

Pre-Merger Notification Guide

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

Law No 19/2012, 8 May, which substitued Law No 18/2003, 11 June, from 8 July 2012 onwards, is the Portuguese Competition Act (the Act). It applies to all concentrations that take place or may produce effects in the Portuguese territory.

Regulation No 120/2009, 17 March, sets out the form according to which a concentration subject to notification should be filed with the Competition Authority (*Autoridade da Concorrência*).

Regulation No 1/E/2003, 3 July, is also important. It sets the filing fee to be paid to the Authority by the notifying parties (see question 12 below).

2. Identify Applicable National Regulatory Agency/Agencies.

The Competition Authority (*Autoridade da Concorrência*) is the regulatory agency with competence to enforce competition law in Portugal, including rules on merger control.

The Authority was created in 2003 by Decree-Law No 10/2003, 18 January, and replaced the former two competition bodies: Competition Council (*Conselho da Concorrência*) and Directorate-General for Commerce and Competition (*Direcção-Geral do Comércio e da Concorrência*).

Without prejudice to the merger control referral mechanism in place within the EU (see question 3 below), the Authority has sole competence to assess and decide on concentrations caught by the Act. In case of prohibition of a given merger, the parties are provided with an extraordinary appeal procedure to the Minister of Economy (see question 18 below).

3. 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 within the meaning of Article 1 of Regulation (EC) No 139/2004, 20 January (the EC Merger Regulation), are subject to exclusive review by the European Commission, even if they fulfil the thresholds for notification in the light of the Act.

This is however without prejudice to the possibility of a referral by the Commission to the Portuguese Competition Authority (and other national agencies) pursuant to Articles 4(4) and 9 of the EC Merger Regulation, and, conversely, of a referral by the Portuguese Competition Authority (or other national agencies) to the European Commission, pursuant to Articles 4(5) and 22 of the EC Merger Regulation.

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

There are no pre-merger filing specific requirements, in the sense that pre-notification contacts are not mandatory. However, these types of contacts are becoming increasingly common and may prove to be very useful, in particular in complex transactions and where there are doubts as to whether a given transaction is subject to notification.

The possibility of using the pre-notification procedure is provided in Article 37(5) of the Act and was also foreseen in former Law No 18/2003. In 2007, still under the previous competition legislative framework, the Authority adopted a notice with guidance on pre-notification of envisaged concentrations.

The guidelines on pre-notification are largely inspired by the decision practice of the European Commission. Pre-notification contacts are thus voluntary, confidential and informal and are considered especially relevant when the parties to the transaction seek to clarify:

i) whether the operation is subject to notification,
ii) the amount of information needed to file a complete notification, and
iii) the eventual existence of competitive constraints arising from the transaction.

The parties should approach the Authority as early in the proceedings as possible and, in any case, at least 15 working days prior to notification.

It is also worth mentioning that in the light of the new Act (similar to what is provided at EU level), notifications may also be made to the Authority on a voluntary basis where the parties to the transaction demonstrate a good faith intention to

conclude an agreement or launch a public bid, provided that the intended agreement or bid will result in a concentration subject to compulsory filing.

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

Concentrations that fulfil the thresholds indicated in question 6 below are subject to notification and review by the Competition Authority.

For the purposes of the Act (and again following the EC Merger Regulation and European Commission's relevant practice), a concentration between undertakings shall be understood to exist:

i) in case of a merger between two or more independent undertakings;
ii) in case one or more individuals who already have control of at least one undertaking, or one or more undertakings, acquire control, directly or indirectly, over the whole or parts of one or several other undertakings; and
iii) in case a joint venture is created, inasmuch as it is deemed a full-functioning independent economic entity and performs its activities on a lasting basis.

For the purposes above, control shall be constituted by any act, irrespective of the form 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:

i) acquisition of all or part of the share capital;
ii) acquisition of rights of ownership or use of all or part of an undertaking's assets;
iii) 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 concentrations between undertakings:

i) the acquisition of shareholdings or assets by the insolvency manager in the framework of insolvency proceedings;
ii) the acquisition of a shareholding merely as a guarantee;
iii) the acquisition by credit institutions, financial institutions or insurance companies of shareholdings in non-financial companies, when such shares are held on a temporary basis and with a view to be resold, provided that the acquirers do not exercise voting rights in respect of those shares in order to determine the competitive behavior of the target, or exercise the voting rights only with a view to prepare the disposal of all or part of the target or its assets or respective shares, and that any such disposal takes place within one year of the date of acquisition. This period may be extended by the Authority where the acquirer can show that the disposal was not reasonably possible within the prescribed period.

6. Is there a "size of transaction" threshold?

The Act provides three 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), the second on their turnover and a third (and new) *de minimis* test, which is a combination of market shares and turnover criteria.

Therefore, concentrations are subject to prior notification if they meet one of the following tests:

i) they result in the acquisition, creation or reinforcement of a share equal to or exceeding 50% of the relevant market, or, where the market is wider than national in scope, in the part of that market corresponding to the Portuguese territory;
ii) the undertakings concerned achieved in Portugal, in the preceding financial year, a net turnover in excess of €100 million, provided that the individual net turnover achieved in Portugal in the same period by at least two of those undertakings exceeds €5 million;
iii) the concentration results in the acquisition, creation or reinforcement of a share between 30% and 50% of the relevant market, or, where the market is wider than national in scope, in the part of that market corresponding to the Portuguese territory, provided that the individual net turnover achieved in Portugal, in the preceding financial year, by at least two of the undertakings concerned exceeds €5 million.

Calculation of market shares and turnovers refer to the whole economic group to which the undertakings concerned belong to.

7. 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 question 6 above.

8. 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 Act is applicable to concentrations between undertakings which take place, or have or may have effects, in the territory of Portugal, whether in the whole or in part of it.

The approval of a concentration by the Authority is dependent on the effects of the concentration on the relevant markets. If a market is wider than national in scope, the Authority will typically limit its analysis to the impact of the concentration in the Portuguese territory.

9. 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 Competition Authority.

Failure to notify a concentration meeting the above-described criteria renders the undertakings concerned subject to heavy fines, as it will be explained in question 17 below.

10. Time in which a filing must be made.

One of the novelties of the new Act, as compaired to the pre-existing competition law, is the fact that the previous time limit of 7 working days to file the transaction has been abolished.

The system now in place is similar to that provided in the EC Merger Regulation, i.e. concentrations covered by the Act are to be notified to the Competition Authority prior to their implementation and following the conclusion of the relevant agreement, the disclosure of the preliminary announcement of a takeover bid or of an exchange offer or the disclosure of the announcement to acquire a controlling interest in a public company. The new Act also contains a special provision concerning the notification of concentrations arising from a public procurement procedure. In this case, notification must be submitted following the final award of the contract and prior to its implementation.

11. Form and Content of Initial Filing.

Notifications must be presented in accordance with the form for concentrations approved by the Authority, which is currently enclosed to Regulation No 120/2009, 17 March.

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 sections of 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 Authority invites the notifying parties, within 7 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).

12. Are filing fees required?

According to the Act and to Regulation No 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 Portugal, in the year preceding the operation.

Thus, the fee due is:

i) € 7,500 if the 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 is notified further to official proceedings by the Authority for failure to notify a given concentration. Also, if the Authority initiates phase 2 proceedings the notifying parties must pay an additional fee, corresponding to 50% of the initial one.

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

Under the Act, a concentration subject to mandatory notification cannot be implemented before being the object of an express or tacit clearance decision by the Authority. Breach of this provision may result in the imposition of heavy fines, up to 10% of the companies' turnover.

However, in the case of public bids, implementation pending approval is possible provided that the acquirer does not exercise the voting rights inherent to the shareholdings or exercises those rights only to protect the value of its investment on the basis of a waiver granted under the terms described hereunder.

Upon a reasoned request by the notifying parties, prior or subsequently to the submission of the notification, the Authority may waive the mandatory waiting period after considering the pros and cons for the participating undertakings and for competition. The granting of the waiver may be subject to conditions and obligations.

The Authority has been very strict in interpreting this provision. So far, the Authority has only waived the stand-still obligation in exceptional circumstances, in particular

when the non-implementation of the transaction results in serious financial consequences to one or more parties.

The Act introduced new standstill obligations, which require the acquiring parties to abstain from exercising their voting rights in the target company and the latter's board to conduct in the ordinary course of business (which implies, for instance, a ban on the sale of equities and assets of the acquired company).

14. 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?

Merger proceedings may encompass two stages.

Phase 1 initiates in the day after the notification is effective. In the first 5 days of Phase 1 the Authority shall promote the publication of the essential elements of the notification in two national newspapers and invite any interested third parties to submit their observations within the time limit prescribed (usually 10 working days).

In Phase 1 of the procedure, the Authority has 30 working days from the date the notification becomes effective to adopt one of the following decisions:

i) declare that the transaction is not subject to notification;
ii) adopt a non-opposition decision, with or without attachment of conditions and obligations, if it deems that the concentration is not likely to significantly impede effective competition in the relevant markets;
iii) initiate an in-depth investigation (i.e., Phase 2) when, in view of the evidence gathered, it has doubts that the concentration concerned is likely to significantly impede effective competition in the relevant markets.

If no decision is issued by the Authority in the term of the 30 days, a tacit non-opposition decision is deemed to have been adopted.

In Phase 2 of the investigation the Authority has a maximum of 90 working days from the date the notification becomes effective to carry out the necessary diligences. By the end of Phase 2, the Authority must issue one of two decisions: (i) not to oppose the concentration, with or without the imposition of conditions and obligations, if it considers that the concentration is not likely to significantly impede effective competition in the relevant markets; (ii) prohibit the concentration when it considers that it is likely to significantly impede effective competition, and, if the concentration was already implemented, adopt the necessary measures to re-establish effective competition, particularly order the de-merger of the undertakings concerned or the assets grouped together or the cessation of control.

During the course of the two stages of the proceedings, the Authority may ask the notifying parties to provide additional information and documents, which shall stop the clock. Pursuant to the new Act, there are no longer limits to the number of requests of information and suspensions in both phases (before there was a total limit of 10 working days in phase 2).

Proceedings are also suspended whenever the Authority hears the interested parties (notifying parties and third parties), which takes place prior to decisions issued at the term of phases 1 and 2. In phase 2 cases, the new Act provides that the Authority shall, in addition, issue a project of final decision within 75 working days from notification.

Other significant innovations of the Act in this field are: *(i)* submission of commitments by the notifying parties in both stages suspends the time-limit for 20 working days; *(ii)* the deadline for scrutiny of the concentration in phase 2 may be extended up to a maximum of 20 working days upon request of the notifying party or with its consent; *(iii)* in mergers with impact in the media sector, the request for opinion from the respective sector regulator (which is mandatory and binding on the Authority) suspends the deadline.

15. What is the substantive test for clearance?

The Act replaced the dominance test of the former law for the SIEC test (significant impediment to effective competition). This change was made to align the national merger control regime with the EC Merger Regulation, thus making clear that the Act also allows the blocking of harmful unilateral effects cases, even in the absence of a dominant position.

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 territory.

In accordance, authorisation is granted to concentrations that are not likely to significantly impede effective competition, whereas a prohibition shall be imposed on concentrations that are likely to significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position.

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 the parties in the relevant market or markets and their economic and financial power, in comparison with their main competitors;
iii) the market power of the acquirer, in order to impede the reinforcement of such power and situations of economic dependence by third parties (this criterion is new and was introduced by the recent Act);
iv) potential competition and the existence, in law or in fact, of entry barriers to the market;
v) the opportunities for choosing suppliers and users;
vi) the access of the different undertakings to supplies and markets;
vii) the structure of existing distribution networks;
viii) supply and demand trends for the products and services in question;

ix) special or exclusive rights granted by law or attached to the nature of the products traded or services provided;
x) control of essential facilities by the undertakings concerned and ability to access such facilities by competitors;
xi) technical and economic progress provided that it is to the consumer's advantage and does not create an obstacle to competition.

It should also be mentioned that in case the Authority opposes to a concentration, the parties may appeal to the Minister of Economy, which may revert the decision if the fundamental interests of the national economy so impose. This has happened only once so far.

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

Please refer to the answer to the previous question.

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

In the new Act, following the abolition of the former 7-days deadline for filing the notification, there is no specific sanction for failure to notify a concentration. However, implementation of a concentration prior to its approval (either in the stand still period or in contravention of a decision prohibiting the transaction or imposing conditions and obligations) constitutes a misdemeanor and renders the undertakings concerned liable for penalties of up to 10% of their respective group's turnover in the year preceding the Authority's decision.

In addition to pecuniary sanctions, failure to notify a concentration may result in the opening of an *ex officio* procedure by the Authority, forcing the parties to submit the notification within the prescribed deadline (the fee due for filing a concentration doubles in case of an *ex officio* notification). In this case, 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.

Also, a transaction in this situation does not produce legal effects.

Filing a notification which has false, inaccurate or incomplete information may be punished with a fine up to 1% of the undertanking's group turnover in the year preceding the Authority's decision.

It should be mentioned that, under the Act, directors and individuals heading or supervising the departments of undertakings involved in the infringement may be deemed liable for that infringement if the breach was (or should have been) to their knowledge, and are subject to the same fines as the undertakings concerned, although specially attenuated.

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

Under the Act, the Competition Authority has competence to issue, on its own, a grounded decision prohibiting a concentration if such concentration is likely to impede effective competition in the relevant markets.

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. 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 authorising or prohibiting a concentration or applying fines in the context of merger control are subject to judicial review by the recently enacted Competition, Supervision and Regulatory Court.

As a rule, appeals do not suspend the effect of the Authority's decision. However, the undertakings concerned may ask the Court to order interim measures, amongst them the suspension of the effects of the decision. Judgements from the Competition, Supervision and Regulatory Court can be appealed to the competent Appeal Court and ultimately, in case of decisions other than the application of fines, to the Supreme Court, although limited to questions of law.

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

Please refer to questions 13 and 17 above.

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

The Competition Authority was created in 2003, the same year of publication of the former competition law, which has been in place for almost 10 years. Throughout these years, thorough modifications were felt in competition law and competition culture in Portugal.

Merger control is one of the areas that most evolved. In our view, this is due to several factors, such as the increasing level of professionalism and commitment put forward by the Authority in merger cases, the importance and complexity of a number of sectors and transactions reviewed by the Authority in the past years, the growing degree of transparency and disclosure with regard to the Authority's understanding of specific areas of merger control in relation to which it has even adopted guidelines and communications (such as pre-notification contacts, simplified decision procedure

and remedies), and, very importantly, the Authority's availability and effort to improve aspects of its own decision practice.

In our opinion, some innovations of the new Act will also help better managing merger control proceedings and, thus, work to the benefit of companies and the Authority, e.g. the elimination of a deadline to submit the filing, the adjustments made in the turnover thresholds in order to adapt them to a new economic reality and the creation, in phase 2 of the proceedings, of a mechanism close to the EU statement of objections.

Conversely, other aspects continue to be specificities of the Portuguese merger control regime, which may generate uncertainties for parties involved in transactions subject to notification. The main concern, in our view, is the difficulty to predict how long a merger investigation may take, given that any information request made by the Authority stops the clock, there is no longer any limit to the number and length of time suspensions and the Authority is keen on using this instrument, especially in complex transactions.

21. Other Important Information: