The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Portugal: Merger Control

This country-specific Q&A provides an overview to merger control laws and regulations that may occur in Portugal.

It will cover jurisdictional thresholds, the substantive test, process, remedies, penalties, appeals as well as the author's view on planned future reforms of the merger control regime.

This Q&A is part of the global guide to Merger Control. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/merger-control

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1. Overview

Competition law in Portugal is mainly ruled by the Competition Act (approved by Law 19/2012, of 8 May) and is enforced by the Autoridade da Concorrência (the Portuguese Competition Authority – PCA).

The PCA was created in 2003 as an independent administrative authority, enjoying substantial autonomy vis-à-vis the government and other state bodies, as well as a certain level of financial autonomy. In 2014, new Statutes of the PCA were approved. The PCA's powers over competition span all sectors of the economy, including those subject

to sectoral regulation.

The Competition Act applies to concentrations that occur in Portuguese territory or that may have an effect in it. Concentrations in markets subject to sector-specific regulation may involve additional assessment by the relevant regulatory authorities.

Merger control is also governed by: the Statutes of the PCA; Regulation 60/2013, regarding notification forms; Regulation 1/E/2003, on the filing fees for merger control; and by Regulation 823/2016, on the payment of fees for other services provided.

Several pieces of guidance applicable to merger control have been issued by the PCA, namely: guidelines on the simplified procedure; guidelines on remedies; guidelines on the method of setting fines; guidelines on pre-notification; and guidelines on the economic appraisal of horizontal mergers. A project of guidelines on the protection of confidential information, disclosed on 4 May 2017, and subject to public consultation, is expected to be formally adopted in the near future.

The following legislation is applicable on a subsidiary basis: the Administrative Procedure Code, applicable to merger control procedures conducted by the PCA; the Administrative Court Procedure Code, applicable to the judicial review of the PCA's decision adopted during review proceedings; and the Misdemeanours Act, applicable to procedures involving the application of penalties and their judicial review.

Furthermore, the PCA tends to follow the Commission's decisional practice and its respective approach stated in its guidelines on merger control.

The main features of the merger control regime in Portugal are as follows:

a) A concentration between undertakings is deemed to exist when a lasting change of control over the whole or part of an undertaking occurs.

b) The definition of "control" closely follows that of the EU Merger Regulation.

c) The Competition Act applies to concentrations that meet the relevant jurisdictional

threshold, in which cases the notification is compulsory.

d) The Competition Act sets out three alternative jurisdictional thresholds, related respectively to: i) turnover in Portugal; ii) national market share; iii) de minimis national market share combined with de minimis turnover.

e) Concentrations that meet the jurisdictional threshold must not be implemented before the issuance of a non-opposition decision or a decision of clearance subject to conditions, or before obtaining a tacit clearance decision.

f) Failing to notify a concentration (as well as implementation before clearance), subject to notification, leads to several kinds of severe legal and factual consequences.

2. Is mandatory notification compulsory or voluntary?

The PCA must be notified of concentrations if they trigger one of the three alternative jurisdictional thresholds:

a) Turnover threshold: concentrations are subject to notification if, in the preceding financial year, the aggregate combined turnover of the undertakings concerned in Portugal exceeded €100 million, after deduction of taxes directly related to turnover, provided that the individual turnover achieved in Portugal in the same period, by at least two of the undertakings concerned, exceeded €5 million.

b) Market share threshold: a notification is mandatory if the implementation of the concentration results in the acquisition, creation or reinforcement of a share equal to or exceeding 50% in the “national market” for a certain product, or in a substantial part of it.

c) De minimis market share threshold: a notification is mandatory if there is an acquisition, creation or reinforcement of a share between 30% and 50% in the national market of a certain product or service, and if at least two of the undertakings concerned achieved an individual turnover in Portugal of at least €5 million in the previous financial year.

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, is deemed to constitute a single concentration subject to prior notification where the two or more concentrations assessed in conjunction satisfy the relevant jurisdictional thresholds.

The following operations are excluded:

a) The acquisition of shareholdings or assets by an insolvency administrator within insolvency legal proceedings;

b) The acquisition of shareholdings merely to serve as collateral;

c) The temporary acquisition, by financial institutions or insurance companies, of securities with a view to reselling them (subject to certain conditions);

d) The acquisition by the Portuguese state of a controlling shareholding in a credit institution, or the transfer of its business to a transition bank in situations of bank recapitalization and resolution failing.

3. **Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?**

Concentrations subject to notification must not be implemented prior to being notified to, and authorized by, the PCA, or before obtaining a tacit clearance decision.

Two types of exceptions to the suspensive effect are possible:

a) 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 to the shareholding, or exercises them merely with the aim of protecting the financial value of the investment based on derogation previously granted by the PCA to that effect;

b) Before or after the filing of the notification, the notifying party(ies) may submit a reasoned request to the PCA for a derogation from the suspensive effect. The parties must demonstrate that the threat to the transaction caused by the suspension is real and substantial (e.g. in case of a failing firm). The PCA may authorize such a derogation where the harm to the parties (and, where relevant, to affected third parties) resulting from the standstill obligation exceeds the possible threats to competition that might result from the transaction. The PCA may grant the derogation subject to certain conditions or obligations aimed at ensuring effective competition.

The PCA has been very strict in its allowing of derogations to the stand still obligation. Only in particular circumstances has such derogation been allowed (see Triton/Stabilus, case Ccent. 11/2010, of 23.04.2010, where the PCA consent to a derogation for reasons of imminent bankruptcy). The relevant request must be objectively substantiated, as well as clear on the absence of competition law concerns, and that there will an irreparable damage caused by the standstill obligation. In the context of the financial crisis, this mechanism has been much more frequently used, in particular within acquisitions of businesses near insolvency, by funds.

The Competition Act does not expressly allow for the possibility of carving out the local business or assets in order to allow completion of a global transaction. The notifying party(ies) may submit a reasoned request for a waiver from the standstill obligation, to be assessed on a case-by-case basis by the PCA.

A parking structure is explicitly contemplated in the Competition Act, confirming that acquisitions carried out by financial institutions on a temporary basis (in general, up to 1 year) are not subject to merger control obligations, provided that it is not given control over target during the interim period, otherwise it would amount to an early implementation of the concentration.

4. What are the conditions of the test for control?

A concentration between undertakings is deemed to exist when a lasting change of control over the whole or part of an undertaking occurs as a result of: i) a merger between two or more previously independent undertakings or parts of undertakings; ii) 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 undertaking; or iii) the creation of a full-function joint venture.

Control arises from any act, irrespective of the form it takes, that implies the possibility of exercising a decisive influence over the activity of an undertaking on a lasting basis, solo or jointly. Control can be exercised on a de jure or de facto basis, in particular through: i) the acquisition of the whole or a part of the share capital; ii) the acquisition of ownership rights, or rights to use the whole or a part of the assets of an undertaking; iii) the acquisition of rights or the signing of contracts which confer a decisive influence on the composition, voting or decisions of the undertaking's corporate bodies.

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 if the business plan sets out details on the company's aims and measures for achieving those aims. Veto rights over the company's investment policy are also considered to confer control if the investments in question constitute an essential feature of the market in which the company is active.

Internal restructurings or reorganizations are not caught by the Competition Act, provided they do not result in a change of control.

5. What are the conditions on minority interest in your jurisdiction?

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

When straightforward legal control is not generated, the PCA analyses whether the acquirer has the means to exercise de jure or de facto control over the acquired undertaking, e.g. through special rights attached to shares or contained in shareholders' agreements, board representation and/or the ownership and use of commercially strategic assets.

What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)?

Please see section 2.1 on the three alternative thresholds for mandatory filing. All these criteria apply even in the absence of a substantive overlap; and in the case of the market share jurisdictional threshold - regarding the acquisition of a share equal to or exceeding 50% -, it can be met by the target alone. The jurisdictional thresholds do not vary according to the sector.

7. ## How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

The calculation of the relevant turnover and market shares, is in line with the provisions of the EU Merger Regulation.

The relevant turnover (group-wide) includes the sales of products and the provision of services related to Portugal (turnover achieved in Portugal should include sales from other territories to clients in Portugal) in the last financial year, and should be net of taxes directly related to the business (e.g. VAT) as well as of intra-group sales. For credit institutions, other financial institutions and insurance undertakings, specific rules apply (in line with the provisions of the EU Merger Regulation).

The PCA’s interpretation of relevant market shares is quite broad. For instance, in the absence of any overlap between the parties’ activities, the mere transfer of an undertaking’s position is considered an acquisition of a market share and might trigger mandatory prior notification. Moreover, purely foreign-to-foreign transactions can be caught by the Competition Act in the event that they have effects in Portugal, even if none of the parties is established, has facilities or is represented in Portugal.

If the target is a recently created company with no activity in the relevant market, prior to the concentration, the PCA can use an estimated market share for the future. It is also noteworthy that the relevant market share used for the control of the relevant threshold is only calculated with respect to the relevant product market in Portugal, even if the geographic market is wider.

6.

Finally, please note that an adjustment must always be made to account for permanent changes in the economic situation of the undertakings concerned, such as acquisitions or divestments which are not, or not fully, reflected in the audited accounts. In this regard, the PCA naturally follows the Commission Consolidated Jurisdictional Notice.

8. Is there a particular exchange rate required to be used for turnover thresholds and asset values?

The PCA's practice has been to request that parties convert foreign currencies into euro using the average rate for the relevant twelve-month period, as determined by the European Central Bank, and in line with the Commission Consolidated Jurisdictional Notice.

9. Do merger control rules apply to joint ventures (both new joint ventures and acquisitions of joint control over an existing business?

New joint ventures and acquisitions of joint control over an existing business, are both subject to merger control whenever the joint undertaking is full-function, and one of the three jurisdictional thresholds is met. Non-full-function joint ventures may be subject to the Competition Act and assessed under the restrictive practices legal regime.

For the purposes of calculating the jurisdictional thresholds, turnover comprises the group-wide revenues. In order to calculate the market share for each undertaking concerned in the concentration, the turnover to be considered, 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:

1. A majority shareholding;
2. More than half of the voting rights;
3. The possibility of appointing more than half of the members of the board of directors or the supervisory board;

4. The power to manage the undertakings' affairs;

c) Turnover of the undertakings that have, in the undertaking concerned, alone or jointly, the rights or powers detailed in the previous subparagraph, b);

d) Turnover of the undertakings in which any of the undertakings referred to in subparagraph c) may have the rights or powers detailed in subparagraph

e) Turnover of the undertakings where various undertakings referred to in subparagraphs a) to d) jointly hold, between themselves or with third-party undertakings, the rights and powers listed in subparagraph b) above.

In this area, the PCA also closely follows the rules and criteria set out by the European Commission in its Consolidated Jurisdictional Notice. Non-full-function joint ventures, e.g. the establishment of a cooperative joint venture, are subject to self-assessment by the parties/parent companies to that cooperation agreement, under both Article 101 TFEU and the Portuguese equivalent.

1. **In relation to "foreign-to-foreign" mergers, do the jurisdictional thresholds vary?**

The Competition Act does not distinguish between national and foreign-to-foreign mergers (with connection to the Portuguese territory, e.g. with direct or indirect sales to the Portuguese territory), nor does the decisional practice of the PCA. Therefore, foreign-to-foreign mergers that are caught by the Competition Act are subject to the same obligations and consequences (e.g. fines may apply and the relevant agreements may be declared null and void).

2. **For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?**

Not applicable.

3. **Additional information: Jurisdictional Test**

Please note that due to the market share threshold, there have historically been many multijurisdictional transactions that trigger mandatory notification in Portugal.

4. **What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies?**

The substantive test is used by the PCA to assess whether a merger constitutes significant impediment to effective competition test (SIEC). Mergers are therefore cleared if they do not create SIEC in the national market or in a substantial part of it.

The PCA reviews the horizontal, vertical and conglomerate aspects of a notified concentration, and investigates whether the transaction gives rise to coordinated effects. In this assessment, the PCA typically takes into account: the structure of the relevant market(s) and the existence of effective competition; the position of the parties and their competitors in the relevant market(s), and their economic and financial strength vis-à-vis their competitors; the market power of the acquirer, also assessed in order to prevent the creation of situations of economic dependence (abuse of economic dependence is a separate infringement under the Competition Act); potential competition and barriers to entry in the market; alternatives available to suppliers, clients and users; access to suppliers or markets; the structure of existing distribution networks; supply and demand trends; special or exclusive rights granted by law or attached to the nature of the products traded or services provided; the control of essential facilities by the undertakings in question and the access opportunities to such facilities offered to competing undertakings; technical and economic progress, to the extent that it does not create an obstacle to competition and allows efficiencies that benefit consumers.

5. **Are non-competitive factors relevant?**

The PCA does not consider non-competition factors while assessing concentrations between undertakings. There are, however, two situations in which non-competition factors are taken into consideration. Firstly, in respect to media sector transactions, the PCA is forced to adopt a prohibition decision, even if the concentration does not raise competition concerns, whenever the media regulator issues a negative (binding) opinion on the grounds of the freedom and plurality of media considerations. Secondly, a prohibition decision adopted by the PCA can be reversed by a decision of the Council of Ministers, following an extraordinary appeal, when "fundamental strategic interests of the national economy" are at stake.

6. Are there different tests that apply to particular sectors?

The only situation in which sector specific tests are applied is that referred to in the previous paragraph, regarding the media sector.

7. Are ancillary restraints covered by the authority's clearance decision?

Restrictions which are directly related to, and necessary for, the implementation of a transaction, and related to the Portuguese territory, are covered by the PCA's assessment and decision, without the need for any separate notification. The PCA's decisions usually describe the assessment carried out regarding the ancillary restraints, and may determine changes to be incorporated for their implementation in accordance with competition rules (the duration of a non-compete clause). Although the PCA has no published guidelines on the assessment of ancillary restraints, its decisional practice follows the Commission Notice on restrictions directly related to, and necessary for, concentrations.

8. What is the earliest time or stage in the transaction at which a notification can be made?

Notifications can be (voluntarily) filed from the time the notifying party(ies) is/are able to demonstrate a serious intention to conclude an agreement or,

in the case of a public offer of acquisition or exchange, where the intention to make such an offer has been publicly announced, and if this agreement or the public offer at issue results in a concentration. This serious intention needs to be assessed in light of the particular circumstances of each case, but normally a letter of intent or a memorandum of understanding will be sufficient to satisfy such a requirement.

9. **For mandatory filing regimes, is there a statutory deadline for notification of the transaction?**

There is no deadline for notification, as long as the standstill obligation is respected.

The concentration must be notified (i) after the conclusion of the relevant agreement and prior to its implementation; (ii) following the date of the preliminary announcement of a public offer of acquisition or exchange, or of the announcement of the acquisition of a controlling shareholding in an undertaking with shares listed on a regulated stock market; or (iii) 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.

The notification becomes effective on the date it has been submitted, and considered complete, to the PCA, along with the proof of payment of the filing fee.

The parties are also encouraged to contact the PCA prior to submitting the notification (pre-notification) - during this stage, the PCA may give its preliminary view on the transaction, completeness of the information, and express potential concerns, thereby enabling the parties to address such concerns in advance. Pre-notification discussions, which are confidential, may also reduce the number of questions asked by the PCA after filing, thus increasing the likelihood of a quick approval. In practice, the pre-notification stage lasts up to 2 weeks in straightforward transactions. Recently, we have seen cases where the pre-notification phase has lasted less than five business days.

10. What is the basic timetable for the authority's review?

After receiving a notification and the respective proof of payment of the filing fee, the PCA has up to 7 business days to declare the notification as complete. After this declaration, there is a deadline of up to 5 business days to carry out the publication of the notice in 2 major newspapers (and on the PCA's website), for third parties' observations. Third parties will have up to 10 business days to submit any observations (although in the vast majority of the notifications there are no observations from third parties).

In Phase I, the PCA concludes proceedings within 30 business days from the date that the notification becomes effective (which usually corresponds to the notification day).

In Phase II (in-depth investigation), the PCA concludes the investigation within no more than 90 business days starting from the date the notification became effective.

Where a decision has not been taken within the time limit, a tacit non-opposition decision is deemed to have been adopted.

11. Under what circumstances the basic timetable may be extended, reset or frozen?

The above mentioned periods may be suspended by the PCA: following requests for information or clarifications addressed to the undertakings concerned or third parties; for 20 business days in the case that the notifying party(ies) offers commitments; or whenever a prior hearing of the notifying party(ies), and of interested third parties that have submitted observations, takes place. Finally, under Phase II the mentioned period may be suspended for up to 20 business days upon request of the notifying party(ies) or with its consent.

It should also be noted that the PCA may authorize the introduction of substantial changes to the notification that has been submitted, following a well-substantiated request from the notifying party(ies). In this case, the

time limit for conclusion of proceedings shall be adjusted so as that the new timeline starts from the date when the changes were received.

Finally, and although there are no specific guidelines on this matter, the PCA has been flexible whenever the parties reasonably request an extension of the deadline for submitting the requested information.

12. **Are there any circumstances in which the review timetable can be shortened?**

Straightforward cases, such as those filed under the Simplified Form, may be cleared by the PCA before the Phase I deadline expires.

13. **Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?**

a) In the case of a merger: together by all the undertakings involved;

b) In the case of an acquisition of exclusive control: by the person or undertaking acquiring control;

c) In the case of the creation of a joint venture: by the persons or undertakings that will exercise joint control over the relevant entity;

d) In the case of an acquisition of joint control: by the persons or undertakings that will exercise the joint control.

Please note that joint notifications must be submitted by a common authorized representative.

14. **What information is required in the filing form?**

In essence, the notification form requires the provision of information on the

identification of the parties; details of the transaction; control structure; relevant market definition, and possible related markets; supply and demand structure of the relevant and related markets; information on suppliers and customers; and on any ancillary restraints. The submission of certain information may be waived by the PCA, particularly in the context of pre-notification contacts.

In the case of concentrations that do not pose significant impediments to competition, the notification may be submitted in a simplified form, although this must be subject to the PCA's validation. In this case, the level of detail of the information required is much simpler, thus reducing costs and time in the search for information.

The criteria for the use of the simplified form are the following:

a) When there are no horizontal overlaps, no vertical effects, and an absence of conglomerate relations, between the parties' activities.

b) When there is horizontal overlap, provided that (i) the combined market share (within the geographical scope defined by the notifying party(ies), and in the national territory) does not exceed 15%; or (ii) the combined market share is above 15% but below or equal to 25%, as long as the increase in market share does not exceed 2%.

c) When there are vertical or conglomerate relations, provided that the individual or combined market shares (within the geographical scope defined by the notifying party(ies), and in the national territory), does not exceed 25%.

Nevertheless, the PCA can always ask for more detailed information and even end up requiring the submission of the regular form.

15. **Which supporting documents, if any, must be filed with**

the authority?

The following supporting documents must be filed with the notification:

- Filing fee;
- Power of attorney;
- Copy of:
    - Articles of association of the parties;
    - Annual reports of the parties;
    - Transaction documents;
    - Market reports and studies.

Filing is submitted in Portuguese, but the PCA has been accepting documents drafted in English. No notarization or other certification is usually required.

16. Is there a filing fee? If so, please specify the amount in local currency.

Payment of the filing fee is required for the notification to be considered effective.
The fees vary according to the aggregate turnover in Portugal of the undertakings concerned as follows:

- €7,500 for a turnover up to €150 million
- €15,000 for a turnover between €150 million to €300 million
- €25,000 for a turnover above €300million

There is an additional fee in the case that Phase II (in-depth investigation) is initiated, corresponding to 50% of the basic fee.

Filing fees double when the PCA initiates ex officio proceedings for failure to notify; or if the PCA concludes that a clearance decision was issued based on false or incorrect information provided by the parties.

17. Is there a public announcement that a notification has been filed?

A notice of the concentration, containing a brief description of the parties and a summary of the key elements of the transaction, is published in 2 major national newspapers (at the expense of the notifying party(ies)), and on the PCA's website. The PCA must, within 5 business days of the notification becoming effective, provide for the publication of the notices.

18. Does the authority seek or invite the views of third parties?

The public announcement by the PCA, mentioned in section 6.5 above, will establish a deadline of at least 10 business days for any interested third parties to submit observations. This will happen in all concentrations notified to the PCA, regardless of whether they raise competition law concerns.

The Authority may also, during the course of the assessment procedure, request information from third parties, public or private entities, that it considers relevant to the evaluation of the concentration.

The PCA may conduct a market test at any time and in both Phases I and II. However, typically market tests are carried out during Phase II, and the PCA does not usually request information from third parties in concentrations that clearly do not raise competition law concerns.

19. What information may be published by the authority or made available to third parties?

In general terms, the PCA has a duty to protect the undertakings' business secrets. The PCA's officials are under obligations of professional secrecy and subject to the general provisions of the Criminal Code on breach of secrecy by public servants.

As regards merger control, the notifying party(ies) is/are requested to

identify, both in the notification and in responses to additional requests for information, all information (sensitive commercial information; business secrets) that they believe should be kept confidential, and to submit a non-confidential version of these documents. Failure to do so might lead the PCA to declare the notification or the responses as incomplete. If the PCA accepts the confidentiality claims, the information will not be disclosed to third parties.

Also, within 5 business days from effective notification, the PCA shall publish the essential elements of the notification in two national newspapers and on the PCA's website, so that any interested third parties may present their observations within the prescribed deadline, which must be at least 10 business days. Following a consultation with the notifying party(ies), a non-confidential version of the final decision will be published on the PCA's website.

20. Does the authority cooperate with antitrust authorities in other jurisdictions?

The PCA actively participates in international forums, such as the International Competition Network, the European Competition Authorities and the European Competition Network ('the ECN'). In the framework of the ECN, the PCA is informed of mergers notified in other Member States with a potential impact in Portugal. Further, in the case of multijurisdictional notifications, the PCA is proactive in trying to coordinate its position and the procedural deadlines with others, in particular with the Spanish Competition Authority. Moreover, the PCA is a founding member of the Ibero-American Forum on the Protection of Competition (which includes Portugal, Spain and most Latin American countries) and of the network for competition authorities of Portuguese speaking countries. Finally, it is also worth mentioning the close relationship between the PCA and CADE, the Brazilian Competition Authority.

21. What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in

comparison with major merger control jurisdictions, such as the EU or US?

Both behavioral and structural remedies are acceptable. Although the PCA mentions in its Guidelines on Remedies that it prefers structural over behavioral remedies, its decisional practice shows that, since the PCA was established in 2003, the number of cases where behavioral remedies were imposed does not significantly differ from the number of structural cases.

Both types of commitment have already been accepted by the PCA simultaneously in the same case. In many occasions, and due to constraints around implementing structural remedies in Portugal, the PCA imposed behavioral remedies.

As regards structural remedies, the PCA considers, in particular, three possibilities for transferring an activity to a suitable purchaser and, under all these circumstances, the purchaser must be approved by the PCA: sale of the divested business within a fixed time-limit after the decision; up-front buyer; fix-it-first remedies.

The up-front buyer solution, according to the PCA's Guidelines on Remedies, might be adequate in cases where there are considerable risks related to the choice of purchaser or related to the asset to be transferred, e.g. due to third parties' rights or uncertainties with respect to the possibility of finding a suitable purchaser. This solution was adopted in case Powervia (Fundo Explorer II) / Laso*Auto-Laso*Probilog*Laso Ab (case Ccent. 16/2011, of 12.01.2012).

Additionally, and in any case, the third party purchaser of the divested business must be approved by the PCA. The applicable standard purchaser requirements are very much in line with those established by the Commission, in brief:

- Independent: the purchaser must be independent from the parties, and must not have links with the parties. This requirement will also be assessed according to the features and practices of the industry and

market at stake;

- Capacity and incentive: the purchaser must hold the necessary technical and financial capacities, experience and economic incentive, to maintain and develop the divested business. For this assessment it might be relevant to confirm whether the purchaser holds the necessary licenses or other specific assets;
- Absence of competition law concerns: from the assessment, it must not be expected that the acquisition by the purchaser may create competition law concerns.

22. What procedure applies in the event that remedies are required in order to secure clearance?

The notifying party(ies) may, at any time in Phases I or II of the procedure, at their own initiative or upon informal invitation from the PCA, submit commitments with the aim of ensuring approval for the concentration. There is not a legal timeframe for commitments to be offered, but the PCA recommends that, during Phase I, the parties submit commitments within 20 business days of the original notification and, in Phase II, within 40 business days of the decision being taken to open an in-depth investigation. The parties may also choose to submit commitments during pre-notification contacts before the review procedure is formally initiated.

Remedies are discussed with the PCA on an informal basis. The PCA does not formally have the prerogative to impose remedies which were not proposed by the notifying party(ies).

If the PCA considers the proposal adequate, it is formally submitted in the form of a “commitment”. The formal commitment shall be accompanied by a complete form describing the commitment, explaining its suitability to eliminate the competition concern, identifying any deviations from the PCA’s model texts and providing detailed information on the divestiture business/behavioral commitment offered. The usual practice involves the submission to the PCA of a draft of the commitment and complete form for the case team to review and comment on. After receiving the final formal commitment, the PCA “market tests” it with other market players, and

publishes it on its website, before accepting it.

The clearance decision is subject to conditions and obligations intended to ensure compliance with the commitment.

23. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

Breach of merger control rules may pose serious negative consequences.

The PCA may initiate infringement proceedings and impose fines to the notifying party(ies) of up to 10% of its group turnover in the previous financial year. The Competition Act is not clear as to whether the turnover concerned is national or worldwide, leaving this decision at the discretion of the PCA according to the features of the case at stake.

So far, there have been no infringement procedures, or fines applied, as regards foreign-to-foreign transactions, but at the national level there has been a significant increase in ex officio investigations for the aforementioned breach of the Competition Act. Please note that the PCA may initiate such proceedings with regards to infringements that took place within the previous five years.

Without the relevant clearance from the PCA, the implementation of the transaction will also be deemed null and void, which may have relevant contractual consequences. This effect may be declared as such, and at any time, by a court and, when necessary, the PCA may revoke the concentration and/or order divestment where the transaction has already been closed.

The PCA may also apply a periodic penalty payment, of up to a maximum of 5% of the average turnover in the preceding year, upon the notifying party(ies) until filing.

Furthermore, there may be personal liability regarding the persons holding

managing, senior or supervision positions in the notifying party(ies), in particular if there is evidence that they had, or should have had, knowledge of the infringement. Therefore e.g. board members, directors or managers may also be held liable for the aforementioned infringements, and fines up to 10% of their annual income may apply.

Private enforcement is also a tool available to possible third parties to claim damages arising from the mentioned infringements.

Please also note that the initiation of infringement procedures and the imposition of fines are published on the PCA's website, and usually followed by notes in the general and specialized written press, and media.

24. **What are the penalties for incomplete or misleading information in the notification or in response to the authority’s questions?**

In cases where false, inaccurate or incomplete information is provided, the notifying party(ies) may be subject to fines of up to 1% of its group turnover in the previous year. It is not clear as to whether the turnover concerned is national or worldwide, leaving this decision at the discretion of the PCA, according to the features of the case at stake. In the last couple of years, the PCA has applied several relevant fines (from €100,000 to €150,000) for these sort of infringements, although not within merger control. Criminal liability may also apply; however, such investigations have never been explored.

Additionally, ex officio investigations may also be initiated by the PCA if it concludes that a clearance decision was adopted based on false, inaccurate or incomplete information provided by the notifying party(ies).

25. **Can the authority’s decision be appealed to a court? In particular, can third parties who are not involved in the**

transaction appeal the decision?

All merger control decisions, either clearing or prohibiting a merger, as well as imposing a fine on undertakings, are appealable to the Competition, Supervision and Regulation Court (CSRC), which is a specialized court with competence to hear appeals of the PCA's (and some sectoral regulators') decisions. The authors of the notification are entitled to challenge such decisions, as well as any interested third parties (including parties that have been previously involved in the proceedings before the PCA, as well as other third parties not previously involved in those proceedings), provided that they can demonstrate a "legitimate interest".

Appeals must be lodged within 3 months of the notification of the decision by the PCA, unless the decision is null and void, in which case there is no time limit.

In general, the appeal does not have suspensive effect over the decision of the PCA.

Rulings by the CSRC 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 which exclusively concern points of law shall be lodged to the Supreme Court directly.

Prohibition decisions may also be appealed, by the authors of the notification, to the Minister for Economic Affairs within 30 days of the notification of the decision. This extraordinary appeal is independent of the judicial appeal procedure and has suspensive effects on the time limit to lodge the appeal. The decision authorizing the concentration is taken by the Council of Ministers and must be grounded in "Fundamental strategic decisions of the national economy".

26. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?

The PCA has defined as a priority for merger control: i) enhancing the merger control analysis; ii) reducing the length of the investigations in complex cases; iii) ensuring a better allocation of resources, in order to allow for a more efficient and simplified instruction and decision processes; iv) continuing with the detection and investigation of concentrations implemented without notification.

27. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

With regards to merger control rules, and the Competition Act as a whole, there are no current proposals or discussions being held for a possible revision of the regime. However, as regards the aforementioned binding opinion of the sector media regulator (section 4.2), on the grounds of the freedom and plurality of media considerations, it has been heavily criticized and it is therefore weakened, so this situation may lead to a possible change.