 1, since, combined, the companies would hold a market share of 96%.

Additionally, on 14 December 2005, the Competition Authority has ruled against the acquisition, by Galp, of the coloured diesel-fuel service stations held by Esso. According to the Authority's Press Release No. 13/2005, the decision is grounded on the fact that the merger could create or strengthen a dominant position, on the part of Galp, that may result in significant barriers to competition in the markets for the sale of coloured diesel-fuel in service stations in the ports of Matosinhos, Figueira da Foz, Peniche, Lisbon, Portimão and Olhão. In the post-merger scenario, Galp would hold market shares that could reach a figure of 80%.

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

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

Legal acts relating to a concentration are to be **null and void** insofar as they contravene the Authority's decision which have prohibited the concentration.

Additionally, the execution of concentrations which have been prohibited by the Authority constitutes an **administrative offence subject to a fine that shall not exceed 10% of the previous year's turnover** for each of the undertakings taking part in the infringement.

Additional Comments

However, this does not prevent the implementation of a public bid to purchase or an exchange offer that has been notified to the Authority, provided that the acquirer does not exercise the voting rights attached to

the securities in question or exercises them solely to protect the full value of its investments on the basis of a derogation granted by the Authority.

This derogation may be granted at the duly substantiated request of the notifying undertakings, presented prior to or subsequently to the notification. The derogation depends on the assessment of the consequences for the undertakings of suspending the concentration or the exercise of the voting rights and the negative effects of the derogation for competition.

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

On 24 March 2003, the new Portuguese Competition Authority began its activities, at a time of thorough reforms on the competition legislation and institutional organization in Portugal.

For the Competition Authority, 2004 marked the first full year of its operations.
In what regards specifically to merger control procedures, the Authority introduced improvements to its analyses and has now a rather proactive approach in what relates to merger cases.

During the course of 2004 (data provided for in the Authority's 2004 annual report), the Authority has adopted 46 decisions. In general terms, the notified transactions concern a wide scope of economic sectors. Within the 46 notified transactions, 13 were multiple filings (notified in more than one EU Member State). Additionally, the Authority cleared unconditionally 76% of the notified concentrations in 2004and, during that year, no decisions were issued prohibiting transactions.

Thus, 6,5% of the notifications were considered not to trigger the criteria for prior mandatory notification, whereas the remaining transactions were either (i) cleared under the compliance of conditions and obligations (commitments) (4.3%), (ii) cleared after Phase 2 proceedings (10,9%), or (iv) withdrawn by the notifying party (2.3%).
As previously mentioned above in point relating to the *procedures to adopt if the agency wants to challenge the transaction*, in 2005 the Authority issued its first two prohibiting decisions.

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