



The
**LEGAL
500**

**COUNTRY
COMPARATIVE
GUIDES 2020**

The Legal 500 Country Comparative Guides

Portugal

MERGER CONTROL

Contributing firm

SRS Advogados



Gonçalo Anastácio

Partner | Goncalo.Anastacio@srslegal.pt

Duarte Pirra

Managing Associate | Duarte.Pirra@srslegal.pt

This country-specific Q&A provides an overview of merger control laws and regulations applicable in Portugal.

For a full list of jurisdictional Q&As visit legal500.com/guides

PORTUGAL

MERGER CONTROL



1. Overview

Competition law in Portugal is governed mainly 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 from the Government and other state bodies. In 2014, new Statutes of the PCA (Decree-Law 125/2014, of 18 August) 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 the Portuguese territory or that may have an effect thereon. 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 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 for guidelines on the protection of confidential information (general for the PCA, i.e. not specific for merger control), was disclosed on 4 May 2017, and subject to public consultation, however it has not yet been formally adopted.

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 decisions adopted during review proceedings; and the Misdemeanours Act, pertinent to procedures involving the application of

penalties and their judicial review.

Furthermore, the PCA tends to follow the European 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:

1. A concentration between undertakings is deemed to exist when a lasting change of control over the whole or part of an undertaking occurs.
2. The definition of "control" closely follows that of the EU Merger Regulation.
3. The Competition Act applies to concentrations that meet the relevant jurisdictional threshold, in which cases the notification is compulsory.
4. The Competition Act sets out three alternative jurisdictional thresholds, related respectively to: i) turnover in Portugal; ii) market share; and iii) market share combined with turnover.
5. 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.
6. Failing to notify a concentration (as well as implementation before clearance), subject to prior notification, results in several types of severe legal and factual consequences.

2. Is notification compulsory or voluntary?

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

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.

There are two types of exceptions to the above suspensive effect:

1. 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 of protecting the financial value of the investment based on an exception previously granted by the PCA to that effect;
2. Before or after the filing of the notification, the notifying party(ies) may submit a reasoned request to the PCA for an exception from the suspensive effect. The parties must demonstrate that the threat to the transaction caused by the suspension is real and substantial (*g.* in case of a failing firm). The PCA may authorize such an exception 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 exception subject to certain conditions or obligations aimed at ensuring effective competition.

The PCA has been strict in its allowing of exceptions to the standstill obligation. Only in certain circumstances has an exception been permitted (see *Triton/Stabilus*, case Ccent. 11/2010, of 23.04.2010, where the PCA consented to an exception for reasons of imminent bankruptcy, and for more recent cases see: *KKR/Cabolinik*, case Ccent. 41/2018, of 08.11.2018; *Risus Value/Maló Clinic*, case Ccent. 27/2019, of 03.06.2019; *Core Equity/Varandas de Sousa*, case Ccent. 58/2019, of 26.11.2019). The relevant request must be objectively substantiated, as well as clear on the absence of competition law concerns, and on the fact that there will be irreparable damage caused by the standstill obligation. In the context of the Portuguese financial crisis at the beginning of this decade, this mechanism has been used frequently, in particular for acquisitions of businesses close to insolvency, by funds. In more recent cases, this instrument has arisen in concentrations dealing with failing firms, as well as enforcement of pledges.

The Competition Act does not foresee 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 there is no control over the target during the interim period, otherwise it would amount to an early implementation of the concentration.

4. What types of transaction are notifiable or reviewable and what is 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 clearly 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, either 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; or 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 over the undertaking concerned. Veto rights over a business plan will normally also confer the same power if the business plan sets out details on the company's aims and measures for achieving them. 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

covered by the Competition Act, provided they do not result in a change of control.

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable

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 there is not straightforward legal control, 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.

However, the PCA remains attentive to minority interests, as evident from its recent contribution to the OECD: "Common ownership by institutional investors and its impact on competition", of December 2017.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?

The Competition Act establishes three alternative thresholds for mandatory filing. The jurisdictional thresholds do not vary according to sector. Moreover, purely foreign-to-foreign transactions can be covered 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.

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

1. 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.
2. Market share threshold: a notification is mandatory if the implementation of the concentration results in the acquisition,

creation or reinforcement of a market share equal to or exceeding 50% in the "national market" for a certain product or service, or in a substantial part of it.

3. Market share + turnover threshold: a notification is mandatory if there is an acquisition, creation or reinforcement of a market share between 30% and 50% in the national market for 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, are 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:

1. The acquisition of shareholdings or assets by an insolvency administrator within insolvency legal proceedings;
2. The acquisition of shareholdings merely to serve as collateral;
3. The temporary acquisition, by financial institutions or insurance companies, of securities with a view to reselling them (subject to certain conditions); and
4. 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 failure.

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 generally in line with the provisions contained in the EU Merger Regulation.

On the acquirer's side, 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 previous financial year, and should be net of taxes directly related to the business (e.g. VAT) as well as of intra-group sales. On the target's side, only the turnover of its business is taken into account (the turnover of the seller / vendor's group is

not taken into account).

For credit institutions, other financial institutions and insurance undertakings, specific rules apply (generally in line with the provisions contained in 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 covered 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(s) in Portugal, even if the geographic market is wider.

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

8. Is there a particular exchange rate required to be used to convert turnover 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. In which circumstances are joint ventures notifiable or reviewable (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 if one, or more, of the three jurisdictional thresholds is

met.

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 agreement, under both Article 101 TFEU and the Portuguese equivalent.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

The Competition Act does not anticipate any circumstances in which different stages of the same transaction could be separately notifiable for review. Instead, the Competition Act sets out that two or more concentrations between the same natural persons or undertakings, within a period of two years, even when individually not considered to be subject to prior notification, are deemed to constitute a single concentration subject to prior notification when the two or more concentrations, when assessed in conjunction, satisfy the relevant jurisdictional thresholds. For the purposes of the relevant assessment, the Competition Act does not require that the two or more concentrations be linked and, therefore, there is no need for a *de facto* or *de jure* relation between them. The overall transaction should be notified to the PCA following the conclusion of the agreement related to the last transaction, and before its implementation.

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

Neither the Competition Act nor decisional practice of the PCA distinguishes between national and foreign-to-foreign mergers (with connection to the Portuguese territory, e.g. with direct or indirect sales to the Portuguese territory). Therefore, foreign-to-foreign mergers that are covered 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).

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

Not applicable. According to the Competition Act, prior notification is mandatory whenever any of the relevant

thresholds are met. Due to the market share threshold, there have historically been many multijurisdictional transactions that trigger mandatory prior notification in Portugal.

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

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

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 *inter alia*: 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 concerns 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; and technical and economic progress, to the extent that it does not create an obstacle to competition and allows efficiencies that benefit consumers.

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

14. Are factors unrelated to competition relevant?

The PCA generally 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, with 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. 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. In addition, and more recently, the PCA has also considered the imminent insolvency of the target, but it does so in order to better frame the relevant counterfactual competition scenarios.

15. 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. 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 (e.g. 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.

16. 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 PCA must be notified of the concentration: (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.

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

Notifications can be filed (voluntarily) 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 this requirement.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

The parties are encouraged to contact the PCA prior to submitting the notification (pre-notification). Currently, over 4/5 of pre-notification discussions result in a formal notification; and about half (an increasing number) of formal notifications follow pre-notification discussions. During this stage, the PCA may give its preliminary view on the transaction, the 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 may last up to 2 weeks in straightforward transactions. Recently, we have seen cases where the pre-notification phase has lasted less than five business days, but others have lasted much longer (depending mostly on the sorts of topics under discussion).

19. 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 party observations. Third parties will have up to 10 business days to submit any observations (although in the vast majority of notifications there are no such observations).

In Phase I, the PCA concludes proceedings within 30 business days from the date that the notification becomes effective.

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

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

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

The abovementioned periods may be suspended by the PCA: following requests for information or clarifications addressing the undertakings concerned or third parties; for 20 business days, in the event 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 stated period may be suspended for up to 20 business days upon request of the notifying party(ies) or with its/their 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 that the new timeline begins from the date when the changes were received.

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.

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

There are no specific circumstances under which the timetable can be shortened. However, straightforward cases, such as those filed under the Simplified Form, and where there are no observations from third interested parties, are likely to be cleared by the PCA before the Phase I deadline expires.

22. Which party is responsible for submitting the filing?

1. In the case of a merger: all the undertakings

- involved;
2. In the case of an acquisition of exclusive control: the person or undertaking acquiring control;
 3. In the case of the creation of a joint venture: the persons or undertakings that will exercise joint control over the relevant entity;
 4. In the case of an acquisition of joint control: the persons or undertakings that will exercise the joint control.

Joint notifications must be submitted by a common authorized representative.

23. 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; possible related markets; supply and demand structure of the relevant and related markets; 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 less, thus reducing costs and time in the search for information.

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

1. When there are no horizontal overlaps, no vertical effects, and an absence of conglomerate relations, between the activities of the parties.
2. 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%.
3. 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 may even end up requiring the submission of the regular form.

24. Which supporting documents, if any, must be filed with the authority?

The following supporting documents must be filed with the notification:

- Evidence of payment of the filing fee;
- Power of attorney;
- Copy of:
 - Articles of association of the parties;
 - Annual reports of the parties;
 - Transaction documents;
 - Relevant 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.

25. Is there a filing fee?

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 event that a Phase II (in-depth) investigation is initiated, corresponding to 50% of the initial 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.

26. 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 provide for the publication of the notices within a period

of 5 business days of the notification becoming effective.

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

The public announcement by the PCA 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 or not.

The PCA 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.

In the event that the concentration concerns a market that is subject to sectoral regulation, the PCA will request an opinion regarding the concentration from the respective regulator, before a final decision is adopted. To this effect, the PCA will set a reasonable deadline.

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

28. 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.

For 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, and business secrets) that they believe should be kept confidential, and to submit a non-confidential version of these documents. Failure to do so may 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.

Additionally, 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 consultation with the notifying party(ies), a non-confidential version of the final decision will be published on the PCA's website.

In addition, to provide guidance and clarity on this matter, in May 2017 the PCA launched a public consultation on a draft version of its Guidelines on the protection of confidentiality in sanction and supervisory procedures. However, the final version of the guidelines has not been adopted yet.

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

The PCA actively participates in international forums, such as the International Competition Network, 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, and is code-sharing meetings until 2020. Further, in the event of multijurisdictional notifications, it is possible that the PCA is proactive in trying to coordinate its position and the procedural deadlines with others, in particular with ECN authorities such as the Spanish Competition Authority, followed by the European Commission and the UK Competition and Markets 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.

30. What kind of remedies are acceptable to the authority?

Both behavioral and structural remedies are acceptable. The PCA mentions in its guidelines on remedies that it prefers structural over behavioral remedies, and its more recent decisional practice shows that the latter are becoming less frequent – even in vertical concentrations (where structural remedies may be less available) the PCA is becoming more and more reluctant to accept behavioral remedies (although there is an historic number of cases where behavioral remedies were imposed).

Generally, where structural remedies are applied, these are simultaneously complemented by behavioral remedies in the same case.

For structural remedies, the PCA considers, in particular, three possibilities for transferring an activity to a

suitable purchaser: sale of the divested business within a fixed time-limit after the decision; an up-front buyer; and fix-it-first remedies. Under all these circumstances, the purchaser must be approved by the PCA.

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. As an example, this solution was adopted in *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.

31. 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, on either their own initiative, or upon informal invitation from the PCA, submit commitments with the aim of ensuring approval for the concentration. There is no 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 discussions 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 that 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 of a draft of the commitment and complete form to the PCA 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.

32. 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 on 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 in relation to 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. In 2017, the PCA fined Group Vallis €38,500 for a failure to notify, and currently there are unprecedented infringing proceedings investigating breaches of the market share threshold. The PCA may initiate such proceedings for infringements that took place within the previous five years.

Without the relevant clearance from the PCA, the implementation of the transaction will also lack legal effects, 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 occurs.

Furthermore, there may be personal liability for 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 possible tool available to third parties to claim damages arising from the aforementioned 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.

33. 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 group turnover in the previous year. It is not clear as to whether the turnover concerned is national or worldwide, this decision being left at the discretion of the PCA, according to the features of the case at stake. Over the past few years, the PCA has applied several fines (from €100,000 to €150,000) for these sort of infringements, although not within merger control. Criminal liability may also apply; however, this scenario has 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).

34. Can the authority's decision be appealed to a court?

All merger control decisions, either clearing or prohibiting a merger, as well as those imposing fines on undertakings, are appealable to the Competition,

Supervision and Regulation Court (CSRC), which is a specialized court with competence to hear appeals based on decisions from the PCA (and some sectoral regulators). The *authors of the notification*, as well as any interested third parties (this includes parties that have been previously involved in the proceedings before the PCA, as well as other third parties that were not previously involved), are entitled to challenge these decisions, 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 a suspensive effect over the PCA's decision.

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 directly with the Supreme Court.

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 potential subsequent decision authorizing the concentration is taken by the Council of Ministers and must be grounded in "fundamental strategic decisions of the national economy".

In recent years, there have been no relevant appeals of final decisions, other than those on a few interlocutory decisions based on confidentiality concerns.

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

The PCA defined its 2020 priorities for merger control, and therein included broad information on its focus on providing a swift, accurate and effective merger analysis procedure.

Enforcement activities by the PCA related to gun-jumping cases has not decelerated. In fact, quite the

opposite, as the PCA has recently been very active in detecting and investigating several cases, most of them yet unidentified. The first was the infringing decision dated March 2020 against Hospital Particular do Algarve, S.A. for acquiring control over Hospital S. Gonçalo de Lagos, S.A. without prior notification to the PCA. The, in September 2020, the PCA also issued a Statement of Objections against Fidelidade for allegedly taking control over Fundo Saudeinveste, again without prior notification to the PCA.

In the context of the COVID-19 pandemic, the PCA has been providing very prompt reviews, although statistics show a considerable reduction in merger filings (compared to 2019: from January to October 2020 the PCA received 17 filings, while in 2019 the PCA received 61 filings from January to December). The PCA has been promoting interactions via phone or videoconference,

and all documents and filings are to be submitted by email or using SNEOC (the PCA's specific online platform for merger control filings).

36. 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 to the regime.

However, a review of the PCA's guidelines on remedies is long-awaited. In addition, a new notification form, amending and simplifying the present one, was projected within the PCA's Work Program for 2019, and is expected presently.

Contributors

Gonçalo Anastácio
Partner

Goncalo.Anastacio@srslegal.pt



Duarte Pirra
Managing Associate

Duarte.Pirra@srslegal.pt

