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Legal Guides**



# **Merger Control**

# **2024**

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# Portugal

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## 1 Relevant Authorities and Legislation

**1.1 Who is/are the relevant merger authority(ies)? If relevant, please include details of: (i) independence from government; (ii) who the senior decision-makers are (e.g. Chair, Chief Executive, Chief Economists), how long they have been in position, and their professional background (lawyer, economist, academia, industry, professional services, politics, etc.); and (iii) any relevant key terms of appointment (e.g. duration of appointment) of those in leadership positions (such as Chair, Chief Executive, and Chief Economist).**

The administrative authority competent to enforce competition law in Portugal, including the rules on merger control, is the *Autoridade da Concorrência* (“Competition Authority” or “Authority”). The Competition Authority has broad investigative, regulatory and sanctioning powers in merger control, and is headed by the *Conselho de Administração* (“Board”), a body composed of three to five members, appointed by the Government, for a non-renewable six-year term. The current Board is headed by the President, Prof. Nuno da Cunha Rodrigues, a professor of law appointed in March 2023, and two other members, Prof. Miguel Moura e Silva, a professor of law and former restrictive practices director at the Authority, appointed in August 2019, and Dr. Ana Sofia Rodrigues, an economist and former Chief Economist, appointed in April 2023.

According to its Statutes (Decree-Law 125/2014 of 18 August 2014), the Authority is an independent public entity that has administrative, financial and management autonomy, as well as organisational, functional and technical independence and its own assets. The members of the Board are independent from the Government, cannot be dismissed except in the limited situations established in the Statutes, cannot hold any other public or private office during their term (except for lecturing and investigation, so long as unremunerated), and are subject to a strict incompatibilities’ regime, both during and after their term of office.

Under the Competition Act (Law 19/2012, of 8 May 2012), the Competition Authority has exclusive competence to assess and decide on concentrations subject to mandatory notification. However, a concentration which is prohibited by the Authority may still be approved by the Council of Ministers, subject to commitments, 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 5.10 below). A summary of the Authority’s decisions on merger control is available at <http://www.concorrencia.pt>.

In addition to approval by the Authority under the Competition Act, mergers in certain sectors must also be 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 (“EC Merger Regulation”) and to the exclusive jurisdiction of the European Commission where the relevant thresholds are met (see the European Union chapter in this guide).

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, as amended). The Competition Act was recently amended by Law 17/2022, of 17 August 2022, in the context of the implementation into Portuguese law of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (“ECN+ Directive”). This amendment nevertheless does not contain significant changes to the merger control rules.

**Regulations and guidelines.** Relevant legislation on merger control is also contained in the Statute of the Authority, approved by Decree-Law 125/2014, of 18 August 2014, 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 3.11 below) and in Regulation 993/2021, of 2 December 2021, which sets out the Regular and Simplified Notification Forms to be filed by the notifying parties. Guidelines from the Authority are available, notably 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), on pre-notification contacts (“Pre-notification Guidelines”, of 27 December 2012); on the economic analysis of horizontal mergers (“Horizontal Guidelines”, of December 2016); and on gun jumping (December 2022). All the above documents are available on the Authority’s website.

**Subsidiary legislation.** Further legislation is applicable on a subsidiary basis: the Administrative Procedure Code (approved by Decree-Law 4/2015, of 7 January 2015, 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 5.10 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 Authority's decisions in that respect.

### 1.3 Is there any other relevant legislation for foreign mergers?

Regulation (EU) 2022/2560 of the European Parliament and of the Council, of 14 December 2022, on foreign subsidies distorting the internal market (the Foreign Subsidies Regulation), can apply to transactions covered by the Competition Act.

In addition, Decree-Law 138/2014, of 15 September 2014, establishes rules on the safeguarding of strategic assets, and applies to the main infrastructure and assets for defence and natural security, as well as for the provision of essential services in the energy, transport and communications sectors.

Pursuant to Decree-Law 138/2014, the Government may oppose the acquisition of control, in the meaning of competition law, over a strategic asset by a person or company of a third country to the European Union or the European Economic Area, if such acquisition poses a genuine and sufficiently serious threat to national security or to the security of supply of the relevant essential services. The Decree-Law specifies the situations where a genuine threat may arise (such as connections of the person or company to a terrorist group) and establishes the review and opposition procedure. Acquirers of assets covered by the law may request that the Government confirms that it does not plan to oppose the transaction. Confirmation is tacitly given if no investigation is initiated by the Government within 30 working days.

### 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, communications, water and waste, media or air, rail and road transport), the relevant regulator(s) 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 the proceedings before the Authority very closely.

**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 *Autoridade de Supervisão de Seguros e Fundos de Pensões*, under Law 147/2015, of 9 September 2015, as amended, which may oppose the operation if it considers that 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 three years (five 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*, “ERC”) under Law 78/2015, of 29 July 2015. 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 freedom of speech or the plurality of the media (see, for instance, Ongoing/Prisa/Media Capital (Ccent. 41/2009, decision of 30 March 2010), where the Authority opposed the concentration following a negative binding opinion by the media regulator, despite the transaction posing no competition concerns). Under the Competition Act, the binding opinion of the media regulator suspends the deadline for the Authority to make its decision (see question 3.7 below).

- **Listed companies.** The securities regulator (*Comissão do Mercado dos Valores Mobiliários*, “CMVM”) 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.

### 1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

As mentioned in question 1.3 above, Decree-Law 138/2014, of 15 September 2014, establishes a screening procedure for acquisitions of control of strategic assets in the energy, transport and communications sectors by third-country persons that may harm national security or the security of supply of the relevant essential services. Decree-Law 138/2014 is due to be amended further to Regulation (EU) 2019/452 of the European Parliament and of the Council, of 19 March 2019, establishing a framework for the screening of foreign direct investments into the Union (the “EU FDI Screening Regulation”).

## 2 Transactions Caught by Merger Control Legislation

### 2.1 Which types of transaction are caught – in particular, what constitutes a “merger” and how is the concept of “control” defined?

The Competition Act applies to concentrations between undertakings that meet the jurisdictional thresholds (see question 2.4 below).

**Concentration.** The concept of concentration contained in the Competition Act closely follows 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 another undertaking(s) or part(s) of another undertaking(s) 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 offering 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 three and eight years.

**Control.** The definition of “control” under the Competition Act closely follows 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;
- rights of ownership or use of all or part of an undertaking’s assets; and
- rights or the signing of contracts, which grant decisive influence over the composition or decision-making of an undertaking’s corporate bodies.

**Excluded operations.** The following does 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 their resale, provided 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 one year (however, this deadline may be extended by the Authority); and
- the **acquisition by the Portuguese State of a controlling shareholding in a credit institution, or the transfer of its business to a transition bank as ordered by the Bank of Portugal**, in the context of the rules on bank recapitalisation and resolution contained in Law 63-A/2008, of 24 November 2008, and Decree-Law 298/92, of 31 December 1992, both as amended.

## 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 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 identified in question 2.4 below are met.

Where the creation of the joint venture has the object or effect of co-ordinating 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 closely follow 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 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 the 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 a substantial part of it.
- **De minimis market share threshold.** Even if the standard threshold is not met, the creation or reinforcement of a share of 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 closely follow 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.
- **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 prior 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%-plus share in a relevant product market in Portugal, 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. If the target has a 30%-plus share, the threshold will be met if the target and at least another undertaking concerned achieved a turnover of at least €5 million in Portugal in the previous year.
- **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%.
- **Future market share.** If the target is a recently created company which, prior to or at the time of the acquisition had no activity in the relevant market, the Authority may consider, for the purposes of determining its jurisdiction,

the estimated market share of such company in the foreseeable future, taking into account, *inter alia*, its estimated capacity.

- **Change of control over joint ventures.** 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.
- **Market share calculation.** When more than one independent source on market dimension and market share estimates 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.

### 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 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 3.11 below).

### 2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction (“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, the Act may apply whenever both parties or the target alone (regarding market share notification thresholds, see question 2.4 above) achieve, directly or indirectly, sales in Portugal, despite the fact that neither of the undertakings concerned is established 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.

“Foreign-to-foreign” transactions have traditionally represented a significant proportion of the Authority’s caseload; pure “foreign-to-foreign” concentrations represented approximately 31% of final decisions issued in 2019, 22% in 2020 and 17% in 2021.

### 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 of the EC Merger Regulation are potentially applicable (see the European Union chapter in this guide). The Competition Authority has, in the past, asked for the referral of concentrations with a community dimension under Article 9 of the EC Merger Regulation, and several concentrations originally notified to the Authority under the Competition Act have been referred to the European Commission under Article 22 of the EC Merger Regulation; however, in a number of cases, the Commission rejected the request.

### 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 constituting a single transaction if the combined transactions meet the turnover jurisdictional threshold (see question 2.4 above).

The Authority also follows the case law of the European courts and the practice of the European Commission on inter-related 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 by 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 3.4 below). There is no notification deadline, provided the standstill obligation is respected (see question 3.8 below).

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

Except for the applicability of the EC Merger Regulation to the transaction (either because the EU jurisdictional thresholds are met or because the transaction was referred to the Commission pursuant to the referral mechanisms mentioned in question 2.7 above), there are no exceptions. Whenever a concentration meets the criteria for prior mandatory notification, a clearance decision from the Competition Authority is necessary before the operation can be implemented.

### 3.3 Is the merger authority able to investigate transactions where the jurisdictional thresholds are not met? When is this more likely to occur and what are the implications for the transaction?

No. The Competition Authority does not have jurisdiction under merger control rules to review transactions where the jurisdictional thresholds are not met. In theory, a concentration could also be caught by the rules on the abuse of a dominant position, pursuant to the EU Continental Can case law, although the likelihood of the Competition Authority challenging a concentration under the abuse of dominance rules is very low.

### 3.4 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 aggregated worldwide turnover (which includes all entities forming part of the same economic unit) 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). 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 five years in violation of the Act and order the parties to notify. Such investigation, which may also be opened if a clearance decision of the Authority was based on false or incorrect information provided by the parties, or if the parties disregarded conditions or obligations imposed by the Authority, entails the following negative consequences for the undertakings concerned:

- the *filing fees increase* to double the amount originally due (see question 3.13 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 may be subject to fines of up to 10% of their annual income.

**Increased exposure to fines due to the implementation of the ECN+ Directive.** As noted in question 1.2 above, the Competition Act was recently amended in the context of the transposition of ECN+ Directive. According to the amended Competition Act currently in force, entities forming part of the same economic unit as the infringing entity as of the date of the infringement and exerting upon it, directly or indirectly, significant influence, as well as economic successors of the infringing undertaking, may also be deemed liable for the infringement. Entities that hold 90% or more of the infringing entity's share capital are presumed to exert significant influence over the latter.

### 3.5 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 any decisional practice exist in this regard. The possibility of suspending the completion of a global transaction in Portugal, therefore, could only be analysed on a case-by-case basis. If the target carries out all its activities in Portugal through a local subsidiary, the carving out of such subsidiary from the transaction would seem possible. In other cases, it would appear 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 standstill obligation may be exceptionally waived by the Authority following a reasoned request from the parties (see question 3.8 below).

### 3.6 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 permits 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 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, enable 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, especially if there are doubts as to the concept of "concentration" (it is doubtful that the Authority will give legal comfort on the jurisdictional requirements prior to filing, especially when it requires a market definition assessment); (ii) to verify whether 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 typically consists of one or more meetings and subsequent informal information requests.

### 3.7 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 comprises 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 by tight deadlines in both phases of the procedure: if no decision is issued within the set deadlines, a non-opposition decision is deemed to have been adopted. However, since these time limits are suspended whenever the Authority requests additional information from the parties and hears the notifying parties and other interveners, deadlines are invariably extended. All deadlines set by the Competition Act on merger control procedure are expressed in *working days*.

**Phase 1 investigation.** Within five working days of the date on which the notification is effective, the Authority publishes a summary of the notification in two national newspapers, at the expense of the notifying parties, and on its website, so that any interested third parties may present their comments within the time period set by the Authority (at least 10 working days). A notification only becomes effective after payment of the fee due by the parties (see question 3.13 below) and, if it is not considered incomplete by the Authority, within seven 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 when 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 subject to mandatory filing; (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 and decide the case in less than 30 working days (see question 3.10 below). The Authority cannot block a merger in Phase 1; however, in one media sector case, the Authority controversially prohibited the concentration at the end of Phase 1 further to a negative binding opinion from the media sectoral regulator (*Ongoing/Prisa/Media Capital* (Ccent. 41/2009, 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 the entirety of the 30-day deadline was used in Phase 1, in Phase 2 the Authority will only have 60 working days); however, 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, by up to a maximum of 20 working days.

In Phase 2, the Authority must conduct a hearing of the parties (a procedural step which is usually initiated by the issuance of a draft final decision) within 75 working days from notification. In addition, 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.

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 a period of 10 days to submit initial observations (see above) and to the period of the 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 six prohibition decisions: *Arriva/Barraqueiro* (Ccent. 37/2004, decision of 25 November 2005); *Petrogal/Esso* (Ccent. 45/2004, decision of 14 December 2005); *Brisa/AEO/AEE* (Ccent. 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); *TAP/SPDH* (Ccent. 12/2009, decision of 19 November 2009); *Controlinveste/Zon Optimus/PT* (Ccent. 4/2013, decision of 31 July 2014); and *RBI/Grupo Fundão* (Ccent. 51/2019, decision of 6 October 2020). More recently, in several complex Phase 2 investigations where remedies discussions have proved unsuccessful, the parties have tended to withdraw the notification to avoid the issuance of a prohibition decision.

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 abovementioned 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 to allay the Authority’s concerns suspends the decision deadline for 20 working days, in order 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 (provided the third parties sent observations stating “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 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 make its decision. In the 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).

**3.8 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks of completing before clearance is received? Have penalties been imposed in practice?**

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 make its decision have elapsed. Parties implementing a concentration before clearance are exposed to legal uncertainty as to the legal effects of the transaction and may face serious sanctions (see question 3.4 above). Agreements should, therefore, condition the completion of the transaction to the clearance of the concentration under the Competition Act. There are, however, three 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 before the clearance of the Authority, provided that the acquirer does not exercise the voting rights attached to the securities (alternatively, voting rights may be exercised insofar as necessary to protect the financial value of the investment, if a derogation is requested and granted by the Authority under the terms described below).
- **Individual waiver.** Further to a reasoned request by the notifying parties, presented prior to or subsequently to the notification, the Authority may waive the standstill 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, such as the imminent bankruptcy of the target company.
- **Sale of a troubled bank.** The sale of a bank to an authorised third party pursuant to a resolution measure adopted by the Bank of Portugal under the applicable EU and national legal framework, to ensure the stability of the financial system, can be implemented before notification and clearance of the Competition Authority.

The Competition Authority has already imposed penalties to parties for early implementation (gun jumping) in several cases, with fines ranging from €35,000 to €2.5 million. Gun jumping is a stated priority of the Authority's enforcement action, and in December 2022 the Authority published detailed guidelines on gun jumping. Several gun-jumping investigations are ongoing, and the Authority started five investigations in 2022 alone.

**3.9 Is a transaction which is completed before clearance is received deemed to be invalid? If so, what are the practical consequences? Can validity be restored by a subsequent clearance decision?**

A transaction subject to filing completed before clearance is

received does not produce legal effects in Portugal and, if further prohibited by the Competition Authority, is null and void. 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. See question 3.4 above.

**3.10 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 993/2021, of 8 May 2021, which replaced the previous regulation and intended to simplify the information to be provided to the Authority. The applicable form must be submitted with supporting documentation electronically, using the Authority's online secure platform. In exceptional cases, the Authority might accept that the applicable form is submitted by e-mail. When supporting documentation is in a foreign language, translation may be required; however, documents in English are usually accepted. Straightforward transactions may be filed pursuant to the Simplified Form (see question 3.11 below), and the Authority may waive the requirement for certain information or documents, especially in the context of the pre-notification procedure (see question 3.6 above). While it is necessary to complete all the sections on the Regular Form, the Authority may waive the requirement for certain information or documents upon reasoned request by the notifying party(ies). 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 3.7 above).

**3.11 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 following requirements of Regulation 993/2021, of 8 May 2021, may be notified according to a Simplified Form: (a) there are no horizontal overlaps or vertical or otherwise close relationships between the parties' activities; (b) in horizontal mergers, the combined market share does not exceed 20%, 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 3.7 above). While the Authority does not commit itself to a specific reduced deadline, simplified procedure cases have frequently been decided in less than 20 working days.

**3.12 Who is responsible for making the notification?**

Notification of a full merger must be jointly made by the merging companies. In the case of acquisition of control over one or more undertakings, the notification must be filed by the undertakings acquiring control; however, 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. Joint notifications must be presented by a common representative empowered to send and receive documents on behalf of all the notifying parties.

### 3.13 Are there any fees in relation to merger control?

According to the Competition Act and to Regulation 1/E/2003 of the Authority, of 3 July 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 exceeds €150 million and is below or equal to €300 million; and
- €25,000 if the turnover exceeds €300 million.

An **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 3.4 above).

In addition to filing fees, the notifying parties bear the cost of the mandatory publication of the notice of the concentration in two national newspapers (see question 3.15 below).

### 3.14 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 subsequent to the announcement to the market in accordance with the Securities Code; however, parties can voluntarily present the notification after they have publicly disclosed the intention to launch such bid or offer (see question 3.6 above).

A public offer may be implemented prior to the clearance of the Authority if the acquirer does not exercise any voting rights or exercises those rights further to a waiver granted by the Authority (see question 3.8 above). Finally, certain transactions concerning listed companies are subject to prior disclosure and registration with the securities regulator (see question 1.4 above).

### 3.15 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 five days of submission of a complete notification (see question 3.7 above). The complete notification is not published; however, a 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 EC Merger Regulation. Authorisation is granted to concentrations that do not create an SIEC in the national market or in a substantial part of it. By contrast, concentrations which create an SIEC, in particular, resulting from the creation or reinforcement of a dominant position, are prohibited.

**Assessment criteria.** Concentrations are reviewed to determine their effects on the structure of competition in the relevant market(s). The Competition Act closely follows Article 2(1)(b) of the EC Merger Regulation with regard to the criteria to be considered in the Authority’s substantive assessment, but includes three additional criteria: under the “Essential Facilities” criterion, control over essential infrastructure by the undertakings concerned and the 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 criterion allows for a limited “efficiency defence” (see question 4.2 below); and the third criterion is the 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 “a 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 Competition 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 under 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 if the Government, sitting in the Council of Ministers, decides to reverse a prohibition decision by the Authority. In such case, the strategic fundamental interests of the national economy should be considered by the Minister. Only one of the Authority’s prohibition decisions up to the present was overturned by the Government (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 for public interest reasons 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 the publication of the 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 transaction 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. The hearing suspends the time periods for the adoption of the decision (see question 3.7 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 Competition 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 publication of the notice and the deadline to submit observations, and to the period during the hearing of the notifying and third parties; however, in this case, the time limit for third parties to submit observations will increase to a minimum of 20 working days (see question 3.7 above).

#### 4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

The Authority enjoys broad investigative and sanctioning 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 many 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 which it considers necessary for making its decision (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 replying are usually no longer than 10 working days and are frequently shorter. As noted above, all information requests to the notifying parties stop the clock (see question 3.7 above).

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

**Sanctions.** Failure to supply or the supply of false, inaccurate or incomplete information in response to a request or questioning by the Authority, failure to co-operate, or the obstruction of said powers constitute misdemeanours in the case of individuals, punishable with fines of up to €5,200. The Authority may also decide to apply a periodic penalty payment of up to 5% of the average daily turnover of a company 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; however, the parties may request pre-notification documents to be appended to the case file after submission of the Notification Form.

**Phases 1 and 2.** In the notification and in responses to additional requests, notifying parties must identify information that, in their view, should remain confidential and must 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 Statute 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 on 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 26/2016, of 22 August 2016.

## 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 adopted by the Board of the Competition Authority within the time periods described above (see question 3.7 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 parties 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 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 5.5 below). If the final proposal is agreed upon, the Authority will include conditions and/or obligations in the final decision to ensure compliance with the commitments submitted by the notifying parties (see question 5.7 below).

The Authority will refuse the commitments when it considers that their purpose is merely dilatory or that the 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 does not formally have the powers to unilaterally impose remedies which were not proposed by the parties.

### 5.3 Are there any (formal or informal) policies on the types of remedies which the authority will accept, including in relation to vertical mergers?

The Authority published in July 2011 its Remedies Guidelines. Remedies may be of a structural nature (e.g., sale of assets) or

of a behavioural nature (e.g., ensuring transparent and non-discriminatory access to facilities or services, measures to attenuate switching costs, limitations to exclusivity agreements, among others). In the Remedies Guidelines the Authority stated that divestitures are clearly preferable to behavioural commitments. However, the Authority's practice in this respect seems to reflect a more positive approach to behavioural remedies than the practice of the European Commission, as most of the cases approved, subject to commitments in recent years, have included behavioural remedies.

#### 5.4 To what extent have remedies been imposed in foreign-to-foreign mergers? Are national carve-outs possible and have these been applied in previous deals?

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, of all the decisions with commitments adopted by the Authority since 2003, only one involved a company without assets in Portugal: in *Dräger Medical/Hillenbrand* (Ccent. 44/2003, decision of 5 April 2004), which led to 80%-plus shares in the national markets for incubators and other equipment for newborns, the Authority imposed a set of behavioural remedies to ensure adequate distribution and spare parts of the relevant products.

As noted above (see question 3.5), there are no guidelines from the Authority regarding national carve-outs, nor does any decisional practice exist in this regard.

#### 5.5 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. While 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 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. The current Competition Act limits the suspension of the deadline for the assessment and negotiation of remedies to 20 working days.

#### 5.6 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.

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

Usually, 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 divestitures and behavioural commitments (especially reporting obligations) may take several years following the clearance decision.

The Authority does not exclude that in certain cases, an upfront 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 that 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 of up to 10% of the previous year's worldwide aggregated turnover (which includes all entities forming part of the same economic unit) 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.

#### 5.8 How are any negotiated remedies enforced?

In recent years, most cases decided subject to remedies (see questions 5.2 and 5.5 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 recommend this approach. Drafts of the mandate agreements and proxies (based on European Commission mandate models and adapted to the specificities of Portuguese law) are submitted to the Authority, discussed in the framework of remedies negotiations and annexed to the clearance decision. In this context, the Authority assumes an essentially supervisory role; however, it retains its broad investigatory and sanctioning powers to enforce remedies (see question 5.7 above).

#### 5.9 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 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 ancillary to a concentration.
- **Non-compete obligations between a joint venture and parent companies,** usually exempted during the lifetime of the joint ventures.

- **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.

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

Yes. All 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 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 must ask 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).

**Administrative appeal against a prohibition decision.** Independently from the judicial appeal procedures, concentrations prohibited by the Authority may, nonetheless, be authorised by the Government under an extraordinary appeal mechanism set out in the Statute of the 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 for the Economy within 30 days from the notification of the prohibition decision. The Minister may propose to the full Government sitting in the Council of Ministers to authorise the operation when it benefits fundamental strategic interests of the national economy, which outweigh the restrictions of competition arising from its implementation. The decision, taken through a resolution of the Council of Ministers and published in the Official Journal, must be duly reasoned and must contain conditions and obligations in order to mitigate its negative impact on competition.

The current Statute of the Authority, approved in 2014 (see question 1.2 above), tightened the requirements of this appeal by requiring that the decision be taken by the full Council of Ministers (previously, the competence lay with the Minister for the Economy) and that it must, in any event, include adequate remedies. The first (and so far, the only) time a prohibition decision of the Authority was reversed was in *Brisa/AEO/AEA* (Ccent. 22/2005, Authority's decision of 7 April 2006, Ministerial decision of 8 June 2006).

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

Under the Competition 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 three 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.

#### 5.12 Is there a time limit for enforcement of merger control legislation?

Proceedings for pursuing undertakings found in the infringement of the competition rules are subject to limitation periods of between three and five years, depending on the gravity of the infringement. Similarly, the limitation period set out for fines is between three and 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's decision. Those limitation periods may be suspended or interrupted according to the provisions of the Competition and Misdemeanours Acts, and in particular are suspended indefinitely if the infringement decision is appealed before the courts.

However, the nullity of a concentration implemented in breach of the Competition Act (see question 3.4 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 your jurisdiction liaise with those in other jurisdictions?

The Authority has a close working relationship 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, particularly with the Spanish *Comisión Nacional de los Mercados y de la Competencia*.

The Authority is also an active member of the International Competition Network and of the European Competition Authorities 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 in Africa and South America.

#### 6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

In 2022 the Authority adopted 62 final decisions, which included 54 clearance decisions, one of which with remedies, and four inapplicability decisions. Parties withdrew filings in four additional cases, in three of them after the Authority opened an in-depth investigation. 2023 has become one of the Authority's busiest years in merger enforcement: by end October, the Authority had adopted 65 final decisions and nine cases were under review.

The Authority has also been very active in gun-jumping cases in the last three years, opening several investigations in 2022 alone. It has imposed fines for gun jumping in five cases, *Grupo HPA Saúde/Hospital de Lagos* (2017), *Fidelidade SGOII/Saudeinveste\*IMOFID* (2021), *SFI/White and Green Natural* (2021), *AOC Health/Stemlab* (2021) and *SCML/SG HCV* (2022). The Authority also published detailed guidelines on best practices regarding gun jumping in December 2022.

Finally, in 2022, the average time period for the Authority to clear transactions was 29 days; however, in straightforward cases, clearance decisions may be issued in less than four weeks from notification.

### 6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

The Portuguese merger control regime was subject to a significant reform in 2012, with the approval of the new Competition Act (Law 19/2012, of 8 May 2012), and more recently amended by Law 17/2022, of 17 August 2022 to implement the ECN+ Directive. While this recent amendment does not include substantial changes to the merger control rules, it provides for increased exposure to fines in case of breach of the standstill obligation (see question 3.4 above).

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

This chapter is up to date as at 31 October 2023.

## 7 Is Merger Control Fit for Digital Services & Products?

### 7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

In July 2019, the Competition Authority released an Issues Paper on *Digital Ecosystems, Big Data and Algorithms*. Among other issues, the Issues Paper highlighted that the incentives of incumbents to protect their ecosystem may trigger strategies aimed at promoting the persistence of market power and limiting contestability and potential competition.

Concerning merger control, according to the Authority, an incumbent platform may “close the entry point” to the market through an aggressive strategy of acquiring small and potential rivals. These pre-emptive mergers may aim at expanding/strengthening the ecosystem by incorporating products/services or discontinuing/limiting the introduction of new products (killer acquisitions). One of the challenges for competition policy in the digital era is avoiding the risk that pre-emptive mergers escape

competition authorities’ merger control for not meeting notification thresholds, namely when the turnover of the target firm is small. One of the issues discussed is the need to adjust the notification criteria foreseen in the legal frameworks for competition to capture these mergers, particularly those that harm competition.

In this regard, the Authority referred to the statement of 19 June 2019 of European Commissioner Vestager to the effect that, for the European Commission, it is important to investigate the adequacy of introducing additional notification criteria linked to the value of the merger, as was the case in Germany and Austria.

However, the Issues Paper does not propose or advocate any changes to the merger control rules in Portugal.

In December 2022 the Authority has also published a paper on competition enforcement in the digital sector in Portugal, which does not focus specifically on merger control issues.

### 7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

No, there have been no such changes (see above).

### 7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

To our knowledge, there has been to date only two merger cases in Portugal involving the digital economy, *Fixe Ads/Custo Justo* (Ccent. 26/2015), between two online platforms for advertisements, sales and auctions, and *DH/GLOVO* (Ccent. 61/2021). In *Fixe Ads/Custo Justo* the notification was withdrawn while still in Phase 1, further to the issuance of a draft decision raising anti-competitive concerns and initiating Phase 2. In *DH/GLOVO* the Authority considered that the transaction did not meet the thresholds for mandatory filing. In any case, digital mergers may be caught by merger control rules in Portugal on the basis of the parties’ estimated market shares and the Authority’s expansive interpretation of the market share threshold.



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Morais Leitão, Galvão Teles, Soares da Silva & Associados ("Morais Leitão") is an independent full-service law firm and one of the recognised leading firms in Portugal, with more than 270 lawyers and offices in Lisbon, Porto, Funchal (Madeira) and Singapore. 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 the Morais Leitão Legal Circle, an association with leading law firms in Angola, Cape Verde and Mozambique. We are the sole Portuguese member of Lex Mundi, the world's leading association of independent law firms, and maintain close contact with major law firms in Europe, South America and the United States.

Our EU and Competition Law departments, based in Lisbon and Porto, is one of the leading EU and Competition practices in Portugal. We advise and represent clients in the majority of high-value national and cross-border transactions, disputes and competition agencies' investigations in

or concerning Portugal, involving multinational corporations, financial institutions, the Portuguese Government and respective agencies, as well as domestic corporations. We have extensive experience representing clients in 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.

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