

Chapter XX

PORTUGAL

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I INTRODUCTION

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

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

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

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

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

In a recent case,² the PCA considered that a reduction in the number of controlling shareholders (from four to two) is a concentration representing a change in the quality of control since the transaction would imply a significant change of the controlling shareholders' powers and incentives and, therefore, a change on the nature of the joint control structure. The object of control in these cases may be legal entities, the assets of such entities or some of these assets as long as they represent a business with a market presence to which a market turnover can be clearly attributed (e.g., brands³ and clients⁴). The PCA has considered that even legal entities that do not develop any economic activity at the time of the notification may constitute an undertaking when they are expected – with a high degree of certainty – to start activities in a reasonable period of time. Conversely, even when the activity of the assets or legal entity acquired is expected to be discontinued, they are qualified as 'undertaking'.

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

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

- a* acquisition of shareholdings or assets under the terms of a special process of corporate rescue or bankruptcy;
- b* acquisition of shareholdings or assets as merely a form of guarantee; and
- c* acquisition of shareholdings in non-financial undertakings by credit institutions, when the acquisition is expressly limited to a maximum period of three years or does not exceed 25 per cent of the voting rights.

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

- a* the aggregate combined turnover of the involved undertakings in Portugal exceeds €150 million, after deduction of taxes directly related to the turnover, and provided that the individual turnover achieved in Portugal in the same period by at least two of these undertakings exceeds €2 million; or
- b* the implementation of the concentration 'creates or reinforces a share exceeding 30 per cent in the national market for a particular good or service, or in a substantial part of it'.

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

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

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

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

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

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

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

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

II YEAR IN REVIEW

In 2010, despite the national economic context, there were more mergers notified to the PCA (62) than in 2009 (52). All the PCA decisions on mergers in 2010 were adopted during the first phase of investigation, even though two of them were cleared with remedies⁹ and another one an opposition decision.¹⁰

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

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

7 Case 44/2009 – *Metso/Tamfelt*.

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

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

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

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

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

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

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

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

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

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

ii Case 21/2010 – EDP/Greenvouga

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

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

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

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

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

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

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

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

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

This case concerns the proposed acquisition of the Sara Lee’s household insecticide unit by SC Johnson¹⁵ and was initially notified for regulatory clearance in Spain and Portugal as the turnover of the merging parties did not meet the EU threshold.

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

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

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

III THE MERGER CONTROL REGIME

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

The notifying party may submit the notification before the triggering event, as long as, according to PCA practice, the parties have already signed a promissory agreement or a memorandum of understanding. However, even before submitting a formal notification form, the notifying parties may exchange informal and confidential contacts with the PCA¹⁷ in order to discuss whether the transaction is subject to notification and what information needs to be provided in the notification form in order to avoid subsequent information requests (which would suspend the deadlines of the procedure),

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

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

17 The Pre-notification Guidelines of 3 April 2007.

and potential competition issues raised by the transaction. The notifying parties should initiate the pre-notification contact no later than 15 working days before the triggering event.

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

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

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

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

When the PCA identifies competition concerns, the notifying parties, on their own initiative, may submit commitments, in any phase of the procedure (but preferably before the hearing of the interested parties²⁰), in order to resolve any competition concerns identified by the PCA and thereby clear the merger. Following the submission of commitments by the notifying party, they will be informally negotiated with the PCA in order to ensure that the remedies to be adopted are effective, sufficient and adequate to the competition concerns identified. Presently there are no guidelines regarding both the procedure to be followed on the submission and the negotiation of commitments and the requirements they must fulfill to enable the PCA to clear the merger. However, in

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

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

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

November 2010, the PCA launched a public consultation on Draft Guidelines regarding the adoption of Remedies.

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

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

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

As referred above, in merger cases taking place in industries subject to sectoral regulation, the PCA must request the opinion of the sectoral regulators on the merger before adopting a final decision, in both phases of the procedure. The opinion of the sector regulator has a non-binding nature, with exception of the ERC. All decisions taken by the board of this administrative authority are presently appealed before the commercial court with jurisdiction over the place of the applicants' headquarters. However, a new Tribunal was recently created (by Law 46/2011 of 24 June) with special competence on competition, regulatory and supervision matters, which will have jurisdiction in first instance throughout the entire country. Furthermore, according to the extraordinary appeal procedure, set out in the PCA Statutes (approved by Decree-Law 10/2003 of 18 January) the decision prohibiting a merger may be appealed before the Minister for the Economy, who may authorise it when the benefits for fundamental national economic interests compensate for the restrictions of competition arising from it.

IV OTHER STRATEGIC CONSIDERATIONS

i Coordination with other jurisdictions

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

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

request from a Member State for the referral of a merger, notified at national level, to the Commission (22(4) of the ECMR), in cases 25/2010²¹ and 69/2005;²² therefore, some cases originally notified to the Authority under the Competition Act were referred to the European Commission.²³

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

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

ii Minority shareholding

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

To date, the PCA has not contested a merger on the basis of existing minority shareholding in competing companies. However, as previously mentioned, this fact was taken into account by the ERC in its negative opinion issued in the Case 41/2009.²⁴

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

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

22 *Gas Natural/Endesa*.

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

24 *Ongoing/Prisa/Media Capital*.

25 Case 6/2008 – *EDP/Activos EDIA*.

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

V OUTLOOK AND CONCLUSIONS

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

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

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

In July 2010, the PCA made public its thoughts on a possible revision of the Portuguese competition regime, which were in line with the proposals described above. Moreover, in July 2011, the Circle of Portuguese Competition Lawyers presented its contribution to such revision, which, in general, addresses the same concerns identified by the PCA.

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

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