The Merger Control Review

Fourth Edition

Editor
Ilene Knable Gotts

Law Business Research

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EDITOR'S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. This book provides an overview of the process in 45 jurisdictions as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

As shown in further detail in the chapters, some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are a few jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture ('JV') that produced no effect in Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view, by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, the Netherlands, Romania, Spain and Turkey). Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; and Hungary, Ireland and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Serbia) for mandatory pre-merger review by federal antitrust authorities. Most jurisdictions have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., United States, Ukraine, Greece, and Portugal).

Most jurisdictions more closely resemble the European Union model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged), parties can offer undertakings during the initial stage to resolve competitive concerns, and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission ('the JFTC') announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

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

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period for challenging a notified transaction.

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

Some jurisdictions (e.g., the EU and Ireland currently) have as their threshold test for pre-merger notification whether there is an acquisition of control. Such jurisdictions will often consider relevant joint control (e.g., the EU) or negative (e.g., veto) control rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey). Minority holdings and concern over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, seem to be gaining increased attention in many jurisdictions, such as Australia. Some jurisdictions will consider as reviewable acquisitions in which only 10 per cent interest or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Japan and Russia, at any amount exceeding 20 per cent of the target). This past year, several agencies analysed partial ownership acquisitions on a stand-alone basis as well as in connection with joint ventures (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

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

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. As discussed in the last chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or US. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past year imposed a variety of such behavioural remedies (e.g., China, EU, Netherlands, Norway, South Africa, Ukraine and the US). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2013

Chapter 31

PORTUGAL

Gonçalo Anastácio and Alberto Saavedra[1]

I INTRODUCTION

The new Portuguese competition law regime came into force on 7 July 2012 – Law 19/2012 of 8 May 2012 ('the Competition Act').[2] It is one of the reforms agreed to within the Troika memorandum of understanding (entered into in 2011 between Portugal, the European Commission, the European Central Bank and the International Monetary Fund), with the purpose of aligning Portugal's competition law regime with that of the European Union and taking into account both Portuguese case law and the Portuguese Competition Authority's ('the PCA') past decisions.

The PCA has exclusive jurisdiction to enforce the merger control rules established in the Competition Act. Only 'concentrations', as defined in Article 36 of the Competition Act, which meet one of the notification thresholds 5d in Article 37/1 are subject to merger control review. The basis of the concept of concentration lies in the notion of change of control on a lasting basis.

The definition of 'control' adopted in Article 36/3 of the Competition Act is similar to that used in the European Merger Control Regulation ('the ECMR'):[3] the possibility of exercising decisive influence on an undertaking. Therefore, the following transactions are qualified as a merger:

a the merger between two independent undertakings;

b the acquisition of sole control or joint control of an independent undertaking;

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2 It revokes the main piece of legislation regarding merger control, Law 18/2003 of 11 June 2003, as amended by Law 219/2006 of 2 November, Decree-Law 18/2008 of 29 January, Law 52/2008 of 28 August and Law 46/2011 of 24 June.

3 Council Regulation (EC) 139/2004 of 20 January 2004.

c the change from sole to joint control and from joint to sole control;
d the acquisition of control over a full-function joint venture; and
e the creation of a full-function joint venture.

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

The PCA considers that a reduction in the number of controlling shareholders (from four to two) is a concentration representing a change in the quality of control, since the transaction implies a significant change of the controlling shareholders' powers and incentives and, therefore, a change on the nature of the joint control structure.[4] The object of control in these cases may be legal entities, the assets of such entities or some of these assets, as long as they represent a business with a market presence to which a market turnover can be clearly attributed (e.g., brands[5] and clients[6]). The PCA has considered that even legal entities, which do not develop any economic activity at the time of the notification, may constitute an undertaking when they are expected – with a high degree of certainty – to initiate an activity within a reasonable period of time.[7] Conversely, even when the activity of the assets or legal entity acquired is expected to be discontinued, they are qualified as an 'undertaking'.

Article 36/3 of the Competition Act specifies that control may be acquired by different means. In other words, a concentration may have a legal or a *de facto* basis.[8] It should also be noted that the PCA tends to follow the European Commission's mindset regarding interrelated transactions, considering that two or more transactions constitute a single concentration when they are linked by mutual conditionality.[9]

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

a acquisition of shareholdings or assets under the terms of a special process of insolvency by an insolvency administrator;
b acquisition of shareholdings or assets as merely a form of guarantee;
c acquisition of shareholdings in non-financial undertakings by credit institutions, financial institutions or insurance companies when the acquisition is merely temporary and has the purpose of resale within a maximum period of one year (which can be extended by the PCA followed a reasoned submission by the parties); and

4 Case 32/2010 – *MSF*Lena Construções/AEO*.
5 Case 3/2009 – *Schweppes/ Assets SCC* (brands Joi and Spirit).
6 Case 44/2007 – *SONAECOM/Assets ONI*; Case 47/2011 – *Zon/Clientes Residenciais Ar Telecom*.
7 Case 16/2005 – *Enernova/Ortiga-Safra*.
8 Case 30/2007 – *Bencom/NSL*, in which the PCA established control on a *de facto* basis.
9 Case 15/2008 – *Top Atlântico/Activos Policarpo/Activos Portimar*.

d acquisition by the Portuguese state of a controlling shareholding in a credit institution, if it is undertaken under the Bank Recapitalisation Scheme.[10]

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

a the aggregate combined turnover of the involved undertakings in Portugal exceeds €100 million, after deduction of taxes directly related to the turnover, and provided that the individual turnover achieved in Portugal in the same period by at least two of these undertakings exceeds €5 million;

b the implementation of the concentration 'creates or reinforces a share exceeding 50 per cent in the national market for a particular good or service, or in a substantial part of it'; or

c creation or reinforcement of a share between 30 per cent and 50 per cent of the 'national market' if at least two of the undertakings concerned exceeds €5 million in the previous financial year.

It should be borne in mind that concentrations with an EU dimension will fall under the jurisdiction of the European Commission rather than the PCA.[11]

When a merger is subject to mandatory notification, it cannot be implemented before a non-opposition decision is issued by the PCA. However, Articles 40/2 and 40/3 of the Competition Act establish two exceptions to the standstill clause: in public bids, provided that the acquirer does not exercise the voting rights acquired;[12] and when the negative consequences for the undertakings of suspending the concentration outweigh the potential negative effects on competition of its implementation (subject to a reasoned request by the notifying parties). This only occurs in very exceptional circumstances, as in cases of imminent bankruptcy of one of the parties.[13]

The PCA's decision (of either granting or refusing the derogation of the standstill obligation) is subject to administrative appeal, though not to judicial appeal (Article 40/5).

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

10 Law 63-A/2008 of 24 November 2008, as amended.

11 ECMR.

12 Case 44/2009 – *Metso/Tamfelt*.

13 Individual waivers were conferred in the following cases: Case 11/2006 – *Unión Española de Explosivos/Gestores UEE/Ibersuizas*; Case 44/2009 – *Metso/Tamfelt*; Case 11/2010 – *Triton/Stabilus*; Case 5/2011 – *FCR/Grupo MIF* (the first waiver granted before formal notification to the PCA, i.e., in the pre-notification stage); Case 18/2011 – *FCR/Coelima*JMA*A. Almeida & Filhos*; and Case 44/2011 – *Fundo de Recuperação/Grupo Montebravo* (the first waiver granted where the parties to the transaction had an overlap in the relevant markets).

II YEAR IN REVIEW

In 2012, 61 mergers were notified to the PCA. In 2012, the PCA adopted 52 decisions regarding mergers during the first phase of investigation and only three were subject to Phase II proceedings. Finally, the PCA cleared one case with remedies during Phase II, while there were no opposition decisions. The remaining transactions were either withdrawn by the notifying party (three) or cleared without remedies.

The chart below summarises the activity in 2012 by type of decision and investigation:

Type of decisions	*Number of decisions*
Notifications	61
Decisions	59
Phase I decisions	52
Phase II decisions	3
Withdrawn by the notifying party	3
Non-opposition decisions	51
Non-opposition decisions with remedies	1
Opposition decisions	0
Decisions of non-applicability	4
Referred to the Commission	0

The chart below identifies merger control proceedings that were cleared with remedies or subject to Phase II proceedings, or both, in 2012:

Cases	*Outcome*
Case 16/2011 – *Powervia/Laso*Auto-Laso*Probilog*Laso Ab*	Phase II decision with remedies
Case 31/2011 – *Lactogal/Renoldy*	Phase II, but with no decision (withdrawn by the notifying party)
Case 28/2012 – *Informa/Coface Serviços*	Phase II, but with no decision (withdrawn by the notifying party)

The analysis of Case 47/2011 – *ZON/Clientes Residenciais Ar Telecom* that follows emphasises the PCA's broad margin of discretion in determining the need to notify a concentration by considering that a non-binding transfer of a client base constitutes a notifiable concentration. Subsequently, Case *ANF/Farminveste/Glintt (ParaRede)* shows a more proactive approach towards the PCA's sanctioning of non-notified transactions.

i Case 47/2011 – ZON/Ar Telecom

This case regards the acquisition by ZON TV Cabo Portugal ('ZON') of a group of assets consisting of AR Telecom's residential clients. ZON argued that the mere non-binding transfer of a client base did not constitute a concentration. Notwithstanding, the PCA firmly rejected this view and *ex officio* legally ordered ZON to notify the concentration.

Although there was no binding instrument to transfer the residential clients, the PCA considered that the mere establishment of contacts and operational coordination between ZON and AR Telecom were sufficient to transfer the control of these assets. Citing the European Commission Consolidated Notice on the control of concentrations, the PCA concluded that the referred assets were 'a business with a market presence, to which a market turnover can be clearly attributed'.

ii Case ANF/Farminveste/Glintt (ParaRede)

In December 2012, the PCA fined the National Pharmacy Association ('ANF') and Farminveste for failing to notify a concentration that was subject to mandatory notification. The concentration was implemented in 2008 and consisted in the 'acquisition' of sole control of Glintt (an entity formerly named ParaRede) by ANF (through its subsidiary Farminveste). It occurred within the scope of the merger by incorporation of Consiste with ParaRede.

Although the transaction did not involve an acquisition of a majority of share capital and voting rights in the target, the PCA concluded that there was sole control on the basis of the following arguments:

a the acquirer had a high percentage of share capital and voting rights (approximately 49 per cent);

b five of the nine board members were linked (directly or indirectly through Farminveste or Consiste) to the National Pharmacy Association; and

c the board had certain powers to vote on strategic matters.

After an *ex officio* investigation, in November 2009 the merger operation was notified to the PCA and cleared in May 2010.[14] Notwithstanding the clearance decision, the PCA opened proceedings for violation of the duty not to implement a concentration without prior authorisation. A PCA press release[15] further adds that the PCA applied a fine amounting to 0.05 per cent of the parties' turnover, and that companies operating in Portugal shall bear in mind that infringements to rules on preliminary assessment of mergers are considered a serious infringement of competition law, which the PCA will pursue with vigour (for further developments, see Section IV, *infra*).

III THE MERGER CONTROL REGIME

The formal merger control procedure begins with the submission of a complete filing before the PCA.[16] The new Competition Act eliminated the mandatory deadline to file a notification within seven working days of the following triggering events: the agreement (i.e., when the parties agree to be bound to the essential elements of the transaction), the announcement to the market of a takeover bid and an exchange offer or the submission

14 Case 47/2009 – *Farminveste/ParaRede*.

15 PCA press release, 9 January 2013.

16 Regulation 60/2013 of 14 February 2013, which sets out the notification forms ('regular' and 'simplified' notification forms).

of a bid. As a result of this welcome reform, the Competition Act is now aligned with the current European regime and, in any event, parties to the concentration must respect the standstill obligation, as a result of which they are prohibited from implementing the concentration before a clearance decision has been granted.

A new triggering event was introduced, further to the PCA's previous decisional practice:[17] the 'acquisition' of a concession following a public tender may be qualified as concentration after the final award by a contracting authority and before its implementation.

The notifying party may voluntarily submit the notification before the triggering event, as long as the parties demonstrate a 'serious intention' of concluding the agreement (e.g., parties have already signed a promissory agreement or a memorandum of understanding). However, even before submitting a formal notification form, the notifying parties may hold informal and confidential contacts with the PCA[18] to discuss:

a whether the transaction is subject to notification;

b what information needs to be provided in the notification form in order to avoid subsequent information requests (which would suspend the deadlines of the procedure);

c the nature of control in order to determine the parties that have the duty to notify;

d the relevant market definition (product and geographic);

e potential competition issues raised by the transaction; and

f remedies and ancillary restraints.

The notifying parties should initiate the pre-notification contacts no later than 15 working days before the triggering event.

The notification should be submitted according to the official form recently approved by the PCA under Regulation 60/2013 of 14 February 2013, which can be uploaded to the PCA's website. Some 'essential' information must be provided so that the notification may be considered complete. Interestingly, the Competition Act introduces some degree of flexibility in this respect: the PCA may dismiss the provision of information or documents, subject to a reasoned request of the notifying party.

The PCA must reach a decision during Phase I within no more than 30 working days after the submission of a complete notification and payment of the notification fee.[19] Where the transaction raises serious competitive concerns, the PCA may open an in-depth investigation, which must be concluded within 90 working days from the submission of the notification. It is possible to extend the deadline up to 20 working days following a reasoned request by the notifying party or with its agreement. Furthermore, these procedural deadlines are suspended whenever the PCA requests any additional information from the notifying party. In straightforward cases – which do not raise,

17 Case 78/2007 – *Galp Energia/Concessão do TGLS – Terminal de Granéis Líquidos do Porto de Sines*.

18 The Pre-notification Guidelines of 27 December 2012.

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

further to preliminary assessment, any significant impediment to competition – the parties may benefit from a 'simplified decision' procedure following the presentation of a 'simplified' form, which allows for clearance in a shorter period of time.[20] In this context, it is worth mentioning that the PCA is consistently reducing its appraisal deadlines.[21]

The PCA no longer has to assess mergers according to the substantive test of dominance, since it has been replaced with the significant impediment to effective competition ('SIEC') test as set forth by the current ECMR. As regards the list of factors to be considered in this assessment, Article 41/2 of the Competition Act includes only competition issues; it no longer has elements of economic policy such as the contribution of the merger to international competitiveness of the Portuguese economy or the protection of the fundamental interests of the national economy. Although it now follows closely most of the criteria contained in Article 2/1(b) of the ECMR, the following criteria depart from the EU regime:

a the 'essential facilities' criterion (i.e., control over essential infrastructure by the parties to the transaction and opportunities offered to competitors to access such infrastructure);

b the 'efficiency defence' criterion (i.e., the evolution of the economic and technical progress must also be factored into the assessment); and

c the 'state of economic dependence' (i.e., take into account the bargaining power of the merged entity towards its suppliers).

The above-mentioned criteria (b) and (c) were added by the new Competition Act. It is expected that the PCA will adopt a more effects-based approach following the approval of its guidelines on economic assessment of horizontal mergers.[22]

When the PCA identifies competition concerns, the notifying parties, formally on their own initiative, may submit commitments in any phase of the procedure (but preferably before the hearing of the interested parties)[23] in order to resolve any competition concerns identified by the PCA and thereby clear the merger. Following the submission of commitments by the notifying party, they will be informally negotiated with the PCA to ensure that the remedies to be adopted are effective, sufficient and adequate to meet

20 In its Regulation 60/2013, which contains the simplified form, the PCA identifies some cases that are candidates for a shortened decision, such as

a transactions where there are no horizontal, vertical or conglomeral overlaps in the parties' activities;

b the aggregate market share of the parties does not exceed 15 per cent or 25 per cent (in this latter case, as long as the market share addition does not exceed 2 per cent); and

c the parties are active in a neighbour or vertical related market but their market share (combined or not) does not exceed 25 per cent in the relevant markets,

21 For instance, in Case 34/2012 – *Investcorp/Goromar*, the PCA adopted a decision in a record time frame of only 15 working days.

22 The extensive draft guidelines were released for public consultation in February 2013.

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

the competition concerns identified. Until recently there were no guidelines regarding the procedure to be followed on the submission and the negotiation of commitments, and the requirements they must fulfil to enable the PCA to clear the merger. On 28 July 2011, and following a public consultation, the PCA published its final guidelines on the adoption of commitments in merger control.[24] The submission of commitments, in both Phase I and Phase II, determines the suspension of the deadlines to issue a decision[25] for a period of 20 working days. The PCA is entitled to refuse the commitments when it considers that these have the purpose of delaying the merger control proceedings, or whenever the conditions and obligations are insufficient or inadequate to address the competition law concerns. Regrettably, the refusal decision is only subject to an administrative appeal to the PCA's board without the possibility of the parties resorting to the Competition, Regulation and Supervision Court.

In its assessment of a merger, the PCA also verifies, in line with the Commission's previous decisions and guidelines,[26] whether any clause of the merger agreement introduces a restriction to competition, assessing whether the potential restrictions are directly related and necessary to the implementation of the concentration. If this is the case, the identified restrictions are qualified as ancillary restrictions and are therefore covered by the approval decision.[27]

According to Article 54 of the Competition Act, the PCA must hear the notifying parties and any interested parties before adopting a final decision (an opposition decision, an approval decision with remedies or a decision to open an in-depth investigation). To qualify as an interested party, such party has 10 working days after publication of a notice with the essential elements of the concentration in two national newspapers to submit his or her observations in relation to the transaction. The non-submission of observations during the referred deadline precludes the possibility to intervene in the public hearing, save a PCA decision enabling the interested party intervention in the hearing.

The PCA hears the notifying parties in both phases of the procedure. For this purpose, the time period for the adoption of a final decision is suspended. While the notifying parties may have access to the PCA's (non-confidential) file at any moment of the procedure, the PCA only allows interested parties to have access to the file during the 10 days after the publication of the notification notice and in the hearing periods.

In merger cases taking place in industries subject to sector regulation (such as, *inter alia*, energy, telecoms, media, banking and financial services, securities markets, insurance, or air, rail and road transport), the PCA must request the opinion of the

24 Remedies Guidelines of 28 July 2011.

25 It should be recalled that if no decision is issued by the PCA within the tight deadlines (30 or 90 working days for Phase I or Phase II proceedings, respectively), a non-opposition decision is deemed to have been adopted.

26 Commission Notice on restrictions directly related and necessary to concentrations, Official Journal C 56, 05.03.2005, pp. 24–31.

27 Under exceptional circumstances, the PCA has cleared non-compete obligations exceeding the three-year period prescribed by the referred guidelines of the European Commission on ancillary restraints: see Case 52/2006 – *Mota Engil/RL*.

sector regulator on the merger before adopting a final decision. The opinion of the sector regulator is not binding on the PCA, with the exception of the ERC (the media regulator).[28] The ERC is entitled to express its opposition to the merger project notified if it is deemed to threaten the freedom of speech or media pluralism, irrespective of what the conclusion or the assessment would have been under competition law.[29] With the new competition law regime, the ERC's opinion suspends the deadline for the PCA to decide.

Although this is not a matter directly regulated by the Competition Act, all decisions issued by the PCA's board (including any merger decisions) are now appealable to the new Competition, Regulation and Supervision Court, which has special competence on the referred matters and jurisdiction in the first instance throughout the entire country.[30] Decisions by the Competition, Regulation and Supervision Court are, for the time being, appealable to the Appeals Court of Évora.

Furthermore, according to the extraordinary appeal procedure set out in the PCA statutes, the decision prohibiting a merger[31] may be appealed before the Minister for the Economy, who may authorise it when the benefits for fundamental national economic interests compensate the restrictions to competition arising from it.[32]

IV OTHER STRATEGIC CONSIDERATIONS

i Coordination with other jurisdictions

The PCA participates actively in fora 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 the mergers notified in other Member States with a potential impact in Portugal. Further, in the case of multi-jurisdictional 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

28 The binding nature of the ERC's opinion is established in Article 4(4) of Law 2/1999, 13 January (as amended by Law 19/2012 of 8 May).

29 Case 41/2009 – *Ongoing/Prisa/Media Capital* is the first and only case to date where the PCA has adopted a decision opposing a merger based on a negative binding opinion issued by a sector regulator.

30 Law 46/2011 of 24 June.

31 The PCA has issued only five prohibition decisions: Case 37/2004 – *Barraqueiro/Arriva* (judicial appeal still pending); Case 45/2004 – *Petrogal/Esso* (not appealed); Case 22/2005 – *VIA Oeste (Brisa)/Auto-Estradas do Oeste/Auto-Estradas do Atlântico* (reversed by the Minister for the Economy); Case 12/2009 – *TAP/SPdH*; and Case 41/2009 – *Ongoing/Prisa/Media Capital* (previous opposition by the media regulator).

32 A prohibition decision has only once been reversed by the Minister for the Economy (subject to remedies): Case 22/2005 – *VIA Oeste (Brisa)/Auto-Estradas do Oeste/Auto-Estradas do Atlântico*.

countries. Finally, it is also worth mentioning the close relationship with CADE, the Brazilian Competition Authority.

The PCA normally follows merger cases with EU dimensions, under the jurisdiction of the European Commission, particularly when they have potential effects in Portugal. Furthermore, the PCA appears never to have disagreed regarding the referral of a case to the European Commission, as requested by the notifying parties (Article 4(5) of the ECMR). The PCA has only ever decided to maintain its original jurisdiction following a request from a Member State for the referral of a merger, notified at the national level, to the Commission (22(4) of the ECMR), in Cases 25/2010[33] and 69/2005;[34] therefore, some cases originally notified to the PCA under the Competition Act were referred to the European Commission.[35]

When it is not possible to separate structurally the national part of a global merger, the damages caused to the parties by a delay in the completion of a global transaction would be expected to be considered as a relevant argument when assessing a request for a waiver of the standstill obligation.

ii Minority shareholding

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

To date, the PCA has not contested a merger on the basis of an existing minority shareholding in competing companies. However, this fact was taken into account by the ERC in its negative binding opinion issued in Case 41/2009 involving Ongoing and Media Capital.[36]

Furthermore, the PCA has already analysed, in the context of the execution of a divestment remedy, whether the independence of a 'potential acquirer' is affected by holding a minority shareholding in the merger entity, subject to the divestment obligation.[37] In two other cases,[38] the PCA assessed whether common shareholders in competing companies could lead to a finding that the two companies are a single economic unit.

33 Case 25/2010 – *SC Johnson/Sara Lee's insecticides and repellents business*.

34 Case 69/2005 – *Gas Natural/Endesa*.

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

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

37 Case 6/2008 – *EDP/Activos EDIA*.

38 Case 56/2007 – *TV Cabo/Bragatel*Pluricanal* and Case 21/2008 – *TV Cabo/TVTEL*.

iii Failure to notify concentrations

As in most jurisdictions, the failure to notify a concentration entails negative consequences to the notifying parties, in particular the imposition of heavy fines (up to 10 per cent of the previous year's turnover), no production of effects of the merger, an *ex officio* investigation initiated by the PCA with additional delays and costs, and personal liability of board members and directors.

During the lifetime of the former Competition Law (Law 18/2003), which lasted almost 10 years, the PCA never applied fines to companies for failure to notify.[39] In 2011, however, the competence to pursue these infringements was transferred internally within the PCA from the restrictive practices department to the merger control department. Following this change there were high expectations that the PCA would start pursuing failure to notify cases (typically following on from competitors' complaints). As previously mentioned, ANF and Farminveste were fined in December 2012 for implementing a concentration without prior authorisation (see Section II, *supra*, for more details on this particular case).

This aspect is of paramount importance in terms of risk assessment of the need to notify a concentration, in particular as regards 'foreign-to-foreign' mergers, as these types of transactions are caught by the Competition Act whenever they have, 'or may have, effects in the territory of Portugal'. The PCA adopts a broad interpretation of this concrete legal provision, which determines its jurisdiction. For instance, the Competition Act encompasses those mergers where none of the parties has a permanent establishment in Portugal, but indirectly achieves (e.g., through a distributor) sales in the Portuguese territory.[40]

V OUTLOOK AND CONCLUSIONS

As a result of the new Competition Act, Portuguese merger control has benefited from a further alignment with the EU merger control regime and with its separation from procedural administrative law. However, even with the new Competition Act, there is still no complete separation of these two areas of law:[41] the Administrative Procedure Code applies on a subsidiary basis to merger control procedures conducted by the PCA;[42] and the Code of Procedure in the Administrative Courts is applicable to the judicial review of the PCA's decisions regarding merger control.[43]

39 The PCA only applied fines for infringements to the Competition Law of 1993 (Decree-Law 371/93 of 29 October), in particular to the following companies: SECIL Betões e Inertes (a fine amounting to €75,000), Edinfor (a fine amounting to €19,000), PT Multimédia (a fine amounting to €20,000), Arriva (a fine amounting to €75,000) and JC Decaux (a fine amounting to €25,000).

40 See, for example, Case 7/2004 – *DBAG/SAF* and Case 27/2005 – *Florimond Desprez/Advanta Lambda*.

41 Articles 42 and 91 of the Competition Act.

42 Approved by Decree-Law 442/91 of 15 November 1991, as amended.

43 Approved by Law 15/2002 of 22 February 2002, as amended.

Furthermore, harmonisation with the ECMR has entailed the adoption of the substantive test of 'significant impediment to competition' and the elimination of the deadline established for notification, while maintaining the standstill obligation. Notwithstanding, and as stated above, the market share notification threshold was not suppressed: it was increased (from 30 per cent to 50 per cent), and a new *de minimis* market share threshold was introduced in combination with a turnover threshold. Therefore, a decrease of notifications based on the market share criterion is expected, but the legal uncertainty of the market share trigger is not completely removed.

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

Most of the recent changes in the new legal framework for merger control in Portugal are positive, and it will be interesting to follow its concrete application by the stakeholders (the PCA (including its new board), companies and courts).

Appendix 1

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In 2001, he was seconded to the EU and competition department of Simmons & Simmons in London, and in 2004 he was part of the first group of lawyers to be awarded the title of specialist in European and competition law by the Portuguese Law Society.

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