The Merger Control Review

Third Edition

Editor
Ilene Knable Gotts

Law Business Research

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THIRD EDITION

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Ilene Knable Gotts

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EDITOR'S PREFACE

Perhaps one of the most successful exports from the United States has been the adoption of mandatory pre-merger competition notification regimes in jurisdictions throughout the world. Although adoption of pre-merger notification requirements was initially slow – with a 13-year gap between the enactment of the United States' Hart-Scott-Rodino Act in 1976 and the adoption of the European Community's merger regulation in 1989 – such laws were implemented at a rapid pace in the 1990s, and many more were adopted and amended during the past decade. China and India have just implemented comprehensive pre-merger review laws, and although their entry into this forum is recent, it is likely that they will become significant constituencies for transaction parties to deal with when trying to close their transactions. Indonesia also finally issued the government regulation that was needed to implement the merger control provisions of its Antimonopoly Law. Many of the jurisdictions that were 'early adopters' have either refined their processes and procedures in substantial ways or have proposals pending to do so, typically to conform their regime with the pre-merger regimes of other jurisdictions (e.g., Brazil, Canada and the UK). This book provides an overview of the process in each of the jurisdictions as well as a discussion of recent decisions, strategic considerations and likely upcoming developments in each of these. 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 outliers 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. But, 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 on 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 by which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Brazil requires that the notification be made within 15 business days of execution of the agreements; and Hungary 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 and Serbia) for mandatory pre-merger review by federal antitrust authorities.

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 ('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 that in Brazil, and Brazil's CADE has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Serbia, Montenegro and Slovenia similarly maintain close ties and cooperate on transactions. 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.

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). Jurisdictions will often require some measure of negative (e.g., veto) control rights, to the extent that it may give rise to *de jure* or *de facto* control (e.g., Turkey).

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 China and Brazil can be as important as the approval of the US or EU. This book should provide a useful starting point in this important aspect of any cross-border transaction being contemplated in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2012

Chapter 32

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 past decisions.

This chapter shall therefore refer to the rules of the new competition law regime (Law 19/2012), though the Authority decisions cited relate to 2011 or before and are therefore based on the revoked Competition Act (Law 18/2003).

The Portuguese Competition Authority ('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 established 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'): the possibility of exercising decisive influence on an undertaking. Therefore, the following transactions are qualified as a merger:

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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.

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 control over a full-function joint venture; and
e the creation of 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.[3] 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[4] and clients[5]). 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.[6] 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.[7] 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.[8]

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;

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

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 the maximum period of one year (which can be extended by the PCA followed a reasoned submission by the parties); and

d acquisition by the Portuguese state of a controlling shareholding in a credit institution, if it is undertaken under the Bank Recapitalisation Scheme.[9]

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; or

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.[10]

When a merger is subject to mandatory notification, it cannot be implemented before a non-opposition decision is issued by the PCA. However, Article 40/2 and 40/3 of the Competition Act establishes two exceptions to the standstill clause: in public bids, provided that the acquirer does not exercise the voting rights acquired;[11] 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.[12] 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).

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

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

11 Case 44/2009 – *Metso/Tamfelt*.

12 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*; 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).

The infringement of the standstill rule and the 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. Also, the validity of a merger implemented in breach of a standstill clause is dependent upon the subsequent authorisation of the concentration.

II YEAR IN REVIEW

In 2011, and possibly as a result of the national economic context, there were fewer mergers notified to the PCA (50) than in 2010 (62). It should be noted that 46 decisions regarding mergers in 2011 were adopted during the first phase of investigation and only two were subject to Phase II proceedings. Finally, the PCA cleared three cases with remedies during Phase I, while there were neither opposition decisions nor mergers cleared with remedies during Phase II (these were either withdrawn by the notifying party or cleared with no imposition of remedies).

The chart below summarises the activity in 2011 by type of decision and investigation:

Type of decisions	*Number of decisions*
Notifications	48
Decisions	50
Phase I decisions	46
Phase II decisions	2
Non-opposition decisions	44
Non-opposition decisions with remedies	3
Opposition decisions	0
Decisions of non-applicability	2
Referred to the Commission	0

The chart below identifies merger control proceedings that were cleared with remedies or subject to Phase II proceedings in 2011:

Cases	*Outcome*
Case 1/2011 – *Secil Betões/Lafarge Betões*	Phase I decision with remedies
Case 49/2010 – *TRPN/Internorte*	Phase I decision with remedies
Case 40/2010 – *BENCOM/Negócio de Combustíveis BP Açores*	Phase I decision with remedies
Case 3/2011 – *Fresenius/International Dialysis Centers*	Phase II, but with no decision (withdrawn by the notifying party)
Case 44/2010 – *Essilor/Shamir*	Phase II, but without any remedies

The analysis of Case 49/2010 – *TRPN (Grupo HJT)/Internorte* that follows clarifies the PCA's understanding of one of the exceptions to the obligation to notify (i.e., the acquisition of shareholdings or assets under the terms of a special process of bankruptcy or recuperation proceedings does not amount to a concentration in accordance with the Competition Act).

i Case 49/2010 – TRPN (Grupo HJT)/Internorte

This case regards the acquisition by the HJT Group of 2.23 per cent of Internorte's capital as a result of the insolvency and acquisition by the former of the undertaking 'Linhares', previous holder of Internorte's capital. The principal issue was whether or not the HJT Group was obliged to notify the PCA of the acquisition of Internorte's capital, due to the fact that they were acquired as a result of the acquisition of an independent insolvent undertaking.

The notifying party argued that the acquisition by one undertaking of another's assets or company participations following upon bankruptcy or recuperation proceedings of the latter does not constitute a concentration. The PCA rejected this position arguing that the exception to notify a concentration following bankruptcy or recuperation proceedings only applies when the acquisition of the assets or participations does not cause a lasting change to the competitive structure of the market (i.e., the acquisition does not confer upon an undertaking the possibility of exercising a decisive influence in relation to an operator active in the market). The objective of the legal provision is to facilitate the exit of undertakings that are no longer viable, in particular through bankruptcy or recuperation proceedings of undertakings, which do not lead to the creation of situations of distortion of competition.

Furthermore, the PCA went on to state that the reprieve found within the Competition Act applies only to the acquisition of assets or company participations that allow for the exercise of a decisive influence in relation to the activities of the insolvent undertaking itself. As a result, the legal provision is not applicable to the acquisition of assets or company participations of an insolvent undertaking that subsequently allows for conferring of a decisive influence on the activities of a third undertaking (i.e., the HJT Group acquired the insolvent undertaking Linhares, as a result of which the former then subsequently, and as a direct result of the acquisition of the latter, also acquired determining assets in relation to the undertaking Internorte).

Ultimately, and after analysing the issues at stake, the PCA decided that the acquisition of Internorte's exclusive control (the insolvent undertaking) by the HJT Group must be analysed independently of the acquisition of the undertaking Linhares, in whose portfolio the 2.23 per cent participation within Internorte was found, due to the fact that the undertaking Internorte is neither insolvent nor is it an undertaking that is controlled (for the purpose of competition law) by the undertaking Linhares.

It should be noted that with the new Competition Act the scope of this exception is now narrower, as only acquisitions by an insolvency administrator within insolvency proceedings are exempted from the obligation to notify.

III THE MERGER CONTROL REGIME

The formal merger control procedure begins with the submission of a complete filing before the PCA. The new Competition Act has abolished 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 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:[13] 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) – Article 37/4 of the Competition Act. However, even before submitting a formal notification form, the notifying parties may hold informal and confidential contacts with the PCA[14] 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) and potential competition issues raised by the transaction. 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 approved by the PCA under Regulation 120/2009 of 29 February 2009. Since July 2009, the form can also 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 (Article 45/3 of the Competition Act). Also, due to the new regime, Regulation 120/2009 will possibly be amended.

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.[15] 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 Authority requests any additional information from the notifying party.

In straightforward cases the parties may benefit from a 'simplified decision' procedure, introduced in 2007, which allows for clearance in a shorter period of time.[16]

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

14 The Pre-notification Guidelines of 3 April 2007.

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

16 In its simplified 'decision statement' 12/2007 of 24 July, 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.

Several simplified procedure cases have been decided in less than 20 working days, and in 2011, the PCA adopted five such decisions.[17] Article 44/4 of the Competition Act obliges the PCA to draft and approve a short-form notification and a simplified procedure for those concentrations which do not raise, further to preliminary assessment, any significant impediment to competition.

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: (1) 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); (2) the 'efficiency defence' criterion (i.e., the evolution of the economic and technical progress must also be factored into the assessment); (3) the 'state of economic dependence' (i.e., take into account the bargaining power of the merged entity towards its suppliers). The above-mentioned criteria (2) and (3) were added by the new Competition Act.

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),[18] in order to resolve any competition concerns identified by the PCA and thereby clear the merger (Article 51 of the Competition Act). 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 the competition concerns identified. Until recently there were no guidelines regarding both 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. The submission of commitments, in both Phase I and Phase II, determines the suspension of the deadlines to issue a decision[19] 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

17 The PCA is consistently reducing the appraisal deadlines. For instance, in Case 5/2011 – *Fundo Recuperação/Grupo MIF* the PCA adopted a decision in a record time of only 15 working days.

18 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.

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

concerns. Regrettably, the PCA's refusal decision is only subject to an administrative appeal without the possibility of the parties resorting to the courts.

In its assessment of a merger, the PCA also verifies, in line with the Commission's previous decisions and guidelines,[20] 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.[21]

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, they have 10 working days after publication of a notice with the essential elements of the concentration in two national newspapers to submit their observations, opposing 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 (Article 47 of the Competition Act).

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 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 sector regulator on the merger before adopting a final decision. The opinion of the sector regulator has a non-binding nature on the PCA, with the exception of the ERC (the media regulator).[22] The ERC is entitled to express its opposition to the merger project notified if it is deemed to threaten the freedom of speech or the media pluralism, irrespective of what the conclusion of the assessment would have been under competition law.[23] With the new competition law regime, the ERC's opinion suspends the deadline for the PCA to decide.

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

21 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*.

22 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).

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

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 with jurisdiction in the first instance throughout the entire country.[24] Decisions by the Competition, Regulation and Supervision Court are, for the time being, appealable to the Appeals Court of Évora.

Furthermore, according to the so-called extraordinary appeal procedure, set out in the PCA statutes, the decision prohibiting a merger[25] 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.[26]

IV OTHER STRATEGIC CONSIDERATIONS

i Coordination with other jurisdictions

The PCA participates actively in fora such as the International Competition Network ('the ICN'), the European Competition Authorities ('the ECA') and the European Competition Network ('the ECN'). In the framework of ECN, the PCA is informed of the mergers notified in other Member States with a potential impact in Portugal. Further, in 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 the Portuguese speaking countries. Finally, it is also worth mentioning the close relationship with the Brazilian competition authority ('CADE').

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[27] and 69/2005;[28] therefore,

24 Law 46/2011 of 24 June.

25 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).

26 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*.

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

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

some cases originally notified to the Authority under the Competition Act were referred to the European Commission.[29]

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 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 existing minority shareholding in competing companies. However, this fact was taken into account by the ERC (the media regulator) in its negative binding opinion issued in the Case 41/2009.[30]

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.[31] In two other cases,[32] the PCA assessed whether common shareholders in competing companies could lead to considering the two companies as a single economic unit.

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, 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.

So far, the PCA has never applied fines to companies for failure to notify after the enactment of the former Competition Law (Law 18/2003).[33] In 2011, however, the competence to pursue these infringements has been passed internally within the PCA

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

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

31 Case 6/2008 – *EDP/Activos EDIA*.

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

33 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).

from the restrictive practices department to the merger control department and it is expected that the PCA will start to pursue the failure to notify (typically following on competitors' complaints). As the available precedents are very old and from a different law it is not possible to predict the level of fining that the PCA will want to apply and there will obviously be a case-by-case analysis to assess the seriousness of each company's infringement.

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.[34]

As previously stated, with the enactment of the new Competition Act the mandatory notification deadline of seven working days is suppressed and the market share thresholds have been increased. Such changes will presumably lead to fewer 'failure to notify' cases.

V OUTLOOK AND CONCLUSIONS

As a result of the new Competition Act, Portuguese merger control has benefited from a further alignment with EU merger control regime and with its separation from procedural administrative law. However, it should be noted that even with the new Competition Act, there is still no complete separation of these two areas of law:[35] the Administrative Procedure Code applies on a subsidiary basis to merger control procedures conducted by the PCA;[36] and the Code of Procedure in the Administrative Courts is applicable to the judicial review of the PCA's decisions regarding merger control.[37]

Furthermore, harmonisation with the ECMR has entailed the adoption of the substantive test of 'significant impediment to competition', 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 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.

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

35 Articles 42 and 91 of the Competition Act.

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

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

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 prejudice of a rigorous analysis.

Also, the PCA's performance in merger control has recently been internationally praised and was awarded fourth place among 71 counterparts in the Global Merger Control Index ('GMCI'), which is drawn up annually by the Centre for European Law and Economics. Moreover, *Global Competition Review* praised the PCA's work in the area of merger control, considering it 'excellent' and 'high quality'.

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 (PCA, companies and courts).