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MERGER CONTROL IN PORTUGAL

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INTRODUCTION

Law 19/2012, of May 8, 2012 (the “Competition Law”), which entered into force on July 8, 2012 and repealed the former competition law, Law 18/2003, of June 11, 2003, establishes merger control rules applicable to concentrations having effects in Portugal.

The Competition Law brought relevant changes on merger control rules, particularly by (i) putting the merger substantive test in line with the Significant Impediment of Effective Competition (“SIEC”) test of the European merger rules; (ii) changing the turnover thresholds required for the notification to the Portuguese competition authority (*Autoridade da Concorrência* – the “Competition Authority”), including adding a new de minimis market share notification threshold, (iii) deleting the previous notification deadline, and (iv) amending some deadlines applicable to the merger procedure.

In order to prevent the risk of competition restrictions, the Competition Authority exercises control over planned concentrations with effects in the national market.

A concentration is the legal combination of two or more undertakings, by the merger between two or more undertakings or by the control acquisition, directly or indirectly, of the whole or parts of one or several other undertakings.

Following an assessment phase, the Competition Authority may approve the concentration, including upon the application of remedies to be carried out by the undertakings, or prohibit the transaction insofar as it creates significant impediments to effective competition in the national market, particularly in case of creation or reinforcement of a dominant position in the national market.

Undertakings that execute concentrations which have been suspended or prohibited by the Competition Authority may be subject to fines and the legal acts related to the transaction could be declared null and void. The maximum amount of the fine could be 10% of the aggregate annual turnover of the associated undertakings that have engaged in the prohibited behavior.

This paper reviews some of the most important legal aspects regarding merger control rules in Portugal.

POWERS OF THE COMPETITION AUTHORITY

The Competition Authority is an independent authority with financial autonomy, which was created in 2003 by Decree-Law 10/2003, of January 18, 2003. The role of the Competition Authority is to conduct the enforcement of the competition rules in Portugal with a view to ensuring an efficient market performance and a fair division of the resources and to protect the interests of the consumers under the market economy and free competition principles.

In contrast to antitrust practices, for which the Competition Authority is empowered to apply the Competition Law in parallel with European competition rules whenever an impact on trade between Member States exists; in merger control, the Competition Authority may only take action against concentrations to the extent that the relevant merger thresholds, as set out in Council Regulation (EU) 139/2004, of January 20, 2004 (the EU Merger Regulation), are not met. There is however a referral mechanism that allows the Competition Authority and the European Commission to transfer the case between themselves, both at the request of the involved undertakings and of the Competition Authority, in order for the undertakings to benefit from a one-stop-shop review.

The powers of the Competition Authority include:

- The power to investigate any practices that may infringe the national and the European Union competition rules, to conduct the required procedures and to decide on the applicable sanctions, if any;
- The power to decide on the compatibility of undertakings' agreements with the competition rules and to conduct the applicable administrative procedures;
- The power to review and decide on merger transactions and to conduct the applicable administrative procedures; and
- The power to approve regulations on competition issues as well as codes of conduct and manuals of corporate good practices.

NOTIFICATION THRESHOLDS

The Competition Law does not establish a specific deadline for the filing of a notification. Transactions subject to notification may not be however completed before clearance from the Competition Authority.

The notification is required to the extent one of the following thresholds is fulfilled:

1. **Turnover threshold:** the aggregate net turnover obtained in Portugal by the undertakings involved in the transaction (“Participating Undertakings”) exceeds €100 million in the preceding financial year (after deduction of taxes directly related to turnover), provided that the turnover individually obtained in Portugal by at least two of the Participating Undertakings exceeds €5 million; or
2. **Standard market share threshold:** the transaction leads to the acquisition, creation or reinforcement of a market share of equal to or above 50% of the national relevant market, or in a substantial part thereof; or
3. **“De minimis” market share threshold:** the transaction leads to the acquisition, creation or reinforcement of a market share equal to or above 30% and less than 50% of the national relevant market, or in a substantial part thereof, provided that the net turnover individually obtained in Portugal by at least two of the Participating Undertakings exceeds €5 million in the previous financial year.

Merger transactions may be subject to a preliminary assessment within at least fifteen working days prior to the notification of the transaction to the Competition Authority. This preliminary procedure aims to promote informal and confidential discussions on any proposed transaction with the Competition Authority. Typically, this preliminary procedure is made through one or more meetings with the Competition Authority and subsequent additional information requests. The preliminary procedure may, in practice, entail a reduction in time for the assessment of the transaction by the Competition Authority, as it may prevent that the notification form includes incomplete information and it may reduce any additional information requests by the Competition Authority. The preliminary procedure does not, however, imply the taking of a decision by the Competition Authority concerning the compliance of any transaction with the competition rules.

MERGER CONTROL PROCEDURE

The merger control procedure is very similar to the review procedure set out in the EU Merger Regulation and relevant implementing regulation.

After the filing of the notification, which becomes effective after the Competition Authority receives payment of the relevant fees and insofar as the notification is complete, the Competition Authority publishes a summary of the notification on its website and in two national newspapers within five days, so that any interested third parties may present their comments or objections to the proposed transaction.

Within thirty working days from the date the notification becomes effective, the Competition Authority must complete the evidence taking proceeding and decide (Phase 1):

- That the concentration is not subject to mandatory notification;
- Not to oppose to the transaction; or
- To initiate an in-depth investigation, if it considers that from the transaction, taking into account the evidence gathered, may result significant impediments to effective competition.

The in-depth investigation phase (Phase 2) may not exceed ninety working days from the notification date, which means that the deadline of Phase 2 already comprises the deadline of Phase 1 and, in practice, is of sixty working days.

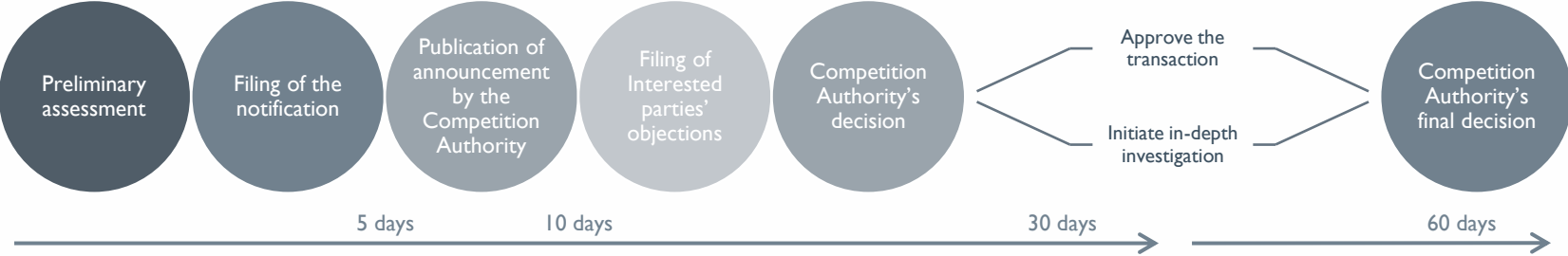
In Phase 2, the Competition Authority must decide:

- To authorize the transaction unconditionally;
- To authorize the transaction subject to the fulfilment of certain commitments by the parties; or
- To prohibit the transaction, in case it creates significant impediments to effective competition in the national market or in a substantial part of it – the so-called “Significant Impediment to Effective Competition”, SIEC test.

In case the Competition Authority fails to adopt a decision within ninety days from the filing date of the notification, the transaction will be deemed as approved.

Both clearance or prohibition decisions may be subject to appeal to the Competition, Supervision and Regulation Court (*Tribunal da Concorrência, Regulação e Supervisão*) created in 2011. The Competition Authority’s decision that prohibits the transaction may be also subject to an extraordinary appeal to the Minister of Economy.

TIMELINE



CONSEQUENCES FOR BREACH OF MERGER CONTROL RULES

- The Competition Authority will prohibit any operations that create significant impediments to effective competition in the national market or in a substantial part of it – the SIEC test –, particularly whether the impediments result from the creation or the reinforcement of a dominant position in the internal market. The Competition Authority will be responsible for defining the criteria for the existence of a dominant position based on the precedents set by the European case law.
- In general terms, an undertaking will be deemed to have a dominant position in the relevant market if it dominates the market and has no relevant competitors. Two or more undertakings operating jointly in the relevant market and having no relevant competitors will be also deemed to hold a dominant position in such market. Conversely, concentrations, which do not create a SIEC in the national market (or in a substantial part of it), are allowed and will be approved by the Competition Authority.
- Failure to notify the Competition Authority (whenever the notification thresholds are met) or the completion of a transaction in breach of a decision issued by the Competition Authority refusing to approve the transaction or approving the transaction with remedies, may entail the parties to severe consequences, as follows:
 - A fine up to 10% of the previous year's turnover for each of the involved undertakings;
 - Periodic penalty payments, in an amount not exceeding 5% of the average daily aggregate turnover of the undertakings in the preceding year to the Competition Authority's decision for each day of failure; and
 - All legal acts related to the transaction are null and void to the extent that they are in breach of the Competition Authority's decision. If the transaction has already been completed, the Competition Authority may order to perform the measures required for the re-establishment of effective competition in the market including, but not limited to, the splitting of the merged undertakings or the transfer of control over the acquired undertaking or business units thereof.

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ABOUT US

WHO WE ARE & WHAT WE DO

ABOUT US

MACEDO VITORINO is a leading Portuguese law firm. We advise domestic and foreign clients in a wide range of business sectors, including banking, distribution, industry, energy, TMT and projects. We are known for our professional and client oriented approach to complex and difficult matters.

Since the foundation of our firm in 1996 we have been involved in several high profile transactions in all of the firm's fields of practice, including banking and finance, capital markets, corporate and M&A, etc.. We have also acted on many complex disputes and restructurings.

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