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Contents

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Law 19/2012 of 8 May, which entered into force on 8 July 2012, is the main piece of legislation applicable to Portuguese merger control. Mergers having an impact in Portugal and meeting the relevant thresholds may be subject to Council Regulation (EC) 139/2004 of 20 January 2004 (the EU Merger Regulation) and to the exclusive jurisdiction of the European Commission.

Merger control in Portugal is also governed by the rules contained in the statutes of the Portuguese Competition Authority (PCA) (Decree-Law 125/2014, of 18 August), Regulation 60/2013 of 25 January, which enacts the rules regarding notification forms (regular and simplified forms, respectively in Annexes I.A and I.B of the regulation) and Regulation 1/E/2003 of the PCA of 25 January 2013, which determines the fees to be paid to the PCA for the review procedure.

The PCA has issued several pieces of relevant guidance (soft-law) on merger control, namely the Guidelines for the economic appraisal of horizontal mergers of 1 February 2013, the pre-notification Guidelines of 27 December 2012 regarding pre-notification contacts with the PCA, the Guidelines on Remedies of 28 July 2011, the guidance on the simplified procedure of 24 July 2007 and the Guidelines on the method of setting fines of 20 December 2012.

On a subsidiary basis, the following legislation is also applicable: the Administrative Procedure Code (approved by Decree Law 54/2015 of 7 January) – applicable to merger control procedures conducted by the PCA, the rules of the Administrative Court Procedure Code (approved by Law 15/2002 of 22 February) – applicable to the judicial review of the PCA's decision adopted during review proceedings and the Misdemeanours Act (approved by Decree-Law 433/82 of 27 October) – applicable to procedures involving the application of penalties and their judicial review.

As a general observation, it should also be mentioned that the PCA tends to follow the Commission's decisional practice and the approach stated in its guidelines on merger control closely.

1.2 Legislation Relating to Particular Sectors

Decree-Law 138/2014 of 15 September 2014 establishes the legal regime for the safeguarding of strategic assets deemed essential to guarantee national defence and security in the provision of essential services in the energy, transport and communication sectors. Article 3 of this Decree-Law pro-

vides that the government may oppose the acquisition of direct or indirect control over a strategic asset by a person or company of a third country to the EU or the EEA if the acquisition poses a "sufficiently real and serious threat" to national security/defence or the security of the supply of strategic services. Article 3 further specifies the relevant criteria that should be applied in determining what constitutes "a real and serious threat" (eg, the physical security of strategic assets) and the situations where this threat may effectively arise (eg, a connection between the acquirer and countries which do not recognise or respect the basic principles of a democratic state). Article 4 establishes the review and opposition procedure. According to Article 5, acquirers of strategic assets covered by the law may request the government to confirm its non-opposition to the transaction. Confirmation is tacitly given if no investigation is initiated by the government within 30 working days.

1.3 Enforcement Authorities

Competition law in Portugal is enforced by the *Autoridade da Concorrência* (the Portuguese Competition Authority or PCA) which was created in 2003 by Decree-Law 10/2003 of 18 January. The PCA enjoys substantial independence with regard to the government and other state bodies and has financial autonomy. The PCA's regulatory powers span all sectors of the economy, including regulated sectors. A summary of the PCA's decisions on merger control is available at www.concorrencia.pt.

Under the Competition Act, the PCA has exclusive competence to assess and decide on concentrations subject to mandatory prior notification. However, concentrations in markets subject to sectoral regulation (such as telecommunications, energy, transport, postal services, banking and financial services, insurance, water and waste, and health and media) are also subject to sector-specific legislation, which may involve additional assessment by the relevant regulatory authorities. In either phases of the procedure (Phase I and II – see **3.8 Review Process**, below), the PCA is obliged to request an opinion from the sectoral regulator. With the exception of negative opinions (eg, blocking the transaction) issued by the *Entidade Reguladora para a Comunicação Social* (the media regulator) all other opinions, either negative or positive, issued by other regulators, as well as positive opinions from the media regulator, are non-binding. In the specific case of the media sector, the law contemplates the possibility for the regulator to block the operation if it is deemed to pose a threat to the freedom of speech or the plurality of the media (see for example the decision adopted in case 41/2009, Ongoing/Prisa/Media Capital, where the PCA prohibited the merger following the negative binding opinion of the regulator, even though it raised no competition concerns). Consultation with the media regulator suspends the time period for the PCA to adopt a final decision. Mergers in other specific sectors must also be notified to and approved by the competent regulatory authorities:

- *Banking* – the direct or indirect acquisition or strengthening of a qualified shareholding in a foreign credit institution or in credit institutions that represent 10% or more of the shareholding of the target or 2% of the shareholding of the acquirer must be notified to and approved by the Portuguese Central Bank, *Banco de Portugal* (see Article 43-A of Decree-Law 298/92 of 31 December 1992). The securities regulator, *Comissão do Mercado dos Valores Mobiliários*, must be notified of any operations concerning the acquisition of a qualified majority in a publicly listed company (see Article 16 of Decree-Law 486/99 of 13 November). In both cases, the assessment is of a prudential nature, not based on competition considerations.
- *Insurance* – the direct or indirect acquisition or strengthening of a qualified shareholding (20%, a third or 50%) in an insurance company must be notified to the *Autoridade de Supervisão de Seguros e Fundos de Pensões* (see Article 162 of Law 147/2015 of 9 September 2015), which may oppose the operation if it considers that the acquirer is not in a position to guarantee the prudent management of the target company (see Article 163 of Law 147/2015 of 9 September 2015).
- *Media* – as mentioned above, acquisitions of shareholdings in companies active in the media sector meeting the relevant legal criteria must be notified to and approved by the media sector regulator (see Article 3 of Law 78/2015 of 29 July 2015).

In addition, pursuant to an extraordinary appeal, a concentration which is prohibited by the PCA may still be approved by the Council of Ministers under the proposal of the Minister of Economy, if the parties are able to demonstrate that the interests pursued by the merger in question are of fundamental strategic economic importance to the national economy and outweigh the competition restrictions generated in the relevant affected markets (see Article 41 of Decree-Law 125/2014 of 18 August).

2. Jurisdiction

2.1 Notification

Notification is compulsory. Concentrations that meet the jurisdictional thresholds are subject to mandatory filing and must not be implemented before:

- the issuance of a non-opposition decision;
- the issuance of a decision of clearance subject to conditions; or
- obtaining a tacit clearance decision (see **3.8 Review Process**, below).

The following operations are excluded:

- The acquisition of shareholdings or assets by an insolvency administrator within insolvency legal proceedings (Article 36(4)(a) of the Competition Act).
- The acquisition of shareholdings merely to serve as collateral (Article 36(4)(b) of the Competition Act).
- The temporary acquisition by financial institutions or insurance companies of securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking, or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition (this period may be extended by the PCA on request where such institutions or companies can show that the disposal was not reasonably possible within the set period) (Article 36(4)(b) of the Competition Act).
- 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 Portuguese central bank (Banco de Portugal) in situations of bank recapitalisation and resolution falling within the scope of Law 63-A/2008 of 24 November 2008 (see Article 20(1)) and Decree-Law 298/92 of 31 December.

2.2 Failure to Notify

There are serious negative consequences for not filing a concentration subject to mandatory notification:

- *Lack of production of legal effects or nullity and voidness* – the legal consequences for the validity of the transaction depend on whether the concentration is implemented before a clearance decision is adopted (regardless of whether it has been notified to the PCA) or whether the parties implemented the concentration in breach of a prohibition decision. A concentration implemented before a clearance decision is adopted does not produce any legal effects. A concentration implemented in breach of a prohibition decision by the PCA is null and void and may be declared as such by a court. The PCA may also revoke a concentration that has been implemented in disregard of a decision of non-opposition imposing commitments.
- *The imposition of fines* – if a concentration subject to mandatory filing without clearance from the PCA or in breach of a prohibition decision is implemented, the PCA may impose fines on the undertakings concerned, reaching up to 10% of the previous year's turnover for each of the participating undertakings, calculated in accordance with the Competition Act and the PCA's guidelines on the method of setting fines.
- *Personal liability of board members, directors and managers* – according to the Competition Act, persons holding positions in the managing bodies or heading up or being responsible for the supervision of the relevant department may also be held liable, with fines of up to 10% of their annual income (if it is demonstrated that the infringement was or should have been to their knowledge).
- *Private enforcement* – it is possible that jumping the gun may give rise to actions for damages in cases where parties suffer harm caused to them by the early and unlawful implementation of a merger. This would be the case, for example, if the parties to a proposed transaction jointly participate in a tender.
- *Ex officio investigations* – in a situation where the PCA becomes aware of a concentration subject to mandatory notification being implemented within the previous five years in breach of the Competition Act, it can initiate ex officio proceedings and order the parties to notify (it does this often). In this case, the filing fees will be double the amount originally due. The PCA may also apply a periodic penalty payment of up to a maximum of 5% of the average turnover in the preceding year until the notification is filed. Ex officio investigations may also be opened if the PCA concludes that the clearance decision was issued based on false or incorrect information provided by the parties or when the parties disregard conditions or obligations imposed by the PCA.
- *Reputational effects* – the consequences listed in any of the above bullet points can create negative reputational effects for the parties.

Penalties imposed on undertakings are published on the PCA's website and are usually contained in press releases issued by the PCA. When the seriousness of the infringement and the fault of the party concerned so justifies, the PCA is allowed to publish an extract of the decision imposing a sanction or, at least, that part of the decision relating specifically to the sanction handed down in a case in the Official Journal of the Portuguese Republic and in a national, regional or local newspaper with a large circulation, according to the relevant geographical market, at the expense of the party concerned.

On 28 December 2012, the PCA considered that the National Pharmacy Association (NPA), Farminveste 3 and Farminveste failed to notify the acquisition of control of ParaRede/Glintt. The concentration was later approved, but failure to notify led to fines of EUR150,000 – the first time that the PCA had taken such a step.

More recently, on 27 December 2017, the PCA imposed fines of EUR38,500 on two firms for failing to notify a concentration in the dental care clinic market. The infringement proceedings originated from the notifying party, as the latter notified the transaction only after implementing the transac-

tion (Ccent. 38/2015 – Vallis Sustainable/32 Senses), which was cleared by the PCA in Phase 1. The undertakings applied for a settlement procedure during the review proceedings, whereby they acknowledged the facts and accepted their respective liabilities.

2.3 Types of Transactions

The Competition Act applies to concentrations between undertakings that meet the relevant jurisdictional thresholds. According to the Competition Act, a concentration is deemed to exist when a change of control (in whole or in part) of one or more undertakings occurs on a lasting basis as a result of:

- a merger between two or more previously independent undertakings or parts of undertakings;
- the acquisition, directly or indirectly, of control of all or parts of the share capital or parts of the assets of one or various undertakings (to which a market turnover can be attributed), by one or more persons or undertakings already controlling at least one undertakings; or
- the creation of a joint venture performing all the functions of an autonomous economic entity on a lasting basis (a full-function joint venture).

The definition of 'control' closely follows that of the EU Merger Regulation. Control is defined as any act, irrespective of the form it takes, implying the possibility of exercising decisive influence over the activity of an undertaking on a lasting basis, whether solely or jointly, in particular through:

- the acquisition of all or part of the share capital;
- the acquisition of ownership rights or rights to use all or part of an undertaking's assets; and/or
- the acquisition of rights or the signing of contracts that confer a decisive influence on the composition, voting or decisions of the undertaking's corporate bodies.

When straightforward legal control is not acquired (eg, through the acquisition of shares conferring the majority of voting rights), the PCA will analyse whether the acquirer has the means to exercise de jure or de facto control over the acquired undertaking, eg, through special rights attached to shares or contained in shareholder agreements, board representation, and/or the ownership and use of commercially strategic assets. In such circumstances, the operation would also be considered as a 'concentration'.

Internal restructurings or reorganisations are not covered by the Competition Act, provided they do not result in a change of control. With regard to operations not involving the transfer of shares or assets, the PCA tends to follow the Commission's approach stated in its jurisdictional notice.

2.4 Definition of 'Control'

The definition of 'control' closely follows that of the EU Merger Regulation. Control consists of the ability to exercise 'decisive influence' over an undertaking. Control can result from rights, contracts or any other means conferring decisive influence on the composition, voting or decisions of the organs of an undertaking. It may also result from ownership or the right to use all or part of an undertaking's assets. Control can be exercised on a de jure or de facto basis. Veto rights over the appointment of senior management or the determination of the budget typically confer the power to exercise decisive influence on the undertaking concerned. Veto rights over a business plan will normally also do so. Veto rights over the company's investment policy are also considered to confer control if the investments at stake constitute an essential strategic feature of the market in which the company is active.

The Competition Act recognises two categories of control: sole and joint. Sole control exists where a single undertaking has the power to determine the strategic commercial decisions of another undertaking. Joint control occurs where two or more undertakings can exercise decisive influence over another undertaking. In this context, decisive influence normally means the ability to block decisions relating to the strategic behaviour of an undertaking so that the joint controlling shareholders are required to reach an agreement on the commercial policy of the undertaking. A situation of joint control will usually arise where two shareholders each own 50% of the shares and voting rights of a company or where there are veto rights over the key strategic decisions of a joint venture (eg, the business plan, budget and appointment of senior management).

Acquisitions of minority shareholdings or other interests which do not result in a change of control fall outside the scope of the Competition Act.

2.5 Jurisdictional Thresholds

Concentrations must be notified to the PCA if they meet one of the three alternative jurisdictional thresholds set out in the Competition Act:

- the parties' aggregate Portuguese turnover exceeds EUR100 million and the individual Portuguese turnover of each of at least two parties exceeds EUR5 million;
- the acquisition, creation or reinforcement of a shareholding exceeding 50% in the national market (or in a substantial part of it) for a particular good or service; or
- the acquisition, creation or reinforcement of a national market shareholding exceeding 30% but lower than 50% in the Portuguese market or in a substantial part of it, if the Portuguese individual turnover of at least two undertakings exceeds EUR5 million.

In addition, two or more concentrations between the same natural or legal persons within a period of two years, even when individually considered as not being subject to prior notification, will be deemed to constitute a single concentration subject to prior notification if two or more of the concentrations assessed in conjunction satisfy the relevant jurisdictional thresholds.

The Competition Act does not provide for any special jurisdictional thresholds applicable to particular sectors.

2.6 Calculations of Jurisdictional Thresholds

The rules of the Competition Act concerning the calculation of market share and turnover of the undertakings concerned closely follow the provisions on turnover calculation of the EU Merger Regulation.

Additional Guidance on the Turnover Threshold

The concept of turnover comprises the amounts derived from the sale of products and the provision of services to undertakings and consumers in Portugal in the normal course of business. In the case of services, the method of calculating turnover in general does not differ from that used in the case of products: the PCA takes into consideration the total amount of sales. However, the calculation of the amounts derived from the provision of services may be more complex, as this depends on the exact service provided and the underlying legal and economic arrangements in the sector in question. Where one undertaking provides the entire service directly to the customer, the turnover of the undertaking concerned consists of the total amount of sales for the provision of that service in the last financial year. The turnover to be taken into account is 'net' turnover, after deduction of sales rebates, VAT and other taxes directly related to turnover and any internal turnover within a group of companies. For credit institutions, other financial institutions and insurance undertakings, specific rules identify the sources of income to be used instead of turnover.

Turnover in foreign currencies must be converted using the average rate for the relevant 12-month period, as determined by the European Central Bank (the PCA follows the approach taken by the Commission in its jurisdictional notice – see **3.8 Review Process**, below).

Additional Guidance on the Market Share Threshold

For the purpose of establishing jurisdiction, the PCA will consider the market shares of the undertakings concerned in the relevant product market in Portugal, even if the geographical market is wider in scope. The transfer of an undertaking's position in a given market (eg, when the acquiring undertaking is not active in the same relevant market(s) as the acquired company) is considered by the PCA to amount to the 'creation' of a market share for jurisdictional purposes.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Turnover comprises the group-wide revenues. In order to calculate the market share and the turnover for each undertaking concerned in a concentration, the turnover to be taken into account, cumulatively, is as follows:

(a) turnover of the undertaking concerned in the concentration;
(b) turnover of the undertaking in which it has, directly or indirectly:
  (i) a majority shareholding;
  (ii) more than half of the voting rights;
  (iii) the possibility of appointing more than half of the members of the board of directors or the supervisory board; and/or
  (iv) the power to manage its businesses;
(c) turnover of the undertakings that have, in the undertaking concerned, in isolation or as a whole, the rights or powers detailed in the previous point b);
(d) turnover of the undertakings in which any of the undertakings referred to in point c) may have the rights or powers detailed in point b);
(e) turnover of the undertakings where various undertakings referred to in points a) to d) hold together, between themselves or with third-party undertakings, the rights and powers detailed in point b).

Where a concentration constitutes a merger, the undertakings concerned (and whose turnover should therefore be included in the calculation) are the merging entities. In cases of acquisition of control and joint ventures, it can be a complicated matter to determine which undertakings are concerned. The PCA follows the rules and criteria set out by the European Commission in its Consolidated Jurisdictional Notice on the control of concentrations between undertakings (paragraphs 132 to 153).

Adjustments must always be made to account for permanent changes in the economic reality of the undertakings concerned, such as acquisitions or divestments which are not, or not fully, reflected in the audited accounts. The PCA follows the rules and criteria set out by the European Commission in its Consolidated Jurisdictional Notice on the control of concentrations between undertakings (paragraphs 172 to 174).

2.8 Foreign-to-foreign Transactions

Foreign transactions are caught by the Competition Act to the extent that they have, or may have, effects in the Portuguese territory. The Act may apply whenever both or one of the parties alone (eg, a merging party or a party to a joint venture (JV)) achieve direct or indirect sales in Portugal (even through an agent or distributor), even if neither of the undertakings concerned is established or has assets in Portugal. Foreign-to-foreign transactions must be notified if the jurisdictional thresholds are met.

2.9 Market Share Jurisdictional Threshold

As noted in **2.6 Calculations of Jurisdictional Thresholds**, above, a substantive overlap is not required to trigger the obligation to notify: the mere transfer of an undertaking's position in a given market (eg, when the acquiring undertaking is not active in the same relevant market(s) as the acquired company) is considered by the PCA to amount to the 'creation' of a market share for jurisdictional purposes. Merger rules will apply where the operation constitutes a concentration within the meaning of the Competition Act and meets one of the alternative jurisdictional thresholds. However, in the absence of an overlap, a concentration might be deemed to not raise competition concerns and as such may benefit from the simplified procedure.

2.10 Joint Ventures

Joint ventures are subject to merger control whenever the joint undertaking is full-function (eg, when it performs all the functions of an autonomous economic entity on a lasting basis) and the thresholds set out in **2.5 Jurisdictional Thresholds**, above, are met. Non-full-function joint ventures may still be subject to the Competition Act and assessed as restrictive practices if they have, as their object or effect, the co-ordination of the competitive behaviour of independent undertakings (co-operative joint ventures' co-ordination is assessed under the rules applicable to prohibited agreements and practices – see Articles 9 and 10 of the Competition Act).

2.11 Power of Authorities to Investigate a Transaction

Transactions are subject to merger review only to the extent they meet the jurisdictional thresholds. Non-full-function joint ventures may still be subject to the Competition Act and assessed as restrictive practices if they have, as their object or effect, the co-ordination of the competitive behaviour of independent undertakings. Co-ordination, in this case, is assessed under the rules applicable to prohibited agreements and practices, which closely follow the wording of Article 101 TFEU.

As noted in **2.2 Failure to Notify**, above, ex officio proceedings relating to concentrations can be initiated whenever the PCA becomes aware of a concentration having been implemented in the preceding five years, without prior notification having been given to the Competition Authority in breach of the provisions of the law. Parties to a non-notified merger could, in theory, still notify the transaction after the fifth year following completion, although this could create specific legal difficulties.

2.12 Requirement for Clearance Before Implementation

A concentration subject to mandatory notification must not be implemented prior to being notified to, and authorised by, the PCA (or before a specified lapse of time in the case of tacit clearance).

2.13 Penalties for the Implementation of a Transaction Before Clearance

Parties implementing a concentration before clearance is obtained are exposed to the consequences referred to in **2.2 Failure to Notify**, above, namely:

- the lack of production of legal effects;
- the imposition of heavy fines;
- personal liability of board members, directors and managers;
- actions for damages in cases where individual parties suffer harm caused to them by the early and unlawful implementation of a merger;
- ex officio investigations and the charging of double notification fees; and
- possible negative reputational effects.

On 28 December 2012, the PCA considered that the National Pharmacy Association (ANF), Farminveste 3 and Farminveste had failed to notify the acquisition of control of ParaRede/Glintt. The concentration was later approved, but failure to notify led to fines of EUR150,000 – the first time that the PCA had taken such a step. More recently, on 27 December 2017, the PCA imposed fines of EUR38,500 for the parties having failed to notify a concentration in the dental care clinic market. The infringement proceedings were initiated against the notifying party, as the latter notified the transaction only after implementing the transaction (Ccent. 38/2015 – Vallis Sustainable/32 Senses), which was cleared by the PCA in Phase 1. The undertakings applied for a settlement procedure during the review proceedings whereby they acknowledged the facts and accepted their respective liabilities.

Over the past five years the PCA has imposed fines for 'gun jumping' only in the two cases mentioned above. No penalties for 'gun jumping' have so far been imposed by the PCA in the case of foreign-to-foreign transactions.

As noted in **2.2 Failure to Notify**, above, penalties are usually made public by being published on the PCA's website. The PCA can also decide to publish its decision in the Official Journal of the Portuguese Republic and in a national, regional or local newspaper with wide circulation.

2.14 Exceptions to Suspensive Effect

There are two possible exceptions to the suspensive effect:

- A public bid of acquisition or an exchange offer notified to the PCA can be implemented before clearance, provided that the acquiring party does not exercise the voting rights associated with the shareholding, or exercises them merely with the aim to protect the financial value of the

investment on the basis of derogation previously granted by the PCA to that effect.
- Before or after the filing of the notification, the notifying parties may submit a reasoned request to the PCA for a derogation from the suspensive effect. The PCA may waive the standstill period where the detriment to the notifying parties (and, where relevant, affected third parties) resulting from the standstill obligation exceeds the possible threats to competition resulting from the transaction. The notifying parties must demonstrate that the threat to the transaction caused by the suspension is real and substantial. If deemed necessary, the PCA may condition the granting of the derogation on the basis of certain conditions or obligations aimed at ensuring effective competition. A complaint can be lodged against the decision to accept or reject the request for a derogation, but no appeal is admissible. The PCA's approach is very restrictive: the waiver is granted in very exceptional circumstances only, eg, in cases of imminent bankruptcy (see case 11/2010, Triton/Stabilus).

The PCA may allow a derogation to the suspensive effect in the case of a failing firm but, as noted, the notifying parties have to demonstrate that the threat to the transaction caused by the suspension is real and substantial nd that no major competition issues exist.

2.15 Circumstances Where Implementation Before Clearance is Permitted

See **2.14 Exceptions to the Suspensive Effect**, above. To date, the PCA has not issued any guidance, nor adopted any decisional practice, on the possibility of carving out the local business or assets in order to allow for the completion of a global transaction. As it stands, the Competition Act does not expressly allow for this possibility. As noted, the parties are nonetheless allowed to submit a reasoned request to the PCA for a waiver.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no notification deadline, as long as the standstill obligation is respected. See **2.1 Notification**, **2.12 Requirement for Clearance Before Implementation** and **2.14 Exceptions to Suspensive Effect**, above.

3.2 Type of Agreement Required Prior to Notification

Regarding the triggering event, notifications should be submitted to the PCA:

- after the parties have concluded a binding agreement;
- following the date of the preliminary announcement of a public offer of acquisition or exchange, or the date of the announcement of the acquisition of a controlling shareholding in an undertaking with shares listed on a regulated stock market; or
- in the case of a concentration resulting from a public procurement procedure, after the definitive tender selection and before the public contract is signed off.

Notifications can be made from the moment the parties are able to demonstrate a 'serious intention' to conclude an agreement or, in the case of a public offer of acquisition or exchange, where they have publicly announced the intention to make such an offer, and if this agreement or the public offer at issue results in a concentration. A letter of intent or a memorandum of understanding will normally be sufficient to satisfy the 'serious intention' requirement, but this needs to be assessed in light of the specific circumstances of each case.

3.3 Filing Fees

Notifications only become effective upon the payment of the filing fee by the notifying parties, as defined in Regulation 1/E/2003. In practice, the rule is that notifying parties must attach a copy of the receipt of payment to the notification form. The base fee is payable at the time of notification and amounts to:

- EUR7,500 where the combined turnover generated in Portugal is below or equal to EUR150,000 million;
- EUR15,000 where the combined turnover generated in Portugal is in excess of EUR150,000 million but below or equal to EUR300,000 million; or
- EUR25,000, where the combined turnover generated in Portugal is in excess of EUR300,000 million.

An additional filing fee, corresponding to 50% of the base fee, must be paid upon the opening of a Phase II investigation.

Filing fees double when the PCA initiates ex officio proceedings for one of the following reasons (see **2.2 Failure to Notify**, above):

- in a situation where the PCA becomes aware of a concentration subject to mandatory notification being implemented within the previous five years in violation of the Competition Act;
- if the PCA concludes that the clearance decision was issued based on false or incorrect information provided by the parties; or
- when the parties disregard conditions or obligations imposed by the PCA at the time of the decision of non-opposition.

3.4 Parties Responsible for Filing

Which parties to the concentration are obliged to notify is dependent on the type of transaction in question. Joint notification must be made by the merging parties in true

merger cases and, in the case of joint control, by those parties acquiring control. In changes of joint control over an existing joint venture, existing controlling undertakings not part of the transaction are not required to intervene as notifying parties. In other cases, the undertaking acquiring control must notify.

Joint notifications must be submitted by a common representative empowered to act on behalf of the notifying parties.

3.5 Information Included in a Filing

Notifications must be submitted using either a regular or a simplified form as set out in Regulation 60/2013. The regular form specifies the information that notifying parties must generally provide when submitting a full-form notification. It requires extensive information on the parties, the transaction and the relevant markets, as well as contact details for customers, competitors, trade associations and potential suppliers, whom the PCA will consult as part of its investigation. The PCA may waive the requirement for certain information or documents, particularly in the context of pre-notification contacts. Straightforward transactions may be filed using the simplified form. The alternative simplified form may be used when notifying concentrations are unlikely to raise competition concerns.

The notification must also include supporting documentation, such as copies of the agreements bringing about the concentration, relevant board meeting minutes, reports and accounts and various analyses, reports, studies, surveys and comparable documents that assess or analyse the concentrations or the affected markets with respect to market shares, competitive conditions, etc. The complete notification and supporting documentation must be submitted to the PCA in hard copy and digital copy. These can also be uploaded to the PCA's website.

Filing is submitted in Portuguese. Translations may be required when the supporting documentation is in a foreign language, particularly when the case handlers to which the case has been allocated are not comfortable with it. Attached documents drafted in English are usually accepted.

3.6 Penalties/Consequences of Incomplete Notification

An incomplete form will be rejected by the PCA and will prevent the notification from becoming effective. The notifying parties will be forced to provide the missing information in order for the review procedure to initiate and the clock to start ticking on the final decision. An incomplete notification can generally be avoided by engaging in pre-notification discussions in order to clarify the level of information required by the PCA.

In cases where the PCA discovers omissions in the filing after formal notification has been made, and depending on the nature and extent of the missing information, the notifying parties might be offered an opportunity to urgently provide the missing information and thereby avoid the filing being declared incomplete. Due to the time constraints in merger procedures, the time allowed for such a rectification is normally limited to one or two days maximum.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The provision of inaccurate or misleading information in the filing authorises the PCA to impose fines on the undertakings concerned, reaching up to 1% of the previous year's turnover for each of the participating undertakings, calculated in accordance with the Competition Act and the PCA's guidelines on the method for setting fines.

The situation may also lead to personal liability for board members, directors and managers: according to the Competition Act, persons holding positions in the managing bodies or heading or being responsible for the supervision of the relevant department may also be held liable, with fines of up to 40 'counting units' (in 2019 one counting unit equates to EUR102, so 40 counting units equates to EUR4,080) if it is demonstrated that the infringement was or should have been to their knowledge.

Furthermore, if the concentration is authorised by the PCA on the basis of inaccurate or misleading information, the latter may order measures such as the separation of the undertakings or of any aggregated assets or the cessation of control (ie, the PCA will order the concentration to be reversed).

To date, there is no relevant precedent to report.

3.8 Review Process

The assessment of a concentration under the Competition Act may encompass two phases: Phases I and II. Following receipt of the formal notification form, subject to being satisfied that the notification is complete (the PCA has a seven-working-day period upon formal notification within which to decide on the completeness of the notification; if the notification is considered complete, the deadline for a Phase I decision is counted from the date of that formal notification), the PCA has an initial period of 30 working days (extendable if information requests are made) to undertake a formal investigation and determine whether the transaction will result in a Significant Impediment of Effective Competition (SIEC) in the relevant markets.

In straightforward cases, including ones where the PCA used the simplified procedure, the PCA will normally make a decision in less than 30 working days. The PCA's review in Phase I involves sending requests for information to the parties and to third parties, including customers and competitors. These are quite common and may be burdensome depending on the complexity of the transaction and the

degree of information initially provided. The PCA may also hold a meeting as part of the process.

At the end of Phase I, the PCA will reach one or more of the following decisions:

- a decision of no jurisdiction – the transaction does not fall within the Competition Act either because it is not a concentration or because it does not reach the relevant jurisdictional thresholds;
- a decision of referral – the PCA may decide to refer the transaction to the European Commission under Article 22 of the EUMR (his is normally the case when the PCA concludes that the transaction can potentially and significantly affect trade between member states; such a request shall be made at most within 15 working days of the date on which the concentration was notified to the PCA);
- a decision clearing the transaction – the transaction is authorised to proceed because it does not give rise to a SIEC;
- a decision of clearance subject to commitments – where a transaction raises serious concerns it may nevertheless be cleared subject to conditions, eg, that the parties must divest certain businesses within a certain period following completion or must give commitments regarding their future behaviour; and
- a decision launching a Phase II investigation – the transaction raises serious doubts regarding the creation of a SIEC such that a more detailed investigation is required.

The PCA is not authorised to block a merger in Phase I (with the exception of the merger in the Ongoing/Prisa/Media Capital case, which, as mentioned in **1.3 Enforcement Authorities**, above, was blocked in Phase I following the binding negative opinion of the media regulator). When, in view of the evidence collected and analysed, it has serious doubts that the concentration will lead to a SIEC, the PCA will start a Phase II investigation. Phase II proceedings involve a detailed, in-depth investigation that places a significant burden on the parties, the PCA and interested third parties involved in the process.

Phase II investigations must be concluded within a maximum time limit of 90 working days from the date the notification becomes effective. The 90 working day period already comprises the initial 30 working days used by the PCA for Phase I investigations. In practice, the timetable is as follows: 30 working days for Phase I and 60 working days for Phase II, totalling 90 working days. Following a Phase II investigation, the PCA will either clear the transaction (often subject to commitments) or prohibit it (unless the deal has already been abandoned by the parties).

Both the 30- and the 60-working-day deadlines may be suspended in the following four cases:

- by up to 20 working days in complex cases at the request of the parties or by the PCA with the consent of the parties;
- by 20 working days when the parties offer commitments – the suspension ceases when the PCA informs the notifying parties that the commitments were either accepted or rejected);
- when the parties have not supplied information required by the PCA – in these cases, the PCA will typically 'stop the clock' until such time as the missing information is provided, and the clock will resume on the day following the receipt by the PCA of the requested information (it is not uncommon for the PCA to send information requests to the parties); and
- in the case of a prior hearing of the notifying parties or of interested third parties having submitted observations.

Parties are encouraged to engage in pre-notification discussions with the PCA. The pre-notification guidelines recommend that interested parties contact the PCA at least 15 working days before notification by sending a memorandum describing the essential elements of the transaction and a draft notification form. If no decision is adopted within the time limits, a non-opposition decision is deemed to have been adopted (tacit clearance).

3.9 Pre-notification Discussions with Authorities

Parties are encouraged to engage in pre-notification discussions with the PCA. The pre-notification guidelines recommend that interested parties contact the PCA at least 15 working days before notification by sending a memorandum describing the essential elements of the transaction and a draft notification form. Pre-notification consultations are customary.

The PCA's pre-notification guidelines state categorically (in paragraphs 6 and 10) that all confidential information exchanged by the notifying parties with the PCA during the pre-notification phase shall be treated as such. Moreover, the PCA's statutes determine, in general, that PCA officials are bound to obligations of professional secrecy and subject to the general provisions of the Criminal Code on breach of secrecy by public servants.

3.10 Requests for Information During Review Process

The PCA is allowed to, and very often does, request the notifying parties to provide additional information that it considers necessary for its analysis. Requests for additional information in both phases of the procedure stop the clock. The clock resumes on the day following receipt of the requested information by the PCA. In more complex cases, the PCA has been noted to send up to four or five additional requests for information to the notifying parties. Conversely, in most straightforward cases that do not raise competition concerns, the PCA often waives additional request for

information. Pre-notification discussions with the PCA can reduce the need for information requests which, as noted, stop the clock and may cause severe delays. In more straightforward cases where the additional information the PCA seeks is of a simple nature and can be readily obtained from the parties via informal contacts (eg, e-mail, etc) the PCA may, and often does, agree to not stop the clock.

3.11 Accelerated Procedure

As mentioned in **3.5 Information Included in a Filing**, above, as a general principle concentrations which do not raise competition concerns may be notified according to the simplified form. This form can be used when the following conditions are met:

- there are no horizontal or vertical overlaps and no conglomerate relationships between the parties;
- the combined market share of all parties to the concentration that are engaged in business activities in the same product and geographical market (horizontal relationships) does not exceed 15%, or 25% if the share increase is not higher than 2%;
- none of the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships) exceed 25%; and
- none of the individual or combined market shares of all the parties to the concentration that are engaged in business activities in neighbouring markets (conglomerate relationships) exceed 25%.

Cases filed under the simplified form (and other straightforward cases) may be cleared by the PCA before the Phase I deadline expires. Although the PCA does not commit to specific reduced timeframes, cases decided under the simplified procedure have often been decided in about 20 working days. Pre-notification discussions with the PCA can reduce the need for information requests which, as noted in **3.8 Review Process**, above, stop the clock and may cause severe delays.

4. Substance of the Review

4.1 Substantive Test

The substantive test employed by the PCA is the SIEC. Mergers are cleared if they do not create a SIEC in the national market or in a substantial part of it.

4.2 Markets Affected by a Transaction

Unlike the Commission Regulation (EC) No 802/2004, Regulation 63/2013 does not provide for a definition of affected markets as such. However, for purposes of information required in the notification forms attached to Regulation 63/2013, affected markets may be interpreted as consisting of all plausible relevant product and geographic markets, on the basis of which the concerned parties have a relevant overlap in the Portuguese territory.

Depending on the nature and intensity of this overlap, or even the absence of one, Regulation 63/2013 may require the concerned parties to file a regular or a simplified notification form. The latter may be used when the following conditions are met:

- there are no horizontal or vertical overlaps and no conglomerate relationships between the parties;
- the combined market share of all parties to the concentration that are engaged in business activities in the same product and geographical market (horizontal relationships) does not exceed 15%, or 25% if the share increase is not higher than 2%;
- none of the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships) exceed 25%; and
- none of the individual or combined market shares of all the parties to the concentration that are engaged in business activities in neighbouring markets (conglomerate relationships) exceed 25%.

Market shares below the thresholds identified in the last three points above are usually deemed to be de minimis for the purposes of assessing the overlap between the parties' activities. In these cases, competitive concerns are usually deemed unlikely.

The PCA's Guidelines for the economic appraisal of horizontal mergers do not set a de minimis threshold as such. However, as mentioned above, in its decisional practice the PCA tends to follow the general guidance issued by the European Commission, including the Guidelines on the assessment of horizontal mergers and the Guidelines on the assessment of horizontal non-horizontal mergers. Pursuant to the former, a horizontal merger will not in principle be liable to impede effective competition where the market share of the undertakings concerned does not exceed 25% in the relevant markets, with a post-merger Herfindahl-Hirschman Index (HHI) below 1000. The PCA is also unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1000 and 2000 and a delta below 250, or a merger with a post-merger HHI above 2000 and a delta below 150. Moreover, pursuant to the Guidelines on non-horizontal mergers, the PCA is unlikely to find concern in non-horizontal mergers where the post-merger market share of the new entity in each of the markets concerned is below 30% and the post-merger HHI is below 2000.

4.3 Case Law from Other Jurisdictions

The PCA's decisional practice, including on market definition, generally follows the case law of the European Courts and the practice of the European Commission. Other jurisdictions may be an important source of information where there is an absence of recent and relevant precedents by the EU and the PCA, in particular case law from close jurisdictions and well-established and reputed competition authorities.

4.4 Competition Concerns

The PCA reviews the horizontal, vertical and/or conglomerate aspects of a proposed transaction and will investigate whether the transaction gives rise to co-ordinated and/or non-co-ordinated effects. In its assessment, the PCA typically takes into consideration the structure of the relevant markets; the positions of the parties and their competitors in the relevant market; the market power of the acquirer; potential competition and barriers to entry. The PCA also considers any efficiency claims identified by the parties.

4.5 Economic Efficiencies

According to the Competition Act, in its substantive assessment the PCA must take into account the evolution of economic and technical progress that does not constitute an impediment to competition, "provided there are efficiency gains that benefit consumers resulting directly from the concentration." This provision (Article 41(2)(k)) is interpreted as the legal basis for allowing for the consideration of efficiency claims.

4.6 Non-competition Issues

There are two situations where non-competition issues may be taken into account in the substantive assessment of a merger:

- a prohibition decision adopted by the PCA can be reversed by a decision of the Council of Ministers when "strategic fundamental interests of the national economy" are at stake (see Article 41 of the PCA's statutes); and
- mergers in the media sector where the media regulator issues a negative binding opinion.

In the latter case, the PCA is forced to adopt a prohibition decision, not on competition grounds, but for reasons related to the freedom and the plurality of the media (see Law 78/2015 of 29 July 2015). In case 41/2009, Ongoing/Prisa/Media Capital, the PCA prohibited the merger following the negative binding opinion of the regulator, even though it raised no competition concerns.

4.7 Special Consideration for Joint Ventures

Full-function joint ventures are, of course, subject to merger control. See **2.10 Joint Ventures**, above. Non-full-function joint ventures may still be subject to the Competition Act and assessed as restrictive practices if they have, as their object or effect, the co-ordination of the competitive behaviour of independent undertakings (co-operative joint ventures' co-ordination is assessed under the rules applicable to prohibited agreements and practices).

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere with Transactions

The PCA can block a transaction if, following the substantive assessment, it concludes that the operation is liable to give rise to an SIEC in the relevant markets. The existence of an SIEC must be shown. The PCA can also 'interfere' with a transaction in the sense that it can force the notifying parties to shape it into a different configuration. As noted in **3.8 Review Process**, above, where a transaction raises serious concerns, it may be cleared subject to conditions, eg, that the parties must divest certain businesses within a certain period following completion or must give commitments regarding their future behaviour.

5.2 Parties' Ability to Negotiate Remedies

The notifying parties may, at any time in Phase I or II, on their own initiative or after an informal invitation from the PCA, submit commitments with a view to ensuring the clearance of the transaction.

5.3 Legal Standard

There is no legal standard as such. However, according to the PCA's 2011 Remedies Guidelines, remedies should be capable of addressing all competition concerns raised by the concentration and be "interpreted in light of the underlying objective of creating conditions for an effective competition in the market or of maintaining an effective competition in the relevant market" (paragraph 14). Therefore, remedies should include an assessment of the adequacy, sufficiency and viability of the commitments.

5.4 Typical Remedies

Commitments may be of a structural or behavioural nature. According to the PCA's guidelines on remedies, structural remedies involving the divestiture of a viable and competitive business (eg, access to infrastructure, networks or key technologies, and change of long-term exclusive contracts) are preferred over behavioural remedies, which involve promises by the parties to abstain from certain commercial behaviours. Both types of commitments have already been accepted by the PCA, in certain cases simultaneously. Despite the stated preference for structural remedies, the PCA's decisional practice shows that behavioural remedies continue to be used quite often and have been imposed on several occasions. Remedies are not sought to address non-competition issues.

5.5 Negotiating Remedies with Authorities

As noted in **5.2 Parties' Ability to Negotiate Remedies**, above, notifying parties may submit commitments in both phases of the procedure and prior to submitting the notification (within pre-notification discussions). Although there is no specific timeframe set by the Competition Act for commitments to be offered, the PCA recommends that, in Phase I, parties submit commitments within 20 working days from notification and, in Phase II, within 40 working days following the decision to open an in-depth investigation.

Remedies are submitted by the parties and then negotiated with the PCA on an informal basis. The PCA does not have the prerogative to impose remedies which were not formally proposed by the notifying parties (ie, remedies are always proposed by the notifying parties). The PCA will refuse the commitments when it considers that they have been submitted as part of a dilatory tactic or that the commitments are insufficient or inadequate to remedy competition concerns. An administrative complaint may be lodged against the refusal decision but no court appeal is allowed. If the PCA is convinced of the merits of the proposal, the remedies are formally submitted in the form of a 'commitment', and the clearance decision is subject to conditions and obligations intended to ensure compliance with the commitment.

The guidelines on remedies set out the procedural rules on the proposal, negotiation and implementation of remedies. The notifying parties must submit a formal commitment, accompanied by a completed form (attached as an annex to the remedies guidelines), describing the commitment, explaining its suitability to remove the competition concern, identifying any deviations from the PCA's model texts and providing detailed information on the divestiture business/behavioural commitment offered. The normal practice is to submit a draft of the commitment and completed form to the case team for review and comment. The case team may then come back with questions that will need to be answered before the 'green light' is given for submission of the final formal commitment. After receiving the formal commitment, the PCA may 'market test' it with other market players before accepting it.

5.6 Conditions and Timing for Divestitures

As a general rule, transactions approved by the PCA subject to commitments can be implemented before the conditions and obligations attached to them have been fully complied with. In fact, the implementation of both structural and behavioural commitments may take several years following the clearance decision. Non-compliance with the remedies will expose parties to the following negative consequences:

- nullity of all legal acts and agreement related to the merger contravening the PCA's decision on the commitments and possible revocation of the clearance decision; and
- the application of fines up to 10% of the previous year's turnover for each of the undertakings taking part in the infringement.

The procedural rules for enforcement against anticompetitive practices are applicable to the PCA's investigation, meaning that the PCA enjoys broad investigative powers.

5.7 Issuance of Decisions

Decisions are always notified to the notifying parties, regardless of whether the decision in question is a clearance (unconditionally or conditionally) or a prohibition decision. The PCA publishes both Phase I and Phase II decisions in non-confidential versions on its website. The PCA also publishes a press release on its website when it adopts a final Phase I or Phase II decision, and generally also when it decides to open a Phase II investigation.

5.8 Prohibitions and Remedies for Foreign-to-foreign Transactions

To date, there have been only six formal prohibition decisions in Portugal: Arriva/Barraqueiro (Case 37/2004, 25 November 2005), Petrogal/Esso (Case 45/2004, 14 December 2005), Brisa/AEO/AEE (Case 22/2005, 7 April 2006), TAP/SPDH (Case 12/2009, 19 November 2009), Ongoing/Prisa/Media Capital, (case 41/2009, 30 March 2010) and Controlinveste/ZON Optimus/PT (Case 4/2013, 31 July 2014). This statistic may be slightly misleading, as challenged transactions are sometimes abandoned by the notifying parties (since 2003, the date the PCA was created, nine transactions have been abandoned; more recently, in 2017 and 2018, two mergers were abandoned following investigation from the PCA: Ccent. 37/2016 SIBS /Ativos Unicre and Ccent 35/2017 Altice/Media Capital, respectively). The imposition of remedies in more complex transactions is common.

Two cases may be mentioned where remedies were applied in foreign-to-foreign mergers: the Dreger/Hillenbrand merger (case 44/2003) and the SC Johnson/Sara Lee's Insecticide Business merger (case 25/2010).

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Restrictions that are directly related and necessary to the implementation of a transaction (such as non-compete obligations between the seller and the acquirer or between the joint venture and the parent companies; or transitional supply, distribution or licensing agreements) are covered by the Commission decision approving a transaction, without the need for a separate notification (it is not possible to file a separate notification form for ancillary restraints).

7. Third-party Rights, Confidentiality and Cross-border Co-operation

7.1 Third-party Rights

Within five working days of the date on which the notification becomes effective, the PCA publishes a summary of the notification with a description of the key elements of the concentration in two national daily newspapers (at the expense of the notifying parties) and on its website, and sets a time limit of no less than ten working days for interested third parties (whose rights or legitimate interests may be affected by the transaction) to submit written observations. Interested parties that submit comments expressing concern regarding the transaction are considered as opposing parties and are allowed to intervene in the procedure at different stages.

Opposing parties are allowed to be heard:

- at the stage of the prior hearing (the execution of which has the effect of stopping the clock for the adoption of the final decision); and
- prior to the adoption of any decisions (non-opposition or prohibition decisions).

Opposing parties may also access a non-confidential version of the PCA's file in both Phases I and II, and appeal the PCA's final decision.

7.2 Contacting Third Parties

Although interested third parties are allowed to intervene in the review process in order to safeguard their legitimate rights, the PCA does not directly contact them (however, the PCA may contact other companies as part of the review process where it deems it useful or necessary to do so). Instead, the procedure is made public and interested parties are invited to intervene. Within five working days of the date on which the notification becomes effective, the PCA publishes a summary of the notification with a description of the key elements of the concentration in two national daily newspapers (at the expense of the notifying parties) and on its website, and sets a time limit of no less than ten working days for interested third parties (whose rights or legitimate interests may be affected by the transaction) to submit written observations. Interested parties that submit comments expressing concern regarding the transaction are considered as opposing parties and are allowed to intervene in the procedure at different stages. Opposing parties are allowed to be heard:

- at the stage of the prior hearing (the execution of which has the effect of stopping the clock for the adoption of the final decision); and
- prior to the adoption of any decisions (non-opposition or prohibition decisions).

Opposing parties may also access a non-confidential version of the PCA's file in both Phases I and II and appeal the PCA's final decision. Regarding remedies, after receiving the formal commitments from the notifying parties, the PCA 'market tests' them with other market players before accepting them.

7.3 Confidentiality

Notifying parties are requested to identify, both in the notification and in responses to additional requests for information, all information (eg, commercially sensitive information and business secrets) that they believe should be kept confidential, and submit a non-confidential version of these documents. Failure to do so might lead the PCA to declare the notification incomplete. If the PCA accepts the confidentiality claims, the information will not be disclosed to third parties. Following a consultation with the notifying parties, a non-confidential version of the final decision is published on the PCA's website.

The PCA's statutes determine, in general, that PCA officials are bound to obligations of professional secrecy and subject to the provisions of the Criminal Code on breach of secrecy by public servants.

7.4 Co-operation with Other Jurisdictions

At EU level, the PCA co-operates closely with the European Commission under the EU Merger Regulation and with the national competition authorities (NCA's) of EU member states, in particular with the Spanish Competition Authority (*Comisión Nacional de los Mercados y de la Competencia*). The PCA is of course a member of the European Competition Network (ECN), a forum for co-operation aimed at ensuring the consistent application of competition law among its members. Within the ECN, the EU Merger Working Group is responsible for merger control-related issues. It consists of representatives from the European Commission and the EU NCAs, together with observers from the NCAs of the EFTA states. The PCA is also part of the International Competition Network (ICN), with a focus on policy matters, and of the network of the European Competition Authorities (ECA), a forum for discussion of all competition law-related matters between the NCAs within the EEA as well as the European Commission and the EFTA supervisory authority. This discussion includes the exchange of information on all merger cases which are notifiable in more than one ECA country. The PCA is a founding member of the Ibero-American Forum on the Protection of Competition and of the network for competition authorities of Portuguese-speaking countries. The PCA has also concluded a working agreement with Brazilian competition authorities.

The PCA contacts other NCAs through these institutional networks on a need basis. This contact may concern co-operation on general policy matters regarding merger control but may also include possible exchanges of information in the context of specific transactions. As a general principle,

the parties' prior consent is not required. However, the PCA must not exchange confidential information relating to the parties with other NCAs unless the parties have given their express consent. The information exchanged can only be used for the purposes for which it has been collected, and the other NCAs are obliged to keep the information confidential.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

All merger control decisions (clearing or prohibiting a merger) are appealable to the Competition, Supervision and Regulation Court (created by Law 46/2011, of 24 June 2011). Under the Competition Act (Article 87(1)) and the Code of Procedure in the Administrative Courts (Article 144(1)), appeals must be lodged within 30 days of notification of the final decision by the PCA (unless the decision is null and void, in which case there is no time limit). The appeal does not have a suspensive effect. Rulings of the Competition, Supervision and Regulation Court can be appealed to the competent Appeals Court (*Tribunal da Relação*) within 30 days of the appealed ruling. Appeals against rulings of the Appeals Court, in cases of decisions other than the application of fines, are lodged with the Supreme Court (*Supremo Tribunal de Justiça*). The appeals to the Supreme Court are limited to points of law. Appeals exclusively concerning points of law are lodged directly with the Supreme Court.

To date, there have only been three appeals based on final decisions on merger control: the appeal of the prohibition decision adopted in the Arriva/Barraqueiro case (case 37/2004, the final court ruling was issued in November 2016), the appeal of the clearance decision adopted in the Arena Atlântida/Pavilhão Atlântico case (case 38/2012) and the appeal of the clearance decision in the SUMA/EGF case (case 37/2014). These appeals were all unsuccessful.

8.2 Typical Timeline for Appeals

As mentioned in **8.1 Access to Appeal and Judicial Review**, above, under the Competition Act and the Code of Procedure in the Administrative Courts, appeals must be lodged within 30 days of notification of the final decision by the PCA (unless the decision is null and void, in which case there is no time limit). In terms of the timeline, it will vary depending on several factors such as the procedural complexity of the case and the court's workload, although it is not expectable for an appeal to be heard earlier than three months following its filing. In general terms, judicial proceedings might take many months or even several years before they come to an end.

As mentioned in **8.1 Access to Appeal and Judicial Review**, to date there is no record of successful appeals of merger decisions.

8.3 Ability of Third Parties to Appeal Clearance Decisions

All of the PCA's final decisions on merger control, including decisions clearing a concentration, are subject to judicial review and may also be appealed by interested third parties. Clearance decisions have been appealed (eg, SUMA/EGF) However, as mentioned above in **8.1. Access to Appeal and Judicial Review**, to date there is no record of a successful appeal on merger control.

9. Recent Developments

9.1 Recent Changes or Impending Legislation

The Portuguese merger control regime was last subject to a significant reform in 2012, with the approval of Law 19/2012 of May 2012 (the new Competition Act). The main changes on merger control brought by the new Act were:

- the abolition of the notification deadline;
- the creation of a new jurisdictional threshold based on turnover and market share and the modification of the turnover thresholds;
- the alignment of the substantive assessment test with the SIEC test of the EU Merger Regulation; and
- changes in some procedural deadlines.

The Statutes of the PCA (approved by Decree-Law 125/2004 of 18 August) have also been reviewed in order to ensure compliance with the recent framework law on regulatory authorities (Law 67/2013 of 28 August 2013). These Statutes were also reviewed in order to introduce relevant changes to the regime of the extraordinary appeal of a concentration to the Minister of Economy. As detailed in **1.3 Enforcement Authorities**, above, a concentration which is prohibited by the PCA may still be approved by the Council of Ministers under the proposal of the Minister of Economy and Employment (or, previously, approved directly by the Minister of Economy), if the parties are able to demonstrate that the interests pursued by the merger in question are of fundamental strategic economic importance to the national economy and outweigh the competition restrictions generated in the relevant affected markets (see Article 41 of Decree-Law 125/2014 of 18 August).

A project on a set of guidelines for the appraisal of horizontal concentrations dated February 2013 was subjected to public consultation and has subsequently been adopted.

There are no pending proposals for reform of the merger control rules.

9.2 Recent Enforcement Record

Fines for failure to notify are not frequently imposed. In December 2012, the PCA issued a decision on the breach of the prior notification obligation in the Farminveste/Para-

Rede case (case 47/2009). Three undertakings were fined EUR150,000. Also, on 27 December 2017, the PCA imposed fines of EUR38,500 on two firms for failing to notify a concentration in the dental care clinic market. The infringement proceedings originated from the notifying party, as the latter notified the transaction only after implementing the transaction (case 38/2015 – Vallis Sustainable/32 Senses).

Concerning the blocking of transactions, see **5.8 Prohibitions and Remedies for Foreign-to-foreign Transactions**, above. So far there have been six blocked transactions. The imposition of both behavioural and structural remedies is frequent practice. In 2018, the PCA issued decisions on 46 merger cases, two of which were in Phase II. The average time period for the Authority to clear transactions in 2018 was 28 days.

It is also worthwhile mentioning that, following notification to the PCA of a concentration where the parties had specifically identified an ancillary restriction to their agreement and provided substantiated reasons for requesting that the PCA also clear said restriction, the PCA decided to formally open an infringement procedure, on the basis of Article 101 TFUE and Article 9 of the Competition Act, against the notifying parties and conducting dawn raids.

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9.3 Current Competition Concerns

In its priorities in the area of merger control for the 2019 competition policy (21 December 2018), the PCA established:

- optimising merger control analysis; and
- reducing the length of merger control investigations to ensure minimal disruption in the functioning and efficiency of the markets.