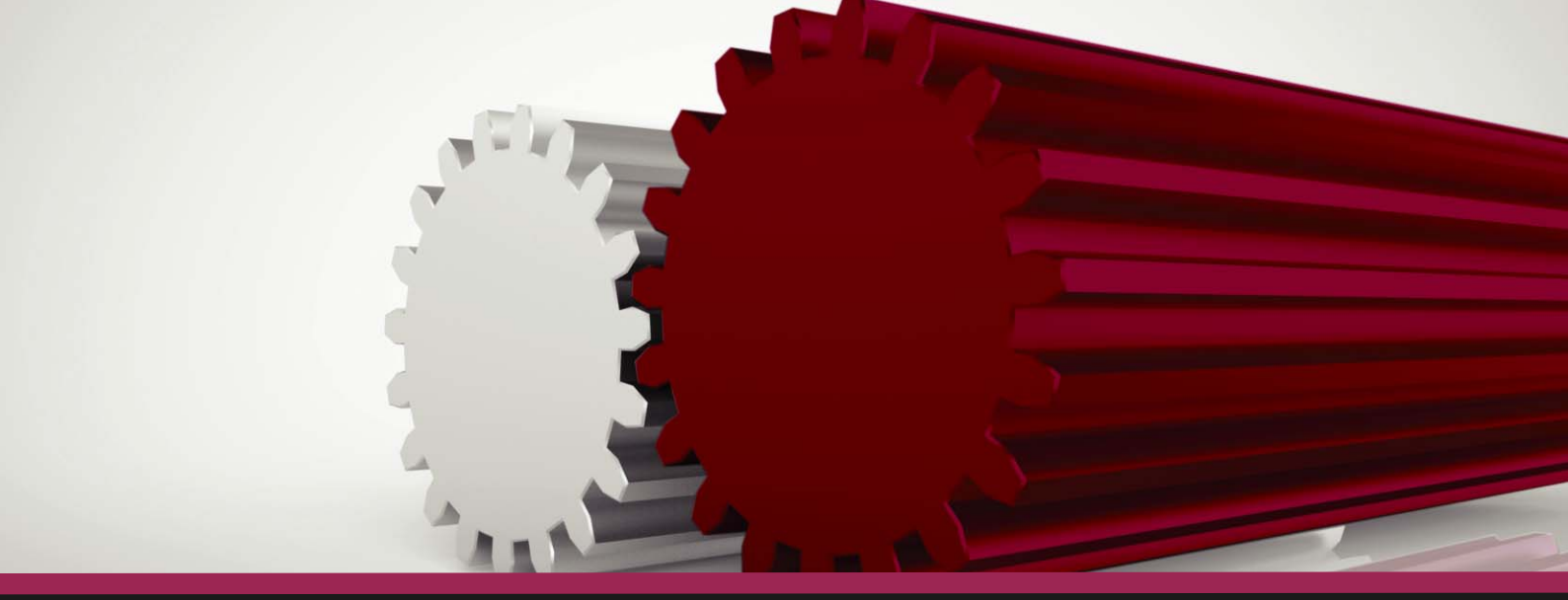


ICLG

The International Comparative Legal Guide to:

# Merger Control 2014

**10th Edition**

A practical cross-border insight into merger control

Published by Global Legal Group, with contributions from:

Accura Advokatpartnerselskab
Advokatfirmaet Wiersholm AS
AlixPartners
Allende & Brea
Anastasios Antoniou LLC
Antitrust Advisory LLC
Ashurst LLP
Balčiūnas & Grajauskas
Beiten Burkhardt
Bergstein Abogados
Boga & Associates
Camilleri Preziosi
Chapman Tripp
Crowell & Moring
Drew & Napier LLC
ELIG, Attorneys-at-Law
Gide Loyrette Nouel
Houthoff Buruma
J. Sagar Associates
Kastell Advokatbyrå AB
Katten Muchin Rosenman LLP
King & Wood Mallesons
King & Wood Mallesons SJ Berwin
Koep & Partners
Lee and Li, Attorneys-at-Law
Linklaters LLP
Matheson
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Moravčević Vojnović i Partneri in cooperation with Schoenherr
Nagashima Ohno & Tsunematsu
Olivares & Cía, S.C.
Oliveira Felix Advogados
Peltonen LMR Attorneys Ltd.
PUNUKA Attorneys & Solicitors
Schellenberg Wittmer Ltd
Schoenherr
SCPA DOGUE-ABBE YAO & Associés
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
TRINITI
Vasil Kisil & Partners
Webber Wentzel

GLG
Global Legal Group

# The International Comparative Legal Guide to: Merger Control 2014

GLG
Global Legal Group

**Contributing Editors**
Nigel Parr and Catherine Hammon, Ashurst LLP

**Account Managers**
Beth Bassett, Maksim Dolgusev, Robert Hopgood, Dror Levy, Maria Lopez, Mahmoud Nedjai, Florjan Osmani, Oliver Smith, Rory Smith

**Sales Support Manager**
Toni Wyatt

**Sub Editors**
Nicholas Catlin
Barbara Fitzsimons

**Editors**
Beatriz Arroyo
Gemma Bridge

**Senior Editor**
Suzie Kidd

**Group Consulting Editor**
Alan Falach

**Group Publisher**
Richard Firth

**Published by**
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

**GLG Cover Design**
F&F Studio Design

**GLG Cover Image Source**
iStockphoto

**Printed by**
Ashford Colour Press Ltd.
November 2013



**ISBN** 978-1-908070-79-1
**ISSN** 1745-347X

**Strategic Partners**

AEJE ECLA

MIX Paper from responsible sources FSC® C011748

## General Chapters:



## Country Question and Answer Chapters:



Continued Overleaf

GLG
Global Legal Group

## Country Question and Answer Chapters:



# EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control in 52 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Nigel Parr and Catherine Hammon of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

# Portugal

Carlos Botelho Moniz

Morais Leitão, Galvão Teles, Soares da Silva & Associados

Pedro de Gouveia e Melo

## 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, Prof. António Ferreira Gomes, and two (in theory up to four) other members. The present Board was appointed by the Government in September 2013 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 19/2012, of 8 May 2012), the Competition Authority has exclusive competence to assess and decide on notified concentrations. 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 Competition, Supervision and Regulation Court (see question 5.9 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, without prejudice to the referral provisions of the EC Merger Regulation (see question 2.7 below).

**Competition Act.** The main piece of legislation regarding merger control is the Competition Act (Law 19/2012, of 8 May 2012), which entered into force on 8 July 2012, replacing the previous Competition Act (Law 18/2003, of 11 June 2003). The main changes on merger control brought by the new Act 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).

**Regulations and guidelines.** 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 60/2013, of 25 January 2013, which sets out the Regular and Simplified Notification Forms to be filed by the notifying parties. Guidelines from the Authority are available on the "simplified decision" procedure ("Simplified Decision Statement", of 24 July 2007), on remedies ("Remedies Guidelines", of 28 July 2011), on the calculation of fines (of 20 December 2012) and on pre-notification contacts ("Pre-notification Guidelines", of 27 December 2012). 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 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 before a final decision is adopted in both phases of the procedure, and may follow very closely the proceedings before the Authority.

**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*, 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 (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). Acquisitions by credit institutions meeting these criteria may be exempt from filing to the Authority if they meet the requirements of the Competition 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 Competition Act, the binding 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 all relevant legal or 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
- 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 by an insolvency administrator** within insolvency legal proceedings;
- the acquisition of a shareholding merely as a **guarantee**;
- the **temporary acquisition by financial institutions or insurance companies** of shareholdings in companies active outside the financial sector, insofar as the securities are acquired with a view to its resale, if the acquirer does not exercise the corresponding voting rights with a view to determine 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 (although 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 (no acquisition of control has occurred under this scheme 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, notably through a shareholders' agreement or a similar arrangement, control over the acquired company (for the definition of control, please see question 2.1 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 9 and 10 of the Competition Act, which follow closely the wording of Article 101(1) to (3) of the Treaty on the Functioning of the European Union).

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

**Thresholds**. The new Competition Act provides three 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 **€100 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 **€5 million**.
- **Standard market share threshold**. Even if the turnover threshold is not met, notification is mandatory if the implementation of the concentration results in the acquisition, creation or reinforcement of a share exceeding **50%** in the "national market" for a particular good or service, or in substantial part of it.
- ***De minimis* market share threshold**. Even if the standard threshold is not met, the creation or reinforcement of a share between **30% and 50%** of the "national market" of a particular good or service will still 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.

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 the provisions on turnover calculation of the EC Merger Regulation.

**Guidance on the market share threshold**. 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 "acquisition" of a market share for jurisdictional purposes. Therefore, if the target has a 50% or 30%-plus share in a relevant product market *in Portugal*, depending on the case, the acquisition must be notified to the Authority even though, pre-merger, the acquirer(s) 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 for market share**. If the acquirer has a market share above 50% or 30% in a relevant product market in Portugal and the target is (or is expected to be) present in the same market, the relevant 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 50%-plus or 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*).
- **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 market share threshold was met, was the most relevant).

### 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 thresholds, 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 (36% in 2009, 34% in 2010, 48% in 2011 and 39% in 2012, according to the Annual Reports), although the revision of the jurisdictional thresholds in 2012 may reduce the number of transactions subject to mandatory filing in the future (see question 2.4 above).

**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 in a number of cases the Commission rejected the request. During 2012, five transactions without a community dimension and subject to notification under the Act were ultimately notified to the Commission pursuant to the Article 4(5) procedure, and two transactions with community dimension were referred to the Competition Authority under Article 4(4) (see the 2012 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?**

Under the Competition Act, two or more transactions executed within two years and between the same parties, which individually are not subject to mandatory filing, will be considered to constitute a single transaction if the combined transactions meet the turnover jurisdictional threshold (see question 2.4 below).

The Authority also 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.

## 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 cannot be implemented before a non-opposition decision is issued by the Competition Authority (infringements are seriously punished, see question 3.3 below). Under the 2012 Act, there is no notification deadline, as long as the stand-still obligation is respected (see question 3.7 below).

**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**. The implementation of a concentration subject to mandatory filing without express or tacit clearance from the Authority, or in breach of a prohibition decision, makes the undertakings concerned liable to fines reaching up to 10% of the previous year's turnover for each of the participating undertakings, and calculated in accordance with the Competition Act and the Authority's guidelines of 20 December 2012.

**The transaction does not produce legal effects and may be declared null and void**. The consequences for the validity of the transaction depend on whether the concentration is implemented before a clearance decision is adopted, or whether 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 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 and effects following an express or tacit clearance from the Authority.

***Ex Officio* investigation, with additional costs**. The Authority may initiate an *ex officio* investigation into a concentration implemented in the previous 5 years 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 if the Authority's clearance decision was based on false or incorrect information provided by the parties or when parties disregard conditions or obligations imposed by the Authority, entail the following negative consequences to the undertakings concerned:

- 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 in merger control cases).

**Personal liability of board members and managers**. Finally, under the Competition Act, *persons holding positions in the managing bodies or heading or being responsible for the supervision of the relevant department* 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 fines up to 10% of their annual income.

**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, therefore, would only 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?

**Triggering event**. Notifications may 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, or to the decision awarding a public contract (see question 3.1 above). The Act also allows the parties to voluntarily notify a reportable concentration before the conclusion of an agreement or announcement of a public bid if a serious or public intention to conclude a transaction can be demonstrated, respectively. Parties are in any event encouraged to engage in pre-notification contacts with the Authority.

**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 verify if the Short Form is available, and to guide notifying parties in adequately filling in the relevant Notification Form, thereby avoiding subsequent information requests, which stop the clock; and (iii) whenever possible, to identify the relevant markets and potential competition issues raised by the transaction and analyse the viability of ancillary restraints.

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 format of the pre-notification contacts is decided on a case-by-case basis, but may typically consist of one or more meetings and subsequent informal information requests.

### 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 5 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 result in significant impediments to effective competition. 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 one media sector case the Authority controversially prohibited the concentration in the end of Phase 1 further to a negative binding opinion from the media sectoral regulator (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 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). The Phase 2 deadline can also be extended by the Authority, at the request or with the agreement of the notifying parties, up to a maximum of 20 working days.

Until recently no statement of objections was issued by the Authority, and the only document available to the parties on the Authority's concerns was the decision to initiate Phase 2. This seriously harmed the parties' interests, especially if remedies were submitted, since the Authority is not formally bound to state its objections to the transaction until the issuance of a draft final decision, which usually took place 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 5.4 below). In the 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 New Act also partially addresses this shortcoming by requiring that in Phase 2 the Authority hears the parties (a procedural step which is usually initiated by the issuance of a draft final decision) within 75 working 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 to a third party "showing a legitimate interest" may be restricted to the period of 10 days deadline to submit initial observations (see above) and to the period of hearing of the interested parties (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 most Phase 2 clearance decisions issued to date, the Authority required remedies to clear the transaction (see question 5.2 below).

**Deadline suspensions**. The above-referred time periods are suspended in three cases: (i) if the Authority asks for additional information from the notifying parties; (ii) if the parties submit commitments; and (iii) when the Authority consults the notifying parties and other interested parties before the adoption of a decision in both phases of the procedure:

- **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 in both phases of the procedure 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.
- **Submission of commitments**. The submission of commitments in both phases of the procedure in order to allay the Authority's concerns suspends the decision deadline for 20 working days, so as to allow their analysis and negotiation with the parties. The suspension ceases when the Authority conveys to the notifying party that the commitments were accepted or refused (see question 5.4 below).
- **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 must be heard (as long as the third parties sent observations "with their express and reasoned position" further to the publication of the summary notification within the prescribed time limit). 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 Act, the time limit to submit observations increases to 20 working days when third parties 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).

### 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 are exposed to legal uncertainty as to the validity and legal effects of the transaction and 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 Forms approved by the Authority and set out in Regulation 60/2013. The Forms must be submitted with supporting documentation, along with one paper and one digital copy, and 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. Straightforward transactions may be filed pursuant to the Simplified Form (see question 3.9 below), and 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 60/2013, however, it is up to the notifying parties to assess whether or not it is necessary to complete all the sections on the Regular 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? Are there any informal ways in which the clearance timetable can be speeded up?

**Simplified Form**. Concentrations which do not raise competition concerns and meet the requirements of Regulation 60/2013 may be notified according to a Simplified Form, in particular where: (a)

there are no horizontal overlaps; (b) in horizontal mergers, the combined market share does not exceed 15%, or 25% if the share increase is not higher than 2%; and (c) in vertical or conglomerate mergers the combined market share does not exceed 25%.

**Simplified Decision**. Straightforward cases, such as those filed under the Simplified Form, may also be cleared by the Authority before the Phase 1 deadline expires. This will not be the case when additional information from the parties is required or when a hearing must be conducted (see question 3.6 above). Although the Authority does not commit itself to a specific reduced deadline, simplified procedure cases are frequently decided in less than 20 working days.

Above all, given that there is no strict notification deadline, the submission of a complete notification to the satisfaction of the Authority, within adequate pre-notification contacts, appears to be the best way to ensure a swift and fast clearance decision.

### 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).

### 3.11 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

Pursuant to the Competition Act, a concentration consisting of a takeover bid, an exchange offer or the acquisition of control over public companies should be notified to the Authority subsequently to the announcement to the market in accordance to the Securities Code, although parties can voluntarily present the notification after they disclosed publicly the intention to launch such bid or offer (see question 3.5 above). The implementation of a public offer may be authorised prior to competition clearance in certain cases (see question 3.7 above). Finally, certain transactions concerning listed companies are subject to prior disclosure and registration with the securities regulator (see question 1.4 above).

### 3.12 Will the notification be published?

The Authority publishes a non-confidential notice of the concentration summarising the transaction and the activities of the parties on its website and in two national newspapers within 5 days of submission of a complete notification (see question 3.6 above). The complete notification is not published, although its non-confidential version can be accessed during the procedure by third parties showing a legitimate interest and by any person after the procedure is closed (see question 4.6 below).

## 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?

**SIEC test**. The substantive test under the Competition Act is the Significant Impediment to Effective Competition ("SIEC") test set forth by the current EC Merger Regulation. Authorisation is granted to concentrations that do not create a SIEC in the national market or in a substantial part of it. By contrast, concentrations which create a SIEC, in particular resulting from the creation or reinforcement of a dominant position, are prohibited.

**Assessment criteria**. Concentrations are reviewed in order to determine their effects on the structure of competition in the relevant market(s). The Competition Act follows closely 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, but includes three additional criteria: under the "Essential Facilities" criterion, control over essential infrastructure by the undertakings concerned and opportunities offered to competing undertakings to access such infrastructure must be taken into account when assessing the competitive impact of a proposed transaction. The second allows for a limited "efficiency defence" (see question 4.2 below); and the third 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.

**Joint ventures.** 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.

### 4.2 To what extent are efficiency considerations taken into account?

The Act provides that within the substantive assessment the Authority must take into account the evolution of economic and technical progress that does not constitute an obstacle to competition, "insofar as efficiency gains benefitting consumers are a direct result from the transaction". This arguably represents an efficiency defence with very strict conditions, and it remains to be seen how (or if) it will be applied in practice.

### 4.3 Are non-competition issues taken into account in assessing the merger?

Non-competition issues may be taken into account in the assessment of a concentration when the Minister for the Economy decides to review a prohibition decision by the Authority. In such case the fundamental interests of the national economy should be taken into account by the Minister. Only one of the Authority's four prohibition decisions was overturned by the Minister (see question 5.9 below). In addition, in mergers in the media sector where the media regulator ERC issues a negative binding opinion, the Authority will effectively adopt a prohibition decision, not on competition grounds but on public interests regarding the plurality of the media (see question 1.4 above).

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

**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 whose rights or legitimate interests may be affected by the Authority may submit observations stating their position on the concentration in "an express and reasoned way" 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. 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 objecting to the transaction may also access a non-confidential version of the Authority's file in both phases of the procedure. Under the New Act, the right of access to the file by third parties may be limited by the Authority 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).

### 4.5 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).

**Inquiries**. The Act also empowers the Authority to summon and question persons whose declarations are deemed relevant.

**Penalties**. Failure to supply or the supply of false, inaccurate or incomplete information in response to a request or questioning by the Authority, or failure to co-operate or obstruction to the said powers, constitute misdemeanours punishable with fines up to 1% of the preceding year's turnover for each of the undertakings involved (or, in the case of individuals, with fines up to €1,020). 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.

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

**Pre-notification**. Pre-notification contacts are considered by the Authority to be confidential, although the parties may ask for pre-notification documents to be appended to the case file after submission of the Notification Form.

**Phases 1 and 2**. 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.

**Decision**. A non-confidential version of final 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.

**"Open file"**. After the review procedure is closed by a final decision no longer subject to appeal, the non-confidential version of the file may be accessed by any person, under the "open file" principle of administrative law, as implemented by Law 46/2007, of 24 August 2007.

## 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 5.9 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 an informal negotiation usually takes place between the Authority and the notifying parties (see question 5.4 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).

The Authority will refuse the commitments when it considers that their purpose is merely dilatory or that commitments submitted are insufficient or inadequate to remedy the competition concerns. Parties may not appeal autonomously from a decision rejecting the commitments, as they will have the right to appeal against the prohibition decision which will close the procedure. The Authority formally does not have the power to impose unilaterally remedies which were not proposed by the parties.

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. Nevertheless, 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 rejected outright, 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 To what extent have remedies been imposed in foreign-to-foreign mergers?

It is unlikely that pure "foreign-to-foreign" mergers (in which the companies have no assets in Portugal) will pose competition concerns, except in small or niche product markets in which the parties may have high market shares. It is perhaps for this reason that, from all the decisions with commitments adopted by the Authority since 2003, only one involved companies without assets in Portugal: in case 44/2003, *Dräger Medical/Hillenbrand*, decision of 5 April 2004, which led to 80%-plus shares in the national markets for incubators and other equipment for new-borns, the Authority imposed a set of behavioural remedies in order to ensure adequate distribution and spare parts of the relevant products.

### 5.4 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. Under the previous Act, during the negotiations the Authority issued several additional information requests (all of which stop the clock), thereby prolonging remedies negotiations, which harmed the interests of notifying parties. The new Act limits the suspension of the deadline for the assessment and negotiation of remedies to 20 working days.

### 5.5 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. The acquirer and the legal instruments concerning divestitures should be previously approved by the Authority.

### 5.6 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 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 (or up to 10% of annual income, in the case of individuals). The Authority enjoys broad investigatory powers in this respect, as the procedural rules for enforcement against anticompetitive practices are applicable.

### 5.7 How are any negotiated remedies enforced?

In recent years, most 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 confirm 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 question 5.6 above).

### 5.8 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**. In exceptional circumstances, non-compete obligations exceeding the three-year period prescribed by the guidelines of the European Commission have been accepted. Non-solicitation of customers and workers clauses are similarly considered to be ancillary to a concentration;
- **non-compete obligations between a joint venture and parent companies**, usually exempted during the lifetime of the JV; and
- **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.

### 5.9 Can a decision on merger clearance be appealed?

Yes. All of the 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. The Competition, Supervision and Regulation Court (created by Law 46/2011, of 24 June 2011) has exclusive jurisdiction to hear appeals against the Authority's decisions clearing or prohibiting a concentration or applying fines to undertakings. As a rule, appeals do not suspend the effects of the decision, and the undertakings concerned or other interested third parties will have to ask for the court to order interim measures. Judgments of the Competition, Supervision and Regulation 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. An appeal against the Authority's first prohibition decision (in case *Arriva/Barraqueiro*) is still pending before the courts.

**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).

### 5.10 What is the time limit for any appeal?

Under the Act and the Code of Procedure in the Administrative Courts, an annulment action against a decision based on its illegality must be lodged with the Competition, Supervision and Regulation Court within 3 months of its notification (unless the decision is null and void, in which case there is no time limit). Further appeals must be brought before the competent appeals court (see question 5.9 above) within 30 days of the appealed ruling.

### 5.11 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 3 and 5 years, depending on the gravity of the infringement. Similarly, the limitation period set out for fines is 3 or 5 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 Competition and Misdemeanours Acts, up to a maximum of 8 years or 10 years and 6 months, respectively.

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 Portugal liaise with those in other jurisdictions?

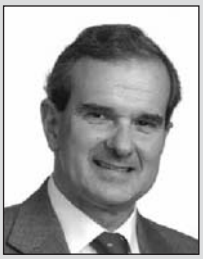
The Authority co-operates intensely with the European Commission under the EC Merger Regulation and the Competition Authorities of the other EU Member States in the framework of the European Competition Network (ECN. The Authority is also an active Member of the International Competition Network (ICN) 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 Are there any proposals for reform of the merger control regime in Portugal?

The Portuguese merger control regime was recently the object of a significant reform, which resulted in the approval of the new Competition Act (Law 19/2012, of 8 May 2012), which entered into force on 8 July 2012. A new Statute for the Competition Authority is being prepared in order to comply with the recent framework law on regulatory authorities (Law 67/2013, of 28 August 2013), and will likely enter into force in the coming months, but no draft has been made public.

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

This chapter is up to date as of 18 October 2013.



**Carlos Botelho Moniz**

Morais Leitão, Galvão Teles, Soares da Silva & Associados
R. Castilho, 165
1070-050 Lisbon
Portugal

*Tel:* +351 21 381 7457
*Fax:* +351 21 381 7411
*Email:* cmoniz@mlgts.pt
*URL:* www.mlgts.pt

Carlos Botelho Moniz is a partner of Morais Leitão, Galvão Teles, Soares da Silva & Associados and the Head of the EU and Competition Law Practice Group. The practice of Carlos Botelho Moniz focuses on EU and Competition Law. His experience includes advising and representing clients in competition cases, both before the European Commission and the Portuguese Competition Authority, in the areas of antitrust, merger control and State aids.

He has vast experience in representing both the Portuguese authorities and private parties in its relations with the EU Institutions, as well as in representing private parties and the Portuguese State before the European Court of Justice and the EU General Court.

Admitted to the Portuguese Bar in 1980, Carlos Botelho Moniz joined the firm in 2001. Previously he was a partner at Botelho Moniz, Magalhães Cardoso, Marques Mendes e Ruiz until 1999 and at PMBGR from 1999 to 2001. Carlos Botelho Moniz completed his law degree at the Universidade de Lisboa (1976) and gained 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. He is currently the president of the Association of Portuguese Competition Lawyers and the Vice-president of the Portuguese Association for European Law.

**Pedro de Gouveia e Melo**

Morais Leitão, Galvão Teles, Soares da Silva & Associados
R. Castilho, 165
1070-050 Lisbon
Portugal

*Tel:* +351 21 381 7409
*Fax:* +351 21 381 7411
*Email:* pgmelo@mlgts.pt
*URL:* www.mlgts.pt

Pedro Gouveia e Melo is a Senior Associate with the EU and Competition Law Practice Group. Pedro focuses his practice in all areas of competition law (antitrust investigations and counselling, merger control and State aids investigations), in a wide range of industries. He also advises clients on EU Law, especially on internal market rules, the Common Agricultural Policy and on rules on structural funds.

His experience includes both merger cases and investigations before the Portuguese Competition Authority and the European Commission, and he has represented public and private companies and the Portuguese Government in competition and EU law-related litigation before the European Court of Justice, the EU General Court and the Portuguese courts.

Pedro joined the firm in 2002. In 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
GALVÃO TELES
SOARES DA SILVA

Morais Leitão, Galvão Teles, Soares da Silva & Associados is an independent full-service law firm and one of the recognised leading 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 and 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.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Lending and Secured Finance
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media and Internet
- Trade Marks

GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk