

## Competition - Portugal

### Competition Authority prohibits merger following media regulator's opposition

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On October 8 2009 the Competition Authority was notified of a concentration in the media sector consisting of the acquisition of joint control of Grupo Media Capital by Ongoing and Vertix, following the conclusion of a share purchase agreement and a shareholders' agreement between Grupo Prisa and Ongoing.

The Competition Law (18/2003) states that in considering concentrations which occur in markets subject to sector regulation, such as the media sector, the authority must request an opinion from the relevant regulatory body before adopting a final decision.<sup>(1)</sup> The authority duly made such a request on October 13 2009.

On February 10 2010, after assessing the likely consequences of the transaction, the Media Regulatory Authority unanimously opposed the proposed transaction. It required Ongoing to sell to an unrelated third party the amount of shares required to reduce Ongoing's participation in Impresa's share capital to 1%. Moreover, it prohibited Ongoing from (i) increasing its participation in Impresa's share capital beyond that limit, and (ii) influencing or involving itself in Impresa's internal affairs - whether directly or indirectly, or individually or with other shareholders - for as long as it remains a Media Capital shareholder.

The media regulator presented a number of grounds in rendering its opinion. However, two issues in particular stand out.

First, the media regulator emphasized its concerns about the threat to the plurality and diversity of the media resulting from Ongoing's simultaneous holdings in the share capital of Impresa and Media Capital.

Second, the regulator indicated the significantly increased risk to the independence and autonomy of journalists and other media professionals, given that the subsidiary companies were the owners of the only two private free-to-air television operators in Portugal and had broad and diverse interests in other areas of the media.

In light of the media regulator's opinion, the authority considered itself legally bound to oppose the merger on the basis of Article 107 of the Code of Administrative Procedure, Article 39 of the Competition Law and Article 4(2) of the Television Act (32/2003). It gave notice of its opposition on March 30 2010.

This is believed to be the first time under the existing competition law regime that the authority has adopted a decision opposing a merger based on a negative binding opinion issued by a sector regulator. Setting aside the merits of the media regulator's decision and the arguments on which it was based, the authority's decision raises doubts in light of the applicable law.

There is no clear and accurate indication in the Competition Law of the effect of a sector regulator's binding and compulsory negative opinion on a merger control procedure. Article 30 calls for reference to the rules of administrative procedure in seeking an appropriate response that takes into account the various interests at stake - in this case, the media regulator's wish to ensure the plurality of the media and the authority's legal obligation to reach a decision based on a competition assessment and the legal and economic criteria in Article 12 of the Competition law.<sup>(2)</sup>

Given that the law states that a sector regulator's opinion must be sought, and in light of the weight of the media regulator's opinion under the Television Act, it is at least arguable that a binding and obligatory opinion leaves the decision-making authority no choice but to follow its conclusions, and that its final decision should contain an approval or transposition of the opinion.

Therefore, following a negative binding opinion, the object of the administrative

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procedure becomes void. As a result, most experts would argue that the authority should adopt a decision revoking the merger control procedure - and ignoring the conditional element in the media regulator's opinion - regardless of Article 112 of the Code of Administrative Procedure.

Even if Ongoing sells its holding in Impresa's share capital, the merger cannot be completed without a new notification being submitted to the authority once the conditions imposed by the media regulator have been met. Thus, a new merger control procedure would include, among other things, a new request to the media regulator for an opinion under Article 39 of the Competition Law (as the previous procedure would already be void as a consequence of the media regulator's initial opposition).

The final outcome under this solution does not differ materially from the final result obtained on the basis of the decision adopted by the authority; nevertheless, there is a distinction between the two outcomes, given that provision of competition legislation appears to allow the adoption of a decision opposing the transaction in the first phase of a review. Moreover, it can be argued that the law does not establish reasons for the Competition Authority to oppose a transaction other than on competition grounds.

As a result, it seems valid to conclude that the authority is bound to declare the procedure closed, as the adoption of any other decision referred to in the law would require a competition assessment, which the authority has not completed.

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## Endnotes

(1) Article 39.

(2) In this regard, see also Articles 35 and 37.

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