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The International Comparative Legal Guide to:
Merger Control 2012

A practical cross-border insight into 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 by Decree-Law 10/2003, 18 January 2003 ("Statutes of the Authority") and is an independent administrative authority with financial autonomy, which has broad investigative, regulatory and sanctioning powers in merger control. The Authority is headed by the Conselho ("Board"), currently composed of the Chairman, Mr. Manuel Sebastião, and two (in theory up to four) other members. The present Board was appointed by the Government in March 2008 for a (once renewable) 5-year term. A summary of the Authority's decisions on merger control is available at www.concorrencia.pt.

Under the Competition Act (Law 18/2003, of 11 June 2003, as amended), the Competition Authority has exclusive competence to assess and decide on notified concentrations (before 2003 the competition authorities had only an advisory role and mergers were approved by the Government). However, a concentration which is prohibited by the Authority may still be approved by the Minister for the Economy pursuant to an extraordinary (and seldom used) appeal procedure. All decisions issued by the Authority can also be appealed to the commerce courts (see question 5.8 below).

In addition to approval by the Authority under the Competition Act, mergers in certain sectors must be also approved by the competent regulatory authority (see question 1.4 below).

1.2 What is the merger legislation?

As Portugal is a Member State of the European Union, mergers having effects in Portugal may be subject to Council Regulation (EC) 139/2004, of 20 January 2004 (the EC Merger Regulation) and to the exclusive jurisdiction of the European Commission where the relevant thresholds are met (see the EU Chapter above). If these thresholds are not met, Portuguese law may apply.

Competition Act. The main piece of legislation regarding merger control is the Competition Act (Law 18/2003, of 11 June 2003). The Act was most recently amended by Law 46/2011, which created a new specialised competition and regulation court (see questions 2.1 and 5.8 below).

New Competition Act. A proposal for a new Competition Act ("Draft New Act") was submitted by the Government to Parliament on 6 February 2012. The main amendments on merger control contemplated are the creation of a new *de minimis* market share notification threshold and modification of the turnover thresholds (see question 2.4 below), the abolition of the notification deadline (see question 3.1 below), changes in a number of procedural deadlines (see question 3.6) and the alignment of the substantive test with the Significant Impediment of Effective Competition ("SIEC") test of the EC Merger Regulation (see question 4.1 below). The proposal was approved by Parliament largely unaltered on 22 March 2012 and will likely be enacted into law by the end of April 2012. The new law will enter into force 60 days after its publication in the official journal (*Diário da República*).

Regulations and guidelines. Guidelines from the Authority are available on the changes brought by Decree-Law 219/2006 ("Interpreting Guidelines", of 1 February 2007), on the prenotification procedure ("Pre-notification Guidelines", of 3 April 2007), on the "simplified decision" procedure ("Simplified Decision Statement", of 24 July 2007), and on remedies ("Remedies Guidelines", of 28 July 2011). Relevant legislation on merger control is also contained in the Statutes of the Authority, as well as in Regulation 1/E/2003 of the Authority, of 3 July 2003, which determines the fees due to the Authority for the merger review procedure (see question 3.10 below) and in Regulation 120/2009, of 17 March 2009, which sets out the Notification Form to be filed by the notifying parties. All the above documents are available at the Authority's website.

Subsidiary legislation. 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.

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

Consultation with sectoral authorities. In merger cases taking

place in industries subject to sectoral regulation (such as banking and financial services, securities markets, insurance, energy, telecoms, media or air, rail and road transport) the relevant regulator(s) must, upon request of the Authority, issue a nonbinding opinion on the merger previously to a final decision being adopted in both phases of the procedure and may follow very closely the proceedings before the Authority (see for instance the prominent role of telecoms regulator ANACOM in case 8/2006, Sonae/PT, decision of 28 December 2006).

Autonomous approval by sectoral authorities. In addition to approval by the Competition Authority under the Competition Act, mergers in certain sectors must also be approved by the competent regulatory authorities, which are as follows:

- **Insurance.** The acquisition or strengthening of a qualified shareholding (20%, 33% or 50%) 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.
- **Banking.** The acquisition or strengthening of a qualified shareholding (5%, 10%, 20%, 33% or 50%) in a credit institution must be notified to and approved by 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% of the voting rights in a commercial company for one or more periods totalling 3 years (5 years if held through a risk capital fund). In principle, acquisitions by credit institutions meeting these criteria are not deemed to constitute concentrations in the meaning of the Competition Act (for exceptions and amendments contemplated in the Draft New Act, see question 2.1 below).
- **Media**. Acquisitions of shareholdings in companies of the media sector meeting the relevant legal criteria must be notified to the media sectoral regulator (Entidade Reguladora para a Comunicação Social) under the Press, Television and Radio Acts (respectively, Laws 2/99, of 13 January 1999 and 27/2007, of 30 July 2007, as amended, and Law 54/2010, of 24 December 2010). In addition, if the transaction is notified to the Competition Authority, the media sectoral regulator 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 (see for instance case 41/2009, Ongoing/Prisa/Media Capital, decision of 30 March 2010, where the Authority opposed the concentration following a negative binding opinion by the media regulator, even though the transaction posed no competition concerns). Under the Draft New Act, the opinion of the media regulator suspends the deadline for the Authority to decide (see question 3.6 below).
- **Listed companies.** The securities regulator (Comissão do Mercado dos Valores Mobiliários) must be previously informed of operations concerning public companies under the provisions of the Securities Code (Decree-Law 486/99 of 13 November 1999, as amended). Pursuant to this Code, mergers consisting of public bids must also be previously registered with, and subject to a formal review by the securities regulator.

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).

Concentration. The concept of concentration contained in the Competition Act follows closely with the EC Merger Regulation. The following operations are therefore deemed to constitute a concentration between undertakings:

- a merger between two or more hitherto independent undertakings;
- the acquisition of control, by one or more undertakings, over other undertaking(s) or part(s) of other undertakings to which a market turnover can clearly be attributed; and
- the creation of a full functioning joint venture on a lasting basis.

Undertakings concerned. This concept encompasses all entities conducting an economic activity through the offer of goods and services on the market, regardless of their legal status. The Authority's practice has construed it in even broader terms, considering that incorporated legal persons without any economic activity may constitute "undertakings" if it is likely that the business will start operating "in a reasonable period of time", which may vary between 3 and 8 years (Decision of 11 November 2005 in case 16/2005, Enernova/Ortiga-Safra).

Control. The definition of "control" under the Competition Act follows closely with the European Commission's practice under the EC Merger Regulation and is inferred from a number of legal and factual circumstances that confer the ability to exercise decisive influence on the target's activity, in particular through the:

- 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 the
- 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.

Excluded Operations. The following do not constitute a concentration in the meaning of the Act:

- the acquisition of shareholdings or assets taking place under the terms of legal proceedings **of corporate rescue or bankruptcy** before a court of law, in Portugal or in another jurisdiction (see case Wayzata/Merisant, decision of 8 January 2010). This bankruptcy exception therefore has a considerable broader scope than the equivalent derogation under the EC Merger Regulation (see EU Chapter above). Under the Draft New Act, the scope of this exception will be considerably narrowed, as only acquisitions by an insolvency administrator within insolvency proceedings will be exempt;
- the acquisition of a shareholding merely as a **guarantee**;
- the **acquisition by credit institutions in non-financial undertakings** of shareholdings of up to 25% of the voting rights of the latter, or if the acquisition is limited to a maximum period of 3 years. However, if there are no provisions for the transfer of the stock exceeding the 25% threshold upon the expiry of the 3-year transitional period, the transaction will likely be considered a concentration and may be subject to filing (see case 70/2005, CGD/Sumolis/Compal, decision of 9 January 2006). On the other hand, it cannot be excluded that an acquisition below 25% on a lasting basis (i.e., for more than three years) may

be subject to notification if it confers control over the target in the meaning of the Act. The Draft New Act aligns this exception with EU practice. Acquisitions by credit institutions will only be exempted if securities are acquired with a view to its resale, if the acquirer does not exercise the corresponding voting rights with a view to determined the competitive behaviour of the target (or only exercises them with a view to prepare the sale), and if the disposal of the controlling interest occurs within 1 year (this deadline may be extended by the Authority); and

- the **acquisition by the Portuguese State of a controlling shareholding in a credit institution**, if carried out under the Bank Recapitalisation Scheme instituted by Law 63-A/2008 of 24 November 2008, as amended, as a response to the 2008 financial crisis and still in force (although it has not been used to date).

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes, if it confers control on the acquirer. The acquisition of a minority shareholding will only constitute a concentration if the shareholding being acquired confers on the acquiring company the right to exercise, alone or (more probably) jointly with other companies, namely through a shareholders' agreement or a similar arrangement, control over the acquired company (for the definition of control, please see question 2.2 above).

2.3 Are joint ventures subject to merger control?

Yes, if full-function. The creation of or the acquisition of control over a jointly controlled undertaking is subject to the merger control rules of the Competition Act whenever the joint undertaking fulfils the functions of an independent economic entity on a lasting basis and the thresholds set out in question 2.4 below are met.

Where the creation of the joint venture has the object or effect of coordinating 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 101 of the Treaty on the Functioning of the European Union).

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

Present thresholds. The Competition Act provides two alternative thresholds for mandatory filing:

- **Turnover threshold.** Concentrations are subject to notification if, in the preceding financial year, the aggregate combined turnover of undertakings taking part in the concentration in Portugal exceeded €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.
- **Market share threshold.** Even if the turnover threshold is not met, notification is still mandatory if the implementation of the concentration creates or reinforces a share exceeding 30% in the "national market" for a particular good or service or in substantial part of it.

The Competition Act contains detailed provisions on the calculation of the market share and turnover of the undertakings concerned (including special provisions for financial and insurance institutions). These follow closely with the provisions on turnover calculation of the EC Merger Regulation.

The Authority's practice has construed the provisions on the market share threshold in very broad terms. In particular:

- **Market Share in Portugal.** Although the Authority's practice on market definition broadly follows the case law of the European Courts and the practice of the European Commission, for the purpose of determining jurisdiction the Authority will consider the share of the undertakings concerned in the relevant product market in Portugal, even if the geographic market is wider in scope (see *inter alia* decision of 27 April 2006 in case 11/2006, *Gestores UEEIbersuizas-Vista/UEE*).
- **Transfer of market position.** The mere transfer of an undertaking's position in a given market (i.e., when the acquiring economic group was not active in the same relevant market(s) as the acquired company previously to the merger) is understood by the Authority as the "creation" of a market share for jurisdictional purposes. Therefore, if one acquires control over a company with a 30%-plus share in a relevant product market *in Portugal*, this operation must be notified to the Authority even though, pre-merger, the acquirer had no activity in that market or in any closely related market (see decision of 20 April 2004 in case 7/2004, *DBAG/SAF*).
- **No *de minimis* exception.** If the acquirer has a market share above 30% in a relevant product market in Portugal and the target is (or is expected to be) present in the same market, the threshold will always be met, even though the market share of the target is less than 1% (decision of 11 November 2005 in case 16/2005, *Enernova/Ortiga-Safra*).
- **Future market share.** If the acquired company, previously to or at the time of the acquisition, had no activity in the relevant market, the Authority will consider, for the purposes of determining its jurisdiction, *the estimated market share of such company in the future*, taking into account *inter alia* its estimated capacity (see decisions of 12 July 2004 in case 18/2004 *Secil Britas/Carcubos*, and of 11 November 2005 in case 16/2005, *Enernova/Ortiga-Safra*).
- **Change of control over JVs.** In the case of a joint venture having a 30%-plus share in a relevant product market in Portugal, the acquisition by one of the parents (formerly exercising joint control) of sole control over the company may be perceived by the Authority as a "reinforcement" of its market share (see decision of 1 July 2005 in case 34/2005, *CTT/Mailtec*), although in other cases it has decided otherwise (see for instance decision of 30 November 2007 in case 73/2007, *Sonae Sierra/GaiaShopping*).
- **Market share calculation.** When more than one independent source on market dimension and market shares estimate is available, notifying parties should take particular care in selecting the source of market share estimates on which to base the decision on whether or not to notify (in case 3/2009, *Schweppes/JOI/Spirit*, decision of 6 March 2009, the concentration fell below the threshold according to the data of an independent research company, and was therefore not notified; several months later the acquirer was compelled to file, after the Authority decided that a different independent source, according to which the 30% threshold was met, was the most relevant).

Draft New Act: modified thresholds. The Draft New Act substantially modifies the jurisdictional thresholds. Pursuant to this draft, there will be three alternative thresholds:

- **Turnover threshold.** The combined turnover in Portugal in the preceding financial year is lowered to €100 million, but the individual turnover which must be achieved by at least two of the merging parties in Portugal is increased to €5 million;
- **Market share threshold.** The standard market share threshold is increased to 50% of the national market of a

given good or service; and

- **New *de minimis* market share threshold.** A new de minimis threshold is introduced, according to which the creation or reinforcement of a share between 30% and 50% of the "national market" will be subject to mandatory filing if at least two of the participating undertakings achieved individually in Portugal a turnover of at least €5 million in the previous financial year.

2.5 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 2.4 above), even in the absence of a substantive overlap. However, in the absence of competition concerns concentrations may benefit from the simplified procedure and be cleared in a shorter timeframe (see question 3.9 below).

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

Foreign mergers are caught by the Competition Act to the extent that they 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 Act may apply whenever both parties or the target alone (in the case of the market share notification threshold, see question 2.4 above) achieve, directly or indirectly, sales in Portugal. This is confirmed by the practice of the Competition Authority, which as already stated, has adopted a broad interpretation of the legal provisions determining its jurisdiction. In particular, concentrations where the acquirer is not at all present in Portugal and only the target achieves sales in Portugal (even if through an agent or distributor) are subject to mandatory filing (see decisions of 20 April 2004 in case 7/2004, *DBAG/SAF* and of 19 May 2005 in case 27/2005, *Florimond Desprez/Advanta Lambda*).

"Foreign to foreign" transactions still represent a significant proportion of the Authority's caseload (approximately 20% in 2005, 18% in 2006, 29% in 2007, 15% in 2008 and 36% in 2009, according to the Annual Reports publicly available).

2.7 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 4(4) and 4(5), 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. Several concentrations originally notified to the Authority under the Competition Act were referred to the European Commission under Article 22(4) of the EC Merger Regulation, although at least in one case the Commission rejected the request (see decision of 27 October 2005 on the Gas Natural/Endesa proposed merger, IP/05/1356). During 2009 five transactions without community dimension and subject to notification under the Act were ultimately notified to the Commission pursuant to the Article 4(5) procedure (see 2009 Annual Report).

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The Authority follows the case law of the European Courts and the practice of the European Commission on interrelated transactions and considers two or more transactions to constitute a single concentration for the purposes of the Competition Act when there are "sufficient legal or economic links" between them, in particular when: (i) the transactions are linked by mutual conditionality; (ii) one transaction is associated with and ancillary to the other; and/or (iii) the transactions "stand or fall together".

Even in the absence of reciprocal conditionality, other aspects may be considered by the Authority in assessing the degree of interrelation, such as commonality of the parties, the existence of one single agreement, the economic rationale of the transaction and the parties' intentions as evidenced in the relevant documents (see decisions of 10 April 2008 in case 15/2008, *Top Atlântico/Activos Policarpo/Activos Portimar* and of 15 September 2008 in case 47/2008, *Sonae Distribuição/RAR Holdings/JV*).

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 meeting the jurisdictional thresholds is subject to **mandatory notification** and must be filed with the Portuguese Competition Authority within **seven working days** of: (i) the conclusion of the agreement; (ii) the publication date of the preliminary announcement of a takeover bid or of an exchange offer; or (iii) the publication of the announcement to acquire a controlling interest in a public company (see also question 3.5 below).

A concentration subject to mandatory notification cannot be implemented before a non-opposition decision is issued by the Competition Authority. Infringements are seriously punished (see question 3.3 below).

In a welcome change to the current regime (inspired by the EC Merger Regulation), the Draft New Law abolishes the notification deadline, which may result in incomplete notifications and is at any rate unnecessary, as pursuant to the stand-still obligation the parties are prohibited from implementing the transaction before an express or tacit clearance decision.

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

There are none. Whenever a concentration meets the criteria for prior mandatory notification, a clearance decision from the Authority is necessary before the operation can be implemented.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Failure to file a concentration subject to prior notification exposes the merging parties to serious negative consequences.

Heavy fines may be imposed. Failure to notify a concentration subject to mandatory filing within the legal deadline 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 participating undertakings (under the Draft New Law this offence will disappear, together with the mandatory notification deadline). 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 participating undertakings.

The Transaction does not produce legal effects and may be declared null and void. Negative consequences facing the validity of the Transaction itself differ whether there was simply a *failure to notify* or if the parties *breached a decision prohibiting the merger*. A concentration implemented in breach of a prohibition decision by the Authority 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). In contrast, under the Act the validity of any legal transaction carried out to implement an un-notified concentration is *dependent upon the issuance of a non-opposition decision*, although the Authority has claimed in legal proceedings before the Supreme Court that such transactions (if subject to notification and not notified) are equally void. In this respect, the Draft New Act clarifies that a transaction implemented before a clearance decision is adopted does not produce any legal effect. Parties to a concentration subject to notification will therefore only enjoy legal certainty as to its validity following an express or tacit clearance from the Authority.

***Ex Officio* Investigation, with additional delays and costs.** The Authority may initiate an *ex officio* investigation into a concentration not filed in violation of the Act and order the parties to notify. The Supreme Court and the Lisbon Appeals Court have confirmed the broad powers of the Authority to open *ex officio* investigations. Such investigations, which may also be opened when the Authority's clearance decision was based on false or incorrect information provided by the parties or when parties disregarded conditions or obligations imposed by the Authority, entail the following negative consequences to the undertakings concerned:

- the *deadlines* for the Authority to decide are significantly increased to 90 working days for Phase I and an additional 90 working-day deadline for Phase II (see question 3.6 below), and can be suspended indefinitely by the Authority. Pursuant to the Draft New Act, the standard deadlines will also apply to ex officio investigations;
- the *filing fees increase* to double the amount originally due (see question 3.9 below); and
- the Authority may apply a periodic penalty payment of up to 5% of the average daily turnover in the preceding year for each day of delay (although there is no record that a penalty payment has ever been imposed by the Authority).

Personal liability of board members. Finally, under the Competition Act, *persons holding positions in the managing bodies* 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. The Draft New Act extends liability of individuals beyond members of the board to include persons heading or being responsible for the supervision of the departments involved in the infraction.

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

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 in Portugal only would therefore have to be analysed on a case-by-case basis and appears to be difficult in practice, since the parties would have to convince the Authority that the concentration would not produce *any* effects in Portugal until clearance had been received. Nevertheless, the obligation to suspend the implementation of the concentration prior to clearance may be exceptionally waived by the Authority, following a reasoned request from the parties (see question 3.7 below).

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

At present, notifications may only be formally filed with the Authority after the "conclusion of an agreement" or subsequent to the announcement to the market of takeover bids, exchange offers or acquisitions of control over public companies (see question 3.1 above). Parties are nevertheless encouraged to engage in pre-notification contacts with the Authority. The Draft New Act will allow the parties to voluntarily notify a reportable concentration before the conclusion of an agreement or announcement of a public bid, if "a serious intention" to conclude a transaction can be demonstrated.

Pre-notification contacts. The Pre-Notification Guidelines, which are inspired by the practice of the European Commission, allow for informal, confidential contacts between the parties and the Authority staff prior to notification in order to attain the following objectives: (i) to determine whether the transaction is subject to notification (although it is not certain that the Authority will confirm to the parties that a transaction does not meet the jurisdictional requirements previously to filing, especially when the issue is about the market share threshold); (ii) to guide notifying parties in adequately filling in the Notification Form, therefore avoiding subsequent information requests, which stop the clock; and (iii) whenever possible, to identify potential competition issues raised by the transaction.

Interested parties should contact the staff at least 15 working days before notification by sending a Memorandum briefly describing the essential elements of the transaction and a tentative market definition and analysis. Whenever possible this should be accompanied by a draft Notification Form. The case handling staff will then decide on the format of the pre-notification contacts: in straightforward cases, a voluntary information request will be sent to the parties detailing the information necessary to complete the Form or to complement it, whereas in more complex cases several information requests may be sent, and one or more meetings between the Authority and the parties may take place for a preliminary discussion of the issues raised by the transaction.

Triggering event. In case of agreements, the Authority considers that an obligation to notify exists when the parties agree to be bound to the "essential elements" of the transaction, whether through a final agreement or a merely promissory one. Significantly, in its practice the Authority has occasionally accepted notifications based on promissory agreements, although with the pre-notification procedure this issue has become less relevant in practice. In any event, it is 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 merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

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 set deadlines, a non-opposition decision is deemed to have been adopted. However, since these time limits are suspended whenever the Authority requests additional information from the parties and hears the notifying parties and other interveners, deadlines are invariably extended. All deadlines set by the Competition Act on merger control procedure are expressed in *working days*.

Phase 1 investigation. Within five working 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 3.10 below) and if it is not considered incomplete by the Authority within 7 working days of the notification. In this case, the Authority asks the notifying parties to complete or correct the notification and the notification will only be effective on the date the Authority receives the missing information.

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, it has serious doubts that the concentration will create or strengthen a dominant position that may result in significant impediments to effective competition in the Portuguese market or in a substantial part of it (please see question 4.1 for the proposed changes in the substantive test). In straightforward cases, the Authority may use the "simplified decision" procedure introduced in 2007, and decide the case in less than 30 working days (see question 3.9 below). The Authority cannot block a merger in Phase 1, although in a recent broadcasting merger case, the Authority controversially opted for opposing the concentration in the end of phase 1 further to a negative binding opinion from the media sectoral regulator, even though it had no objections from a competition law perspective (see case 41/2009, *Ongoing/Prisa/Media Capital*, decision of 30 March 2010, and question 1.4 above).

Phase 2 investigation. In Phase 2 the Authority has a maximum of **90 working days** from the date of notification to carry out the additional inquiries that it considers necessary. This deadline, reduced in 2006, already incorporates the working days used by the Authority during Phase 1. Therefore, in reality the Authority's deadline in Phase 2 is always less than 90 working days (i.e., if all of the 30-day deadline was used in Phase 1, in Phase 2 the Authority will only have 60 working days), although deadlines can always be suspended by information requests (see below).

Until recently no statement of objections was issued by the Authority, and the only document available to the parties on the objections of the Authority to the operation was the decision to initiate Phase 2. This seriously harmed the parties' interests, especially if remedies are submitted, since the Authority is not formally bound to state its objections to the transaction until the issuance of a draft final decision, usually near the very end of the procedure, and in some complex cases, parties have had to conduct remedies negotiations without a clear picture of the Authority's objections (see also question 5.2 below). In the recent Remedies Guidelines, the Authority has committed to send a written statement of objections as soon as possible in Phase 2, in order for the parties to be able to submit remedies which are timely and useful. The Draft New Act also partially addresses this shortcoming by requiring that in Phase II the Authority hears the parties (which is usually initiated by the issuance of a draft final decision) within 75 days from notification.

Access to the Authority's file is given to the notifying parties on request in both phases of the procedure. By contrast, access to (a non-confidential version of) the file is only given to a third party when it has expressed itself to be against the operation. Under the Draft New Act third parties will only have access to the file during the 10 day deadline to submit observations (see above) and after the hearing of the parties is initiated (see below); otherwise, they are only entitled to be informed on the general state of the procedure.

By the end of the Phase 2 deadline, the Authority must 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.

From its creation in 2003, the Authority has issued only four prohibition decisions: *Arriva/Barraqueiro* (case 37/2004, decision of 25 November 2005), judicial appeal still pending; *Petrogal/Esso* (case 45/2004, decision of 14 December 2005), not appealed; *Brisa/AEO/AEE* (case 22/2005, decision of 7 April 2006), appealed to the Minister for Economy, who overturned the Authority's prohibition and cleared the merger subject to remedies (see question 5.8 below); and *TAP/SPDH* (case 12/2009, decision of 19 November 2009).

In all but five of the nineteen Phase 2 clearance decisions issued to date, the Authority required remedies to clear the transaction (see question 5.2 below). Finally, the notifying parties withdrew the notification before the end of Phase 2 in five cases.

Deadline suspensions. 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 of the procedure. These time limits are also considerably extended whenever the Authority initiates *ex officio* proceedings (see question 3.3 above):

- **Additional information requests.** The Authority can request the notifying parties to provide all the additional information and documents considered necessary for its analysis. All additional information requests to the merging parties stop the clock, which resumes only on the day following the receipt by the Authority of the requested information (information requests to public authorities and third parties do not stop the clock). In most cases, 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.

  Further to the 2006 amendment of the Competition Act, suspensions to the Phase 2 deadline due to information requests were limited to 10 working days, with the express purpose of reducing the (sometimes considerable) extensions to the deadline caused by these requests. However, in the Interpreting Guidelines, the Authority controversially interpreted this limitation as applying to each information

request, meaning that in practice each request must be answered within 10 working days and that the Authority has no restriction on the number of requests it issues during Phase 2. This interpretation arguably frustrates the central objective of the reform. However, the Authority has been reluctant to test its position: since the issuance of the Guidelines several complex cases were decided after unusually long Phase 1 investigations, suggesting that the Authority might be willing to suspend the Phase 1 deadline for longer periods in order to close the case without initiating Phase 2. Under the New Draft Act, information requests will continue to stop the clock.

- **Hearing of the notifying parties and of third parties.** The Competition Act provides that, before a decision is adopted by the Authority in both phases of the procedure, the notifying parties as well as interested third parties (as long as they have sent observations further to the publication of the summary notification within the prescribed time limit and expressed themselves to be against the transaction) must be heard. For this purpose, the Authority issues a draft decision and establishes a deadline of no less than 10 working days for the parties to present their views. Under the New Draft Act, the time limit to submit observations increases to 20 working days when third parties against the transaction did not have access to the file beforehand. In addition, in Phase 2 cases the hearing must be initiated within 75 days from notification. The 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.

Whenever a concentration affects a market that is subject to sectoral regulation, the Competition Authority must hear the opinion of the relevant regulatory authority before issuing a final decision (either in Phase 1 or Phase 2). 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).

Finally, pursuant to the Draft New Act, the submission of commitments in both phases of the procedure suspends the relevant deadline for a maximum of 20 working days (see question 5.3 below).

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

A concentration subject to prior mandatory notification cannot be completed before it has been notified and cleared by the Authority (or the time limits for the Authority to decide have elapsed). Parties implementing a concentration before clearance may face serious sanctions (see question 3.3 above). 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:

- **Public Bid.** 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 the alternative, voting rights may be exercised insofar as necessary to protect the financial value of the investment, if a derogation is requested and granted under the terms described below).
- **Individual waiver.** Further to a reasoned request by the notifying parties, presented prior to or subsequent to the notification, *the Authority may waive the stand-still obligation*, 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 Authority is very restrictive in waiving the suspension obligation, as it considers that such waiver can only be granted in very exceptional circumstances, in particular, when the non-implementation of the transaction causes grave consequences to the parties, such as imminent bankruptcy (see *inter alia* cases 11/2006, *Ibersuizas et al/UEE*, decision of 27 April 2006, and 11/2010, *Triton/Stabilus*, decision of 23 April 2010).

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 120/2009. The Form must be submitted with supporting documentation, along with one paper and one digital copy. Since July 2009, the Form can also be uploaded to the Authority's website. When supporting documentation is in a foreign language, translation may be required, although documents in English are usually accepted. The Authority may waive the requirement for certain information or documents, especially in the context of the pre-notification procedure (see question 3.5 above). Under Regulation 120/2009, however, it is up to the notifying parties to assess whether or not it is necessary to complete all the sections on the Form. Certain information specified in the Regulation is considered essential to the Form and must always be provided; submitting an incomplete form prevents the notification from becoming effective (see question 3.6 above).

3.9 Is there a short form or accelerated procedure for any types of mergers?

At present there is no short notification form, although certain information may be waived (see question 3.8 above). The Draft New Act provides that the Authority will approve a simplified notification form and define the cases to which it will apply.

Straightforward cases may enjoy early clearance pursuant to the "Simplified Decision" procedure, which allows for a shortened clearance decision to be issued without using the entire available Phase 1 deadline. Candidate transactions for a simplified decision are those: (i) which do not constitute a concentration (see question 2.1 above) or do not meet the jurisdictional thresholds (see question 2.3 above); (ii) where clearly no overlaps exist between the parties; or (iii) whose effects in Portugal are *de minimis* or from which no significant horizontal or vertical effects arise. This procedure will not be used when additional information from the parties is required or when a hearing must be conducted (see question 3.6 above). Although the Authority did not commit itself to a specific reduced deadline, several simplified procedure cases have been decided in less than 20 working days.

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

Notifying party(ies). Notification of a full merger must be jointly made by the merging companies. In case of acquisition of control over one or more undertakings, the notification must be filed by the undertakings (or persons) acquiring control, although in changes of joint control over an existing joint venture, existing controlling shareholders that are not part of the transaction are not required to intervene as notifying parties (see case 47/2008, Sonae Distribuição/RAR Holdings/JV, decision of 15 September 2008).

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

Notification Fees. According to the Competition Act and to Regulation 1/E/2003, the effectiveness of the notification is dependent on the payment of filing fees by the notifying parties.

The **base fee** is due upon notification and amounts to:

- €7,500 if the aggregate turnover in Portugal is below or equal to €150 million;
- €15,000 if the turnover is more than €150 million and below or equal to €300 million; and
- €25,000 if the turnover is more than €300 million.

The **additional fee** is due upon the opening of a Phase 2 investigation and corresponds to 50% of the base fee.

Filing fees *double* when the Authority initiates *ex officio* proceedings for one of the following reasons:

- the Authority became aware of a concentration subject to mandatory filing which was not notified;
- the notifying parties provided false or inexact information upon which the Authority based its clearance decision; or
- the notifying parties disregarded the conditions or obligations imposed by the Authority in the clearance decision (see also question 3.3 above).

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? Are non-competition issues taken into account?

Substantive test. The substantive test under the Portuguese Competition Act follows the "dominance test" of Article 2 of the former EC Merger Regulation (Council Regulation (EEC) 4064/89). 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. By contrast, concentrations which create or strengthen a dominant position from which results the above-mentioned impediment are prohibited. Under the New Draft Act, the dominance test will be replaced with the Significant Impediment to Effective Competition ("SIEC") test set forth by the current EC Merger Regulation.

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 impact of the transaction on the relevant markets, although it contains an additional "Essential Facilities" criterion, according to which control over essential infrastructure by the undertakings concerned and opportunities offered to competing undertakings to access such infrastructure are relevant factors when assessing the competitive impact of a proposed transaction. The Draft New Act adds two additional new criteria. The first allows for a limited "efficiency defence" and provides that the evolution of economic and technical progress that does not constitute an obstacle to competition must be taken into account, insofar as efficiencies benefitting consumers result from the transaction. The second is most controversial, as it requires the Authority to take into account the bargaining power of the merged entity towards its suppliers, in order to prevent the reinforcement of "the state of economic dependence" of the latter.

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

Non-competition issues may be taken into account in the assessment of a concentration under the Act in two cases:

- **International competitiveness of the Portuguese economy.** The Authority may take into account, in its competition assessment, the contribution brought by the concentration to the international competitiveness of the Portuguese economy. To date no explicit reference to this criterion can be found in the case practice, which will be abolished pursuant to the Draft New Act.
- **Fundamental interests of the national economy.** In case the Minister for the Economy decides to review a prohibition decision by the Authority, the fundamental interests of the national economy should be taken into account. The Minister overturned only one of the Authority's four prohibition decisions (see question 5.8 below).

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

The scope of intervention of third parties differs whether a third party is neutral to the notified transaction or, by contrast, shows itself to be against it before the Authority.

Written observations. Following publication of a notice of the notification by the Competition Authority in two national newspapers (which should be made within five days after the date it became effective), and on its website, 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.

Third party hearing and access to the file. In addition, prior to the adoption of a Phase 1 or Phase 2 decision the Authority must hold a hearing of the third parties which have already intervened in the procedure and expressed a negative opinion on the operation. Complaining third parties are sent a non-confidential version of the draft final decision and may submit observations. This hearing suspends the time periods for the adoption of the decision (see question 3.6 above). Third parties expressing themselves against the transaction may also access a non-confidential version of the Authority's file in both phases of the procedure. Under the Draft New Act, the right of access to the file by third parties may be limited to the 10-day period in phase 1 between the notice and the deadline to submit observations, and to the period within the hearing of the notifying and third parties, although in this case the time limit for third parties to submit observations will increase to 20 working days (see question 3.6 above).

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

The Authority enjoys broad investigative powers in the course of a merger control procedure.

Information requests. Usually the Authority sends one or more additional information requests to the parties (even in most Phase 1 cases). In more complex cases competitors, trade associations and regulators are also questioned. Under the Competition Act the Authority may request from all public and private entities the information it considers necessary to decide (the only exception being legally privileged information). Information and documents requested by the Authority should be provided within 30 working

days, unless otherwise stated. Given the time constraints of merger control procedures, deadlines for reply are usually no longer than 10 working days, and frequently shorter. As noted above, all information requests to the notifying parties stop the clock (see question 3.6 above).

Failure to supply or the supply of false, inaccurate or incomplete information in response to a request by the Authority, 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. These powers have not been used to date in merger cases.

Other investigative powers. In merger control the Authority holds the same rights and powers (and is subjected to the same duties) as when investigating anticompetitive practices (e.g., cartels). Although such actions are not common in the course of merger control procedures, the Authority may in particular: question the legal representatives of the undertakings involved or of other undertakings and any other persons whose declarations are deemed relevant; and provided that a warrant is previously obtained from the competent judiciary authority, search the premises of the undertakings concerned, and seal them and/or collect all documents deemed relevant for the investigation. The Authority may require any other public or administrative entities, including police force, to provide the necessary co-operation. Under the Draft New Act, in merger control cases the Authority will only be entitled to question persons whose declarations are deemed relevant.

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

Pre-notification contacts are considered by the Authority to be confidential. Notifying parties must identify in the notification and in responses to additional requests information that in their view should remain confidential and submit a non-confidential version of these documents (without which the notification or response may be declared incomplete). Should the Authority accept the request for confidentiality, the information will not be disclosed to third parties. Authority officials are subject to obligations of professional secrecy under the Statutes of the Authority and are subject to the provisions of the Criminal Code on breach of secrecy by public servants.

A non-confidential version of the decisions on merger control is usually published in the Competition Authority's website further to consultation with the notifying party. In more complex cases, the Authority has also made available non-confidential versions of certain documents in the file, such as economic reports.

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 reasoned 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 is equivalent to a tacit decision of non-opposition to the concentration. The Competition Authority's decisions can be appealed by merging and third parties (see question 5.6 below).

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Yes. The notifying parties (on their own initiative or following an informal invitation) may submit commitments in order to enable the Authority to clear the transaction. Further to the submission of remedies (see question 5.4 below), an informal negotiation usually takes place between the Authority and the notifying parties (see question 5.3 below). If the final proposal is agreed upon, the Authority will include conditions and/or obligations in the final decision in order to ensure compliance with the commitments submitted by the notifying parties (see question 5.6 below).

Commitments may be of a structural or of a behavioural nature. In the detailed Remedies Guidelines published in July 2011 the Authority has stated that divestitures are clearly preferable to behavioural commitments. However, its past practice in this respect seems to reflect a more positive approach to behavioural remedies than the practice of the European Commission, as in most of the cases approved subject to commitments since 2003 behavioural remedies were imposed. However, in Arriva/Barraqueiro (case 37/2004, decision of 25 November 2005), the first merger prohibited by the Authority, a large set of behavioural remedies was outright rejected, the Authority clearly stating that behavioural remedies were not capable "as such" of eliminating the competition concerns resulting from the merger. This appears to be a stand-alone case in an area where the Authority seems to enjoy considerable discretion, since nearly all subsequent clearance decisions with commitments, including those in which divestitures are imposed, contain large and complex sets of behavioural remedies.

5.3 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The notifying parties may present commitments to the Authority in both phases of the procedure. Although there is no specific time period set by the Competition Act for commitments to be offered, the Authority recommends that in Phase 1 remedies be submitted within 20 working days from notification, and that in Phase 2 within 40 days subsequent to the decision opening an in-depth negotiation.

Remedies submissions should: address all competition concerns raised by the transaction; be signed by duly empowered representatives of the parties; include an assessment of the adequacy; sufficiency and viability of the commitments; and be drafted according to the model documents annexed to the Remedies Guidelines.

In complex cases, remedies negotiations may be both exhaustive and protracted. During the negotiations, the Authority may issue several additional information requests (all of which stop the clock). This frequently-used mechanism in reality allows the Authority to extend the decision deadline indefinitely, thereby prolonging remedies negotiations. In two complex open bid cases, *Sonae/PT* (8/2006, decision of 28 December 2006) and *BCP/BPI* (15/2006, decision of 16 March 2007), press reports indicated that remedies negotiations lasted more than five months. Market inquiries may be conducted by the Authority to collect views of competitors and sectoral regulators can also be heavily involved in the negotiations. In the Draft New Act, the submission of remedies may also suspend the decision time limits for up to 20 working days.

The present system and practice, which give greater flexibility to the Authority, may however significantly harm the interests of

notifying parties submitting remedies, since parties cannot have any legitimate expectation as to the conclusion of remedies negotiations, in contrast for instance with the practice of the European Commission, where both the Commission and parties know the date when a final (agreed) proposal must be submitted and a final decision be taken by the Commission.

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The Remedies Guidelines of July 2011 contain detailed rules on the divested business, the conditions to be met by the acquirer, the terms, procedural steps and deadlines of the divestiture and its monitoring by monitoring and divestiture trustees. All legal instruments concerning divestitures should be previously approved by the Authority.

5.5 Can the parties complete the merger before the remedies have been complied with?

Yes. As a rule transactions approved by the Authority subject to conditions and/or obligations can be completed before remedies have been completely complied with, and the implementation of both divestures and behavioural commitments (especially periodic reporting obligations) may take several years following the clearance decision.

The Authority does not exclude that in certain cases an up-front buyer or even a divestiture before clearance ("fix-it first" solution) may be required. In the *Arriva/Barraqueiro* case (see question 5.2 above), the Authority imposed an up-front buyer for the divested assets, but ultimately rejected the proposed remedy partly because it was not certain the proposed buyer would be a credible competitor to the parties.

Failure to comply fully and timely with conditions or obligations attached to a clearance decision will expose the parties to serious negative consequences: (i) all legal acts relating to the transaction are null and void insofar as they contravene the Authority's decision; and (ii) parties are subject to fines up to 10% of the previous year's turnover for each of the undertakings taking part in the infringement. The Authority enjoys broad investigatory powers in this respect (see question 4.3 above).

5.6 How are any negotiated remedies enforced?

Until 2006, the Authority usually established obligations for periodic reporting on the implementation of remedies by notifying parties. Monitoring was also directly conducted by the Authority, even in case of divestitures.

The trend is for an increasing sophistication in remedies enforcement. As from late 2006, practically all cases decided subject to remedies (see questions 5.2 and 5.4 above) have contemplated detailed provisions on the appointment and mandate of independent trustees to monitor the implementation of remedies and carry out divestitures in case the parties had not been able to do so within the agreed timetable. The Remedies Guidelines of July 2011 have confirmed this approach. In these cases, drafts of the mandate agreements and proxies (based on European Commission mandate models and adapted to the specificities of Portuguese law) were also submitted to the Authority, discussed in the framework of remedies negotiations and annexed to the decision. In this context the Authority assumes essentially a supervisory role, although it retains of course its broad investigatory and sanctioning powers to enforce remedies (see questions 4.3 and 5.5 above).

5.7 Will a clearance decision cover ancillary restrictions?

Yes. Under the Competition Act, a clearance decision also covers the restrictions directly related and necessary to the implementation of the concentration. The Authority has in several cases cleared ancillary restraints, such as:

- **Non-compete obligations between the seller and the acquirer in order to preserve the value of the acquired business**, including obligations whose duration exceeds the three-year period prescribed by the guidelines of the European Commission (see *inter alia* cases 52/2006, *Mota Engil/RL*, decision of 27 December 2006, and 31/2007, *Mota Engil/Multiterminal*, decision of 25 June 2007). Non-solicitation of customers and workers clauses is similarly considered to be ancillary to a concentration; and
- **Non-compete obligations between a joint-venture and parent companies**, usually exempted during the lifetime of the JV (see case 41/2004, *ES Viagens/Sonae/Ibéria*, decision of 1 February 2005).

Agreements between the seller and the acquirer during a transitional period, such as supply, distribution or licensing agreements, have already been considered directly related and necessary to the concentration, even for more than three years (see case 23/2007, *Tomgal/Idal*, decision of 3 May 2007).

5.8 Can a decision on merger clearance be appealed?

Yes. All Authority's decisions on merger control, either clearing or prohibiting a merger, are subject to judicial review. In addition, prohibition decisions may also be appealed to the Minister for the Economy.

All final decisions are subject to judicial control. The Authority's decisions on merger control producing external effects (either clearing or prohibiting a merger), can be appealed. Until recently, the Lisbon Commerce Court ("*Tribunal de Comércio de Lisboa*") had exclusive jurisdiction to hear appeals against the Authority's decisions clearing or prohibiting a concentration or applying fines to undertakings. Since January 2009, applicants must bring appeals before the commerce court ("*Tribunal de Comércio*") with jurisdiction over the place of their main headquarters (in case of decisions imposing fines, the place where the offence was committed), although the Lisbon Commerce Court will retain subsidiary jurisdiction, in particular for applicants headquartered abroad. Law 46/2011 created a new Competition, Supervision and Regulation Court, which is to focus on hearing appeals against decisions of the Competition Authority and other sectoral regulators, but at present this court has not yet been installed, and most of the appeals are still brought before the Lisbon Commerce Court.

Only appeals against decisions applying a fine suspend the effect of the same decision (and even the suspensory effect of fines will disappear when the New Draft Law enters into force). In other cases 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.

Judgments of the commerce court can be appealed to the competent Appeals Court ("*Tribunal da Relação*") 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).

Since the Competition Act was enacted, no appeal was ever lodged against a decision clearing a merger. A 2006 appeal against the

Authority's first prohibition decision (in case *Arriva/Barraqueiro*) is still pending.

Administrative appeal against a prohibition decision. Independently from the judicial appeal procedures, 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 reasoned and may contain conditions and obligations in order to mitigate its negative impact on competition. The Minister overturned for the first (and so far the only) time a prohibition decision of the Authority in case 22/2005, *Brisa/AEO/AEA* (Authority's decision of 7 April 2006, Ministerial decision of 8 June 2006).

5.9 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 their 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. Those limitation periods may be suspended or interrupted according to the provisions of the Misdemeanours Act.

However, the nullity of a concentration implemented in breach of the Act (see question 3.3 above) can be invoked before the Portuguese courts by any person with standing without any limitation in time.

6 Miscellaneous

6.1 To what extent does the merger authority in [country] liaise with those in other jurisdictions?

The Authority co-operates intensely with the European Commission under the EC Merger Regulation and the Competition Authorities of the other EU Member States in the framework of the European Competition Network (ECN), especially with the Spanish Competition Authority. The Authority is also an active Member of the International Competition Network (ICN) and of the European Competition Authorities (ECA) and is a founding member of the Ibero-American Forum on the Protection of Competition (which includes Portugal, Spain and most Southern American countries) and of the network for competition authorities of the Portuguese-speaking countries. The Authority also has a close working relationship with the 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 28 March 2012.

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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 till 1999 and at PMBGR from 1999 to 2001. Carlos Botelho Moniz completed his law degree at the Universidade de Lisboa (1976) and a Masters in Economic Law from the same University (1989). He graduated from the College of Europe, Bruges in 1979. He is widely published on the various aspects of EC and Competition Law and lectures on EU law in the Law School of the Portuguese Catholic University.

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Pedro joined the firm in 2002. During the year of 2007 he was seconded to Latham & Watkins LLP in Washington, D.C. He received an LL.M. from the College of Europe in Bruges in 2002 and a Law degree from the Catholic University Law School (Lisbon) in 2001. He has written several articles on European and Portuguese Competition Law and been invited to speak on EU law and on EC competition law at the Catholic University. He is admitted to the Portuguese Bar.

MORAIS LEITÃO
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Morais Leitão, Galvão Teles, Soares da Silva & Associados is an independent full-service law firm and one of the leading law firms in Portugal, with more than 160 lawyers and offices in Lisbon, Porto and Funchal (Madeira). We have a significant international practice in all major areas of law and represent multinational corporations, international financial institutions, sovereign governments and their agencies, as well as domestic corporations and financial institutions.

To address the growing needs of our clients throughout the world, particularly in Portuguese-speaking countries, we established MLGTS Legal Circle, an association with leading law firms in Brazil, Angola, Mozambique and Macau. We also maintain close contacts with major law firms in Europe, the United States and South America, and are the sole Portuguese member of Lex Mundi, the world's leading association of independent law firms.

Our EU and Competition Law team, based in Lisbon and Porto, is widely recognised for its in-depth knowledge in all aspects of EU Law and European and Portuguese Competition Law. We advise and represent international and domestic clients 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 Portuguese and the European Courts. We have an extensive experience representing clients on a wide range of industries, such as energy, financial services, communications, pharmaceuticals, broadcasting, advertising, land, sea and air transportation, retail distribution, logistics, mining, food and beverages, tourism and agriculture.