Portugal merger control

Produced in partnership with Morais Leitão, Galvão Teles, Soares da Silva

A conversation with Pedro Gouveia e Melo, senior lawyer at Portuguese law firm Morais Leitão, Galvão Teles, Soares da Silva on key issues on merger control in Portugal.

NOTE–to see whether notification thresholds in Portugal and throughout the world are met, see Where to Notify.

1. Have there been any recent developments regarding the Portuguese merger control regime and are any updates/developments expected in the coming year? Are there any other 'hot' merger control issues in Portugal?

The Portuguese merger control regime was last amended in 2012, with the adoption of the present Competition Act (Law 19/2012, of 8 May 2012—the Competition Act).

No material changes to the merger control regime are expected in the near future.

In 2019 and the first semester of 2020, the Authority adopted 77 final decisions, including clearing the acquisition of the São Gonçalo Hospital by Grupo HPA Saúde under the failing firm defence, following a lengthy phase 2 investigation. This case is also noteworthy since subsequent to clearance the buyer was fined for gun-jumping, although the Authority allowed the payment of the fine in installments in order not to affect the medical services provided by the company in the current COVID-19 pandemic.

Gun-jumping cases have become of the enforcement priorities of the Authority, with ten such investigations initiated since January 2019.

2. Under Portuguese merger control law, is the control test the same as the EU concept of 'decisive influence'? If not, how does it differ and what is the position in relation to minority shareholdings?

Yes. The definition of 'control' under the Competition Act closely follows the European Commission's practice under the EU Merger Regulation and is inferred from all the relevant legal or factual circumstances that confer the ability to exercise decisive influence on the target's activity.

3. Are joint ventures caught by the national merger control provisions (including non-structural, cooperative joint ventures)?

Yes, in the case of full-function joint ventures. The creation or the acquisition of control over a jointly-controlled undertaking is subject to the merger control rules of the Competition Act when the joint venture fulfils the functions of an independent economic entity on a lasting basis and the jurisdictional thresholds are met.

Cooperative joint ventures are assessed under the rules applicable to agreements and concerted practices (Articles 9 and 10 of the Competition Act, equivalent to Article 101 TFEU).

4. What are the merger control thresholds and would a purely foreign-to-foreign transaction be caught (commenting on any 'effects' doctrine/policy if relevant)?

The Competition Act provides three alternative thresholds for mandatory filing:

- Turnover threshold—applicable to transactions where in the preceding financial year the combined turnover of the undertakings concerned in Portugal exceeded €100m, after deduction of taxes directly related to turnover, provided that the individual turnover achieved in Portugal in the same period by at least two undertakings exceeded €5m, or
- Standard and *de minimis* market share thresholds—notification is also mandatory if the transaction results in the acquisition, creation or reinforcement of a share in the 'national market' for particular goods or a service equal to or above 50%. The threshold is reduced to 30% if at least two of the undertakings concerned achieved, individually in Portugal, a turnover of at least €5m in the previous financial year. The Authority's practice interprets the provisions on the market share threshold in very broad terms.

To see whether thresholds in Portugal are met, see Where to Notify.

Purely foreign transactions may be caught by the Competition Act to the extent that they have effects in Portugal, even if neither of the merging parties is established or has facilities in Portugal. 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 a mandatory filing if the market share threshold is met.

5. Are there any specific issues parties should be aware of when compiling and calculating the relevant turnover for applying the jurisdictional thresholds?

The rules of the Competition Act on turnover calculation follow closely the provisions of the EU Merger Regulation.

Parties should however take care in assessing the market share threshold, as the Authority's practice has construed this threshold in very wide terms. Market share estimates should always consider the relevant product market in Portugal, even if the geographic market is wider in scope. In addition, in the absence of any overlap, the mere transfer of an undertaking's position in a given market is understood by the Authority as the 'acquisition' of a market share for jurisdictional purposes. Also, when more than one independent source on market dimensions and market shares estimate is available, notifying parties should take particular care in selecting the source upon which to base the decision as whether or not to notify. Another type of case that should be carefully assessed is that of recently-created targets without any prior activity, as the Authority has in the past found relevant, for jurisdictional purposes, the estimated future market share of the target, in view of inter alia its estimated capacity.

6. Where the jurisdictional thresholds are met, is notification mandatory and must closing be suspended pending clearance?

A concentration which meets the jurisdictional thresholds is subject to mandatory notification and cannot be implemented before a clearance decision is issued by the Authority.

7. Is there any discretion to review transactions that fall below the notification thresholds?

No, the Authority has no jurisdiction under the merger control rules to review transactions that do not meet at least one of the turnover and market share thresholds of the Competition Act.

It might be argued that in theory such transactions could be reviewed under the general provisions of the Act on restrictive agreements or abuse of dominant position (equivalent to Articles 101 and 102 TFEU). However, in our view is very unlikely that the Authority would devote resources to investigate such transactions, in view of their lack of market impact, as any transaction that may have a meaningful impact would very probably be covered by at least one of the market share tests.

8. Is it possible to close the deal globally prior to local clearance?

A 'local carve out' would have to be analysed on a case-by-case basis, and the parties would have to convince the Authority that the concentration would not produce any effects

in Portugal until clearance had been received.

Note–there is no guidance on when this would be possible and there are no previous decisions of the Authority granting such a 'carve out'.

9. Is there a deadline for filing a notifiable transaction and what is the timetable thereafter for review by the Autoridade da Concorrência?

Under the 2012 Competition Act there is no notification deadline, as long as the stand-still obligation is respected.

The review procedure encompasses two stages: an initial investigation (Phase 1), which should last 30 working days from effective notification, following which, if the transaction raises serious doubts as to its compatibility with the Competition Act, the Authority may initiate an in-depth investigation (Phase 2). This should be completed within 90 working days from the date of effective filing. In the absence of a decision within the set deadline in both phases of the procedure, a clearance decision is deemed to have been adopted.

However, since these time limits can be suspended in several situations (notably whenever the Authority requests additional information from the parties or conducts a hearing of the parties and intervening third parties prior to adopting a decision, when remedies are submitted, or when the Authority requests a binding opinion from a sector regulator), the review periods are frequently extended, especially in more complex cases. In straightforward reviews, the Authority may use the ‘simplified decision’ procedure introduced in 2007, under which clearance decisions are often adopted before the end of the 30 working-day deadline.

Note–deadlines exclude Saturdays, Sundays and national holidays. All deadlines run from the day after notification/receipt of information.

10. Who is responsible for filing a notifiable transaction (noting also whether there is a specific form/document used and an applicable filing fee)?

The filing of a full merger must be jointly made by the merging parties, and acquisitions of control over one or more undertakings should be filed by the party(ies) acquiring control. Joint notifications must be presented by a common representative empowered to send and receive documents on behalf of all the notifying parties.

A filing fee is due from the notifying party, without which the notification is not effective. The base fee is:

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

An additional fee (equivalent to 50% of the base fee) is due if the case is moves to Phase 2. Filing fees double when the Authority initiates *ex officio* proceedings, notably in the case of notifiable transactions implemented without prior clearance.

Notifications must be submitted using either a Standard or a Short Form, which has been available for straightforward cases since 2012. The Authority may waive the requirement for certain information or documents in pre-notification contacts.

11. Please comment on the penalties for failing to notify or suspend transactions pending clearance and the record/stance of the Autoridade da Concorrência in terms of pursuing parties for failing to notify relevant transactions (commenting, if relevant, on any statute of limitations regarding sanctions for infringements of the applicable law).

Parties to a concentration subject to mandatory filing in Portugal should consider carefully the potentially serious consequences of implementing the transaction without notifying or waiting for a clearance decision from the Authority.

First, heavy fines may be imposed, which in theory may reach up to 10% of the previous year's turnover for each of the merging parties. Second, the uncertainty as to the effectiveness of the transaction may harm the parties' normal course of business, as concentrations subject to filing do not produce legal effects in Portugal until a clearance decision is adopted. The Authority can also initiate an *ex officio* investigation into a concentration implemented in the previous five years in violation of the Competition Act and order the parties to notify (in which case the filing fees will double and periodic penalty payments may apply for each day of a delay). Finally, members of managing bodies and the department heads of the parties infringing the stand-still obligation may also be deemed liable for the infringement if it was (or should have been) to their knowledge, and are subject to fines of up to 10% of their annual income.

The Authority has fined companies for 'gun-jumping' a number of times over the years. The highest fine imposed to date for early implementation of a concentration subject to filing amounted to approximately €155,000. Gun jumping cases have recently become one of the Authority's enforcement priorities.

Proceedings for pursuing undertakings that implement a concentration subject to mandatory filing without prior clearance are subject to limitation periods of five years. However, it cannot be excluded that the limitation period only starts from the day when control over the target ceases, which means that as long as the acquirer holds control over the target the limitation period will not apply.

The limitation period set out for fines is three or five years, depending on their value, from the date on which the decision determining its application becomes final or *res judicata*, meaning that in principle, once this period has elapsed, companies can no longer be pursued for not complying with the Authority decision.

These limitation periods may be suspended or interrupted according to the provisions of the Competition and Misdemeanours Acts, up to a maximum of ten years and six months, respectively.

12. Are there any other 'stakeholders' other than the Autoridade da Concorrência (for example, any 'sector regulators' who might have concurrent powers)?

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 regulators must, upon request of the Authority, issue a non-binding 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.

In addition to the merger control review under the Competition Act, mergers in certain sectors must also be approved by the competent regulatory authorities, such as the insurance, banking and the media regulators.

Interested third parties to a transaction, such as competitors, suppliers, customers or consumer associations, may play a significant role in merger review cases. First, any interested third-party whose rights or legitimate interests may be affected by the Authority may submit observations stating their position within a deadline of at least ten days. In addition, prior to the adoption of a Phase 1 or Phase 2 decision the Authority must hold a hearing of the third parties which have already intervened in the procedure, and complaining third-parties are accordingly sent a non-confidential version of the draft final decision and may submit observations, which may influence significantly the course of the review process.