The Merger Control Review

Second Edition

Editor
Ilene Knable Gotts

Law Business Research

The Merger Control Review

SECOND EDITION

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Merger Control Review,
2nd edition (published in November 2011 – editor Ilene Knable Gotts).

For further information please email Adam.Sargent@lbresearch.com

The Merger Control Review

Second Edition

Editor
Ilene Knable Gotts

Law Business Research Ltd

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Nick Barette, Katherine Jablonowska

MARKETING ASSISTANT
Robin Andrews

EDITORIAL ASSISTANT
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITORS
Joanne Morley, Davet Hyland

SUBEDITOR
Caroline Rawson

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2011 Law Business Research Ltd
© Copyright in individual chapters vests with the contributors
No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of November 2011, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-907606-22-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ACCURA ADVOKATPARTNERSELSKAB

ADVOKATFIRMAN CEDERQUIST KB

ADVOKATSKO DRUZHESTVO ANDREEV, STOYANOV & TSEKOVA in cooperation with SCHOENHERR

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALTIUS

ANDERSON MŌRI & TOMOTSUNE

ANDREAS NEOCLEOUS & CO LLC

BARNERT EGERMANN ILLIGASCH RECHTSANWÄLTE GMBH

BLAKE, CASSELS & GRAYDON LLP

BLAKE DAWSON

BREDIN PRAT

CLIFFORD CHANCE LLP

COCALIS & PSARRAS

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ, SC

CUATRECASAS, GONÇALVES PEREIRA

DILLON EUSTACE

EDWARD NATHAN SONNENBERGS

ELIG, ATTORNEYS-AT-LAW

HOUTHOFF BURUMA

KING & WOOD

LANNA PEIXOTO ADVOGADOS

LCS & PARTNERS

LUTHRA & LUTHRA LAW OFFICES

MARVAL, O'FARRELL & MAIRAL

MORAVČEVIĆ VOJNOVIĆ ZDRAVKOVIĆ
IN COOPERATION WITH SCHOENHERR

MOTIEKA & AUDZEVICIUS

NCTM

PELIFILIP

PELLEGRINI & URRUTIA ABOGADOS

ROSCHIER ATTORNEYS LTD

SCHOENHERR

SLAUGHTER AND MAY

SRS – SOCIEDADE REBELO DE SOUSA
& ADVOGADOS ASSOCIADOS, RL

TAVERNIER TSCHANZ

WACHTELL, LIPTON, ROSEN & KATZ

WDA LEGAL, SC

WIESNER & ASOCIADOS ABOGADOS

WONGPARTNERSHIP LLP

YULCHON, ATTORNEYS AT LAW

CONTENTS

Editor's Preface vii
Ilene Knable Gotts

Chapter 1 ARGENTINA 1
Alfredo O'Farrell and Miguel del Pino

Chapter 2 AUSTRALIA 15
Peter Armitage, Amanda Tesvic and Ross Zaurrini

Chapter 3 AUSTRIA 29
Isabella Hartung and Wolfgang Strasser

Chapter 4 BELGIUM 39
Carmen Verdonck and Louise Depuydt

Chapter 5 BOSNIA & HERZEGOVINA 51
Christoph Haid and Srđana Petronijević

Chapter 6 BRAZIL 61
Bruno L Peixoto

Chapter 7 BULGARIA 69
Christoph Haid and Mariya Papazova

Chapter 8 CANADA 78
Julie A Soloway and Cassandra Brown

Chapter 9 CHILE 93
Julio Pellegrini and Pedro Rencoret

Chapter 10 CHINA 102
Susan Ning

Chapter 11 COLOMBIA 109
Dario Cadena Lleras and Eduardo A Wiesner

Chapter 12 CROATIA 117
Christoph Haid

Chapter 13 CYPRUS 125
Elias Neocleous and Ramona Livera

Chapter 14 DENMARK 135
Christina Heiberg-Grevy and Malene Gry-Jensen

Chapter 15 EUROPEAN UNION 141
Tony Reeves and Ashwin van Rooijen

Chapter 16 FINLAND 151
Niko Hukkinen

Chapter 17 FRANCE 160
Hugues Calvet and Olivier Billard

Chapter 18 GERMANY 175
Marc Besen and Albrecht von Graevenitz

Chapter 19 GREECE 184
Alkiviades C A Psarras

Chapter 20 HUNGARY 193
Christoph Haid and Anna Turi

Chapter 21 INDIA 203
Rajiv K Luthra and G R Bhatia

Chapter 22 INDONESIA 214
Theodoor Bakker & Luky I Walalangi

Chapter 23 IRELAND 225
Lorcan Tiernan and Kate Price

Chapter 24 ITALY 237
Luca Toffoletti and Emilio De Giorgi

Chapter 25 JAPAN 247
Yusuke Nakano, Vassili Moussis and Kentaro Hirayama

Chapter 26 KOREA 257
Sai Ree Yun, Seuk Joon Lee and Kyoung Yeon Kim

Chapter 27 LITHUANIA 265
Giedrius Kolesnikovas, Emil Radzihovsky and Beata Kozubovska

Chapter 28 MEXICO 275
Luis Gerardo García Santos Coy, José Ruíz López and Mauricio Serralde Rodríguez

Chapter 29 NETHERLANDS 286
Berend Reuder and Weijer VerLoren van Themaat

Chapter 30 PORTUGAL 295
Gonçalo Anastácio and Maria João Duarte

Chapter 31 ROMANIA 305
Carmen Peli, Carmen Korsinszki and Andra Gunescu

Chapter 32 SERBIA 317
Christoph Haid and Srđana Petronijević

Chapter 33 SINGAPORE 328
Ameera Ashraf

Chapter 34 SOUTH AFRICA 337
Lee Mendelsohn

Chapter 35 SPAIN 350
Cani Fernández, Andrew Ward and Albert Pereda

Chapter 36 SWEDEN 362
Fredrik Lindblom and Amir Mohseni

Chapter 37 SWITZERLAND 369
Silvio Venturi and Pascal G Favre

Chapter 38 TAIWAN 377
Victor Chang, Margaret Huang and Christy Lin

Chapter 39 TURKEY 388
Gönenç Gürkaynak and K Korhan Yıldırım

Chapter 40 UKRAINE 397
Christoph Haid and Pavel Grushko

Chapter 41 UNITED KINGDOM 402
Michael Rowe and Jordan Ellison

Chapter 42 UNITED STATES... 413
Ilene Knable Gotts

Chapter 43 VENEZUELA.. 421
Hernando Díaz-Candia and Arghemar Pérez-Sanguinetti

Appendix 1 ABOUT THE AUTHORS 428

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS... 454

EDITOR'S PREFACE

Perhaps one of the most successful exports from the United States has been the adoption of mandatory pre-merger competition notification regimes in jurisdictions throughout the world. Although adoption of pre-merger notification requirements was initially slow – with a 13-year gap between the enactment of the United States' Hart-Scott-Rodino Act in 1976 and the adoption of the European Community's merger regulation in 1989 – such laws were implemented at a rapid pace in the 1990s, and many more were adopted and amended during the past decade. China and India have just implemented comprehensive pre-merger review laws, and although their entry into this forum is recent, it is likely that they will become significant constituencies for transaction parties to deal with when trying to close their transactions. Indonesia also finally issued the government regulation that was needed to implement the merger control provisions of its Antimonopoly Law. This book provides an overview of the process in jurisdictions as well as an indication of recent decisions, strategic considerations and likely upcoming developments in each of these. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

As shown in further detail in the chapters, some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the outliers in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany also provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are a few jurisdictions, however, that still use 'market share' indicia (e.g., Colombia, Lithuania, Portugal, Spain, the United Kingdom). Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom, Venezuela), the vast majority impose mandatory notification requirements. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory

regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Some jurisdictions impose strict time frames by which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Brazil requires that the notification be made within 15 business days of execution of the agreements; and Hungary and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Many jurisdictions have the ability to impose significant fines for failure to notify (e.g., the Netherlands, Spain and Turkey). Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Serbia) for mandatory pre-merger review by federal antitrust authorities. Very little has changed in the US process in the three decades since its implementation, but some aspects of the US process have been adopted by other jurisdictions. For instance, Canada has recently transformed its procedure to resemble the US style of review, with a simplified initial filing, a 30-day period to issue a detailed information request and the waiting period tolled until the parties comply with the request. Germany and Canada have adopted a procedure, similar to the US, under which parties can 'reset the clock' by withdrawing and refiling the notification. Offers to resolve competitive concerns are only considered by the US after the more detailed investigation has been carried out. The US, Canadian and (although in other respects following the EU model) Swedish authorities must go to court to block a transaction's completion. Both jurisdictions can seek to challenge a completed merger, even if that transaction has already been reviewed pre-merger by the relevant authority, although in Canada, such challenges must be brought within one year of closing, while in the US there is no statute of limitations.

Most jurisdictions more closely resemble the European Union model. In these jurisdictions, pre-filing consultations are more common, parties can offer undertakings during the initial stage to resolve competitive concerns, and there is a set period during the second phase for providing additional information and the agency reaching a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review.

The permissible role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in Tribunal merger hearings and the Tribunal will typically permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection against a clearance.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. Other jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU, however, that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved

undertakings has sales in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, EU and Canadian authorities to work closely with one another during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with that in Brazil, and Brazil's CADE has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Serbia, Montenegro and Slovenia similarly maintain close ties and cooperate on transactions. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011, and the US has also announced plans to enter into a cooperation agreement with India.

Minority holdings and concern over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, seem to be gaining increased attention in many jurisdictions, such as Australia. Some jurisdictions will consider as reviewable acquisitions in which only 10 per cent interest or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Russia, at any amount exceeding 20 per cent of the target). Jurisdictions will often require some measure of negative (e.g., veto) control rights, to the extent that it may give rise to *de jure* or *de facto* control (e.g., Turkey).

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the merger worldwide even though less than 10 per cent of each of the undertakings was attributable to Germany. Thus, it is critical from the outset for counsel to develop a comprehensive plan to determine how to navigate the jurisdictions requiring notification, even if the companies operate primarily outside some of the jurisdictions. This book should provide a useful starting point in this important aspect of any cross-border transaction being contemplated in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
November 2011

Chapter 30

PORTUGAL

*Gonçalo Anastácio and Maria João Duarte**

I INTRODUCTION

The Portuguese Competition Authority ('the PCA') has exclusive jurisdiction to enforce the merger control rules established in the Competition Act (Law 18/2003 of 18 June).[1] Only 'concentrations', as defined in Article 8 of the Competition Act, which meet one of the notification thresholds established in Article 9/1, are subject to merger control review. The basis of the concept of concentration lies in the notion of change of control on a lasting basis.

The definition of 'control' adopted in Article 8/3 of the Competition Act is similar to that used in the European Merger Control Regulation ('the ECMR'): the possibility of exercising decisive influence on an undertaking. Therefore, the following transactions are qualified as a merger:

a the merger between two hitherto independent undertakings;
b the acquisition of sole control or joint control of an independent undertaking;
c the change from sole to joint control and from joint to sole control;
d the acquisition of a full-function joint venture; and
e the creation of full-function joint venture.

It follows that the acquisitions or the mergers between undertakings belonging to the same economic group do not constitute a 'concentration' and that the acquisition of a minority shareholding may constitute a merger, but only if it confers control.

* Gonçalo Anastácio is a partner and Maria João Duarte is an associate lawyer at SRS – Sociedade Rebelo de Sousa & Advogados Associados, RL.

1 As amended by Law 219/2006 of 2 November, Decree-Law 18/2008 of 29 January, Law 52/2008 of 28 August and Law 46/2011 of 24 June.

In a recent case,[2] the PCA considered that a reduction in the number of controlling shareholders (from four to two) is a concentration representing a change in the quality of control since the transaction would imply a significant change of the controlling shareholders' powers and incentives and, therefore, a change on the nature of the joint control structure. The object of control in these cases may be legal entities, the assets of such entities or some of these assets, as long as they represent a business with a market presence to which a market turnover can be clearly attributed (e.g., brands[3] and clients[4]). The PCA has considered that even legal entities, which do not develop any economic activity at the time of the notification, may constitute an undertaking when they are expected – with a high degree of certainty – to start activities in a reasonable period of time. Conversely, even when the activity of the assets or legal entity acquired is expected to be discontinued, they are qualified as an 'undertaking'.

Article 8/3 of the Competition Act specifies that control may be acquired by different means. In other words, a concentration may have legal or a *de facto* basis.[5] It should also be mentioned that the PCA follows the thinking of the European Commission regarding interrelated transactions, considering that two or more transactions constitute a single concentration when they are linked by mutual conditionality.[6]

While the notion of concentration follows closely the definition adopted by the ECMR, there are some differences regarding the operations that the Competition Act exempts from the obligation to notify, considering that they do not constitute a concentration:

a acquisition of shareholdings or assets under the terms of a special process of corporate rescue or bankruptcy;

b acquisition of shareholdings or assets as merely a form of guarantee; and

c acquisition of shareholdings in non-financial undertakings by credit institutions, when the acquisition is expressly limited to a maximum period of three years or does not exceed 25 per cent of the voting rights.

The Competition Act establishes a mandatory notification system for concentrations that meet at least one of two alternative notification thresholds:

a the aggregate combined turnover of the involved undertakings in Portugal exceeds €150 million, after deduction of taxes directly related to the turnover, and provided that the individual turnover achieved in Portugal in the same period by at least two of these undertakings exceeds €2 million; or

b the implementation of the concentration 'creates or reinforces a share exceeding 30 per cent in the national market for a particular good or service, or in a substantial part of it'.

2 Case 32/2010 – *MSF*Lena Construções/AEO*.

3 Case 3/2009 – Schweppes/ Assets SCC (brands Joi and Spirit).

4 Case 44/2007 – *SONAECOM/* Assets ONI.

5 Case 30/2007 – *Bencom/NSL*, in which the PCA established control on a *de facto* basis.

6 Case 15/2008 – *Top Atlântico/Activos Policarpo/Activos Portimar*.

It should be borne in mind that concentrations with an EU dimension will fall under the jurisdiction of the European Commission rather than the PCA.

When a merger is subject to mandatory notification, it cannot be implemented before a non-opposition decision is issued by the PCA. However, Article 11(3) and (4) of the Competition Act establishes two exceptions to the standstill clause: in public bids, provided that the acquirer does not exercise the voting rights acquired;[7] and when the negative consequences for the undertakings of suspending the concentration outweigh the potential negative effects on competition of its implementation (subject to a reasoned request by the notifying parties). This only occurs in very exceptional circumstances, usually in cases of the imminent bankruptcy of one of the parties.[8]

The infringement of this standstill rule and the failure to notify a merger on the established deadline constitutes an administrative offence punishable with fines up to, respectively, 1 per cent and 10 per cent of the preceding year's turnover of the undertaking subject to the obligation to notify. Also, the validity of a merger implemented in breach of a standstill clause is dependent upon the subsequent authorisation of the concentration.

II YEAR IN REVIEW

In 2010, despite the national economic context, there were more mergers notified to the PCA (62) than in 2009 (52). All of the PCA decisions on mergers in 2010 were adopted during the first phase of investigation, even though two were cleared with remedies[9] and another was an opposition decision.[10]

The chart below summarises the activity in 2010 by type of decision and investigation:

Type of decisions	*Number of decisions*
Notifications	62
Decisions	59
Phase I decisions	59
Phase II decisions	0
Non-opposition decisions	53
Non-opposition decisions with remedies	2
Opposition decisions	1
Decisions of non-applicability	2
Referred to the Commission	1

7 Case 44/2009 – *Metso/Tamfelt*.

8 Case 11/2006-Ibersuizas/UEE, Case 11/2019-Triton/Stabilus, Case 44/2009 Metso/Tamfelt, Case 5/2011 – *FCR/Grupo MIF* (the first waiver granted before formal notification to the PCA) and Case 18/2011 – *FCR/Coelima*JMA*A. Almeida & Filhos*.

9 Case 21/2010 – *EDP/Greenvouga* and Case 25/2010 – *SC Johnson/Sara Lee's Insecticides and repellents business*.

10 Case 41/2009 – *Ongoing/Prisa/Media Capital*.

i Case 41/2009 – *Ongoing/Prisa/Media Capital*

The single opposition decision, adopted on 30 March 2010, is relevant to understanding the relationship between the PCA and sector regulators. Also, it is an important decision because it was issued during the first phase of the investigation and not in the second phase, as provided by Article 37(1)(b) of the Competition Act. The case concerns the planned acquisition of joint control of Media Capital, by Ongoing and Prisa.[11] Prisa already owned 95 per cent of Media Capital, operating mainly in the television (through TVI, one of the two Portuguese FTA television private channels) and radio sectors. After the planned transaction, it would maintain a controlling participation in this media company. In turn, the proposed acquirer – Ongoing – also operated in the media sector, owning online financial publications, the daily newspaper *Diário Económico* and 23 per cent of Impresa, which owns newspapers, magazines and SIC, the second national private television channel.

Taking into account the fact that the participating companies were subject to sector regulation, the PCA, in compliance with Article 39(1) of the Competition Act, made a request to ERC (the media regulator) and ICP-ANACOM (the electronic and postal communications regulator) for their opinions on the merger operation under analysis. The ERC's opinion,[12] unlike those issued by other regulators, is binding on the PCA when it opposes the execution of a merger, and in this case, the ERC expressed 'its opposition to the merger project notified' due to its negative impact on the plurality and diversity of the media, resulting from Ongoing's simultaneous holding shareholdings in Impresa and Media Capital. In the view of this binding opinion, the PCA issued its final opposition decision in order to protect the superior public interest in safeguarding diversity and pluralism, irrespective of what the conclusion of the assessment would have been under competition law. This was the first time that the authority has adopted a decision opposing a merger based on a negative binding opinion issued by a sector regulator.

The PCA acted under Article 17(1)(b) of its Statutes, approved by Decree-Law 10/2003 of 18 January, and on the basis of Article 107 of the CAP (Code of Administrative Procedure), combined with Article 39 of the Competition Act and Article 4(2) of Law 32/2003 of 22 August.

The PCA's decision, however, raises some questions, given that there are no indications in the Competition Act, or any other regulators' acts, regarding the effect of a negative binding opinion on a merger control procedure, nor a specific legal basis for the adoption of a Phase I opposition decision. It could be argued that the PCA should have adopted a decision declaring the extinction of the merger control administrative procedure, since its purpose became void, due to the opinion of the sector regulator, instead of adopting an opposition decision in Phase I of the procedure.

11 Ongoing intended to acquire a minority shareholding of Media Capital (35 per cent), which would confer control of the company, based on the projected shareholders' agreement.

12 The binding nature of the opinion of the ERC is established in Article 4(2) of the previous Television Act (Law No. 32/2003 of 22 August).

ii Case 21/2010 – *EDP/Greenvouga*

This was the most interesting case decided by the PCA in 2010, not only for the complex and innovative economic analysis underpinning the decision and the necessity of the remedies adopted, but also because the PCA clarifies its understanding regarding the market share notification threshold.

The transaction under analysis was the acquisition by EDP of the sole control of Greenvouga, a company jointly controlled by EDP and Martifer, intended to run two hydroelectric power stations, which had not yet initiated their activities at the time of the notification. Therefore, the transaction was a change from joint to sole control of Greenvouga by EDP.[13]

Despite arguments submitted by EDP that the merger did not meet the market share notification threshold, the PCA considered that this threshold was met based on the fact that EDP had an estimated market share significantly above 30 per cent in 2009 and in 2014 (i.e., the year in which the acquired power stations were expected to commence activities) taking into account the estimated market shares of the target in terms of production capacity and even value of sales, bearing in mind that one of the hydroelectric power stations was subject to a special regime.[14]

It should be mentioned that the PCA clarified that only in specific circumstances and in some relevant markets (e.g., where the entry and the licensing is planned in the long term or where the production capacity of the assets is predetermined) is it possible to estimate with a high degree of certainty the future market shares of the participating undertakings. Moreover, the PCA clarifies that, even in situations of changing from joint to sole control, there is a reinforcement of the share attributed to the acquiring company as a result of the 'strengthening' of this company's control over the target.

In the economic analysis developed in this decision, the PCA explained how the incentives of Greenvouga would change as a result of the acquisition, arguing that the change in control of Greenvouga would affect its participation in the day-ahead market (system-adjustment services), causing a possible increase in prices resulting from the tender. The commitment accepted as a condition to the approval of this merger consists, under some conditions, of an obligation for EDP to participate in the day-ahead market. The terms of the mandatory offers to be submitted are outlined in the text of the commitments.

Considering that the acquired hydroelectric power stations will only commence their activities some years after the decision, the commitments will only be effective after this date. Moreover, the PCA has conditioned the applicability of the commitments to confirmation at the target date of whether EDP is still indispensable in order for the demand in the day-ahead market to be met.

---

13 EDP is the main player operating in Portugal, in the electricity sector, being active in the production, marketing and distribution of electricity.

14 Applicable to the production of renewable energy, according to which the energy produced is necessarily acquired at a fixed tariff.

iii Case 25/2010 – *SC Johnson/Sara Lee's Insecticides and repellents business*

This case concerns the proposed acquisition of the Sara Lee's household insecticide unit by SC Johnson[15] and was initially notified for regulatory clearance in Spain and Portugal as the turnover of the merging parties did not meet the EU threshold.

Spain, and subsequently other affected countries (Belgium, Greece, France, the Czech Republic and Italy), submitted a referral request pursuant to Article 22(1) of the ECMR. Portugal, however, decided not to join the referral request, maintaining its original jurisdiction, along with the EU jurisdiction to assess the effects of the merger in other countries.

In its decision, the PCA concludes that the proposed merger would likely create or strengthen a dominant position, resulting in a significant obstacle to effective competition in the relevant product markets defined in the household insecticides sector: flying insect killers, crawling insect killers and anti-moth. This conclusion was mainly based on the high joint market shares of the participating undertakings and their possible development, the high degree of concentration, the significant relevance of the brands used by the participating undertakings ('Dum-Dum', 'Bayer', 'Baygon') and evidence demonstrating that SC Johnson and Sara Lee products' are close substitutes.

The PCA approved the transaction subject to a divestment commitment of the 'Dum-Dum' brand and all the assets related with the household insecticides business using it. The period established for the conclusion of the divestment would start, at the latest, on the date of the final decision of the European Commission in the parallel case.[16] However, after the European Commission decision to open an in-depth investigation in this case, SCJ withdrew its notification.

III THE MERGER CONTROL REGIME

The formal merger control procedure begins with the submission of a complete filing before the PCA within seven working days of the following triggering events: the agreement (i.e., when the parties agree to be bound to the essential elements of the transaction), the announcement to the market of a takeover bid and an exchange offer or the submission of a bid.

The notifying party may submit the notification before the triggering event, as long as, according to PCA practice, the parties have already signed a promissory agreement or a memorandum of understanding. However, even before submitting a formal notification form, the notifying parties may hold informal and confidential contacts with the PCA[17] to discuss whether the transaction is subject to notification and what information needs to be provided in the notification form in order to avoid subsequent information requests (which

15 SC Johnson is a US-based corporation specialising in the manufacture, development and distribution of household cleaning products. Sara Lee is a US-based corporation specialising in the manufacture and marketing of a wide range of consumer goods, including household insecticides.

16 M.5969 – *SC Johnson & Son, Inc/Household Insect Control Business of Sara Lee Corporation.*

17 The Pre-notification Guidelines of 3 April 2007.

would suspend the deadlines of the procedure), and potential competition issues raised by the transaction. The notifying parties should initiate the pre-notification contact no later than 15 working days before the triggering event.

The notification should be submitted according to the official form approved by the PCA by Regulation 120/2009 of 29 February 2009. Some 'essential' information must be provided so that the notification may be considered complete.

The PCA must reach a decision during the first phase within no more than 30 working days after the submission of a complete notification and payment of the notification fee.[18] Where the transaction raises serious competitive concerns, the PCA may open an in-depth investigation, which must be concluded within no more than 60 working days, in addition to any days not used by PCA during the first phase. Furthermore, these procedural deadlines are suspended whenever the Authority requests any additional information from the notifying party. During the second phase of investigation, the deadlines cannot be suspended by requests of additional information for more than 10 days. The PCA understands this limitation, introduced by Law 219/2006 of 2 November, to apply to each separate information request (which must be answered within 10 working days), without any restriction on the number of the requests that the PCA may issue during a second phase.

In straightforward cases,[19] even if there is no short-form notification or established simplified procedure, the parties may benefit from a 'simplified decision' procedure, introduced in 2007, which allows for clearance in a shorter period of time. Several simplified procedure cases have been decided in less than 20 working days, and in 2010, the PCA adopted six such decisions.

The PCA assesses the merger according to the substantive test of dominance although the list of factors to be considered provided in Article 12 of the Competition Act includes not only competition issues but also elements of economic policy, such as the contribution of the merger to international competitiveness of the Portuguese economy, and the protection of the fundamental interests of the national economy.

When the PCA identifies competition concerns, the notifying parties, on their own initiative, may submit commitments, in any phase of the procedure (but preferably before the hearing of the interested parties),[20] in order to resolve any competition concerns identified by the PCA and thereby clear the merger. Following the submission of commitments by the notifying party, they will be informally negotiated with the PCA in order to ensure that the remedies to be adopted are effective, sufficient and adequate to the competition concerns identified. Until recently there were no guidelines regarding both the procedure to be followed on the submission, and the negotiation of commitments, and the requirements they must fulfil to enable the PCA to clear the

18 Regulation 1/E/2003 on Fees Payable for the Appraisal of Concentrations.

19 In its simplified 'decision statement' of 24 July 2007, the PCA identifies some cases that are candidates for a shortened decision, such as transactions whose effects in Portugal are *de minimis* or from which no significant horizontal or vertical effects arise.

20 Case 37/2004 – *Arriva/Barraqueiro*, in which the PCA rejected the package presented by the notifying party, in part because they were submitted during the second hearing.

merger. In July 2011, and following a public consultation, the PCA published its final guidelines on the adoption of commitments in merger control.

In its assessment of a merger, the PCA also verifies if any clause of the merger agreement introduces a competition restriction, assessing whether the potential restrictions are directly related and necessary to the implementation of the concentration. If this is the case, the identified restrictions are qualified as ancillary restrictions and, therefore, covered by the approval decision.

According to Article 38 of the Competition Act, the PCA must hear the notifying parties and any interested parties before adopting a final decision (an opposition decision, an approval decision with remedies or a decision to open an in-depth investigation). To qualify as an interested party, they have 10 working days after publication of a notice in two national newspapers to submit their observations, opposing the transaction.

The PCA hears the notifying parties in both phases of the procedure. For this purpose, the time period for the adoption of a final decision is suspended for no less than 10 working days. While the notifying parties may have access to the PCA's file (non-confidential) at any moment of the procedure, the PCA only allows interested parties to have access to file during the 10 days after the publication of the notification notice and in the hearing periods.

As referred above, in merger cases taking place in industries subject to sector regulation, the PCA must request the opinion of the sector regulators on the merger before adopting a final decision, in both phases of the procedure. The opinion of the sector regulator has a non-binding nature, with exception of the ERC.

All decisions taken by the board of this administrative authority are presently appealed before the commercial court with jurisdiction over the place of the applicants' headquarters. However, a new Tribunal was recently created (by Law 46/2011 of 24 June) with special competence on competition, regulatory and supervision matters, which will have jurisdiction in the first instance throughout the entire country. Furthermore, according to the extraordinary appeal procedure, set out in the PCA Statutes the decision prohibiting a merger may be appealed before the Minister for the Economy, who may authorise it when the benefits for fundamental national economic interests compensate for the restrictions of competition arising from it.

IV OTHER STRATEGIC CONSIDERATIONS

i Coordination with other jurisdictions

The PCA participates actively in fora such as the International Competition Network and the European Competition Authorities ('the ECA'). In the framework of ECA, the PCA is informed of the mergers notified in other Member States with a potential impact in Portugal. Furthermore, in case of multi-jurisdictional notifications, the PCA is proactive in trying to coordinate its position and the procedural deadlines with others.

The PCA normally follows merger cases with EU dimensions, under the jurisdiction of the European Commission, particularly when they have potential effects in Portugal. Furthermore, the PCA appears never to have disagreed regarding the referral of a case to the European Commission, requested by the notifying parties (Article 4(5) of the ECMR). The PCA has only ever decided to maintain its original jurisdiction following a

request from a Member State for the referral of a merger, notified at national level, to the Commission (22(4) of the ECMR), in cases 25/2010[21] and 69/2005;[22] therefore, some cases originally notified to the Authority under the Competition Act were referred to the European Commission.[23]

In the light of the mandatory notification deadline established in the Competition Act (Article 9(2)), the notifying parties may have to miss the notification deadline when a referral request under Article 4(5) of the ECMR is still pending. In such a case, the notifying parties should communicate the situation to the PCA, which understands that the national notification deadline should not preclude the notifying parties from triggering the mechanism of Article 4(5).

When it is not possible to structurally separate the national part of a global merger, the damages caused to the parties by a delay in the completion of a global transaction would normally be considered as a relevant argument when assessing a request for a waiver of the standstill obligation. However, the PCA will most likely require that the global merger would not produce any effects in Portugal, until it has been cleared.

ii Minority shareholding

The acquisition of a minority shareholding only constitutes a merger when it confers control over the target business. However, when assessing a merger, the PCA may take into account the holding of minority shares by the notifying parties, even when they do not confer control, in light of the substantive test of dominance. In practice, the notification form requires information on any competing companies in which the participating undertakings holds a minority shareholding or minority percentage of the voting rights.

To date, the PCA has not contested a merger on the basis of existing minority shareholding in competing companies. However, as previously mentioned, this fact was taken into account by the ERC in its negative opinion issued in the Case 41/2009.[24]

Furthermore, the PCA has already analysed in the context of the execution of a divestment remedy, whether the independence of a 'potential acquirer' is affected when it holds a minority shareholding in the merger entity, subject to the divestment obligation.[25] In two other cases,[26] the PCA evaluated whether common shareholders in competing companies could lead to considering the two companies as a single economic unit.

21 *SC Johnson/Sara Lee's Insecticides and repellents business.*

22 *Gas Natural/Endesa.*

23 Case 4/2010 – *Procter & Gamble Company/Sara Lee Corporation*; Case 2007/69 – *Associated British Foods/Activos GBI* and Case 2003/11 – *GE/AGFA*.

24 *Ongoing/Prisa/Media Capital.*

25 Case 6/2008 – *EDP/Activos EDIA*.

26 Case 57/2007 – *Zon/Bragatel*Pluricanal* and Case 21/2008 – *Zon/TVTEL*.

V OUTLOOK AND CONCLUSIONS

Portuguese merger control, despite its many similarities with the EU merger control regime, will benefit from a further alignment with the latter, gaining, in terms of simplicity and effectiveness, with its separation from procedural administrative law.

Harmonisation with the ECMR will entail the adoption of the substantive test of 'significant impediment to competition', the elimination of the deadline established for notification, while maintaining the standstill obligation, and the removal of the market share notification threshold in favour of legal certainty.

The adoption of a simplified procedure and notification form and further determination by the PCA to explore the full potential of the pre-notification stage will also allow earlier clearances, without prejudice of a rigorous analysis.

In July 2010, the PCA made public its thoughts on a possible revision of the Portuguese competition regime. Moreover, in July 2011, the Circle of Portuguese Competition Lawyers presented its contribution to such revision.

Finally, the memorandum of understanding with the IMF/ECB/European Commission as regards a financial bailout for Portugal, in the framework of extensive competition law reform and further to the establishment of a specialised court (already legally approved), envisages the alignment of Portuguese law on merger control with the ECMR, namely regarding the criteria for compulsory *ex ante* notification and the adoption of measures to ensure more clarity and legal certainty in the application of merger control.

Appendix 1

ABOUT THE AUTHORS

GONÇALO ANASTÁCIO

SRS – Sociedade Rebelo de Sousa & Advogados Associados, RL

Gonçalo Anastácio is the partner in charge of the EU, competition and regulatory department of SRS and was previously a partner at Simmons & Simmons. His extensive practice includes antitrust, merger control, state aid, compliance programmes and EU litigation. He joined the firm in 1998 after having worked in Genoa and Lisbon, and studied in Coimbra and Paris (Sorbonne).

In 2001, he was seconded to the EU and competition department of Simmons & Simmons in London and, in 2005, he was part of the first group of lawyers to be awarded the title of specialist in European and competition law by the Portuguese law society.

Since 1997, Mr Anastácio has lectured at the University of Lisbon on EU, competition and regulatory law. He has a master's degree in EU law and is a regular speaker on the above topics.

MARIA JOÃO DUARTE

SRS – Sociedade Rebelo de Sousa & Advogados Associados, RL

Maria João has been an associate lawyer in the EU, competition and regulatory department of SRS since 2011, where her main practice focuses on merger control and antitrust. She was formerly legal adviser at the merger control department of the Portuguese Competition Authority (2006 to 2011).

Ms Duarte graduated in law from the University of Lisbon, where she lectured from 2005 to 2006. She also has a postgraduate degree in economics for competition law from King's College London (2010) and an LLM in European studies from the College of Europe in Bruges (2004).

SRS – SOCIEDADE REBELO DE SOUSA & ADVOGADOS ASSOCIADOS, RL
Rua D. Francisco Manuel de Melo 21
1070-085 Lisbon
Portugal
Tel: +351 21 313 2000
Fax: +351 21 313 2001
goncalo.anastacio@srslegal.pt
maria.duarte@srslegal.pt
www.srslegal.pt