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### Working Party No. 3 on Co-operation and Enforcement

#### PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by Portugal --

14-15 June 2016

*This document reproduces a written contribution from Portugal submitted for Item 3 of the 123rd meeting of the OECD Working Party No 3 on Co-operation and Enforcement 14-15 June 2016.*

*More documents related to this discussion can be found at  
<http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm>*

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## PORTUGAL

### 1. Summary

1. The substantive assessment of mergers carried out by the Portuguese Competition Authority is guided solely by competition considerations. However, other public interest considerations may play a role in the outcome of the merger by the intervention of other public bodies, through legally defined mechanisms.

2. In terms of the substantive assessment of the merger, there are two instances in which other considerations may outweigh the competition-based assessment carried out by the PCA: (i) the case of a negative opinion against the merger by the Regulatory Authority for the Media to protect freedom and pluralism of the media, which is binding to the PCA; or (ii) if a PCA's prohibition decision is reversed by Government on the grounds of fundamental strategic interests of the national economy, which specifically outweigh the detriment to competition stemming from the merger, following an extraordinary appeal by the parties.

### 2. Merger review in Portugal

3. The Portuguese Competition Authority (PCA) is an independent authority with administrative and financial autonomy with the sole mission of enforcing and promoting competition through sanctioning, supervisory and regulatory powers, according to its By-laws<sup>1</sup>.

4. Within its supervisory powers, the PCA is responsible for the review of mergers subject to prior notification, under the Portuguese Competition Act<sup>2</sup>.

5. Since its creation, the PCA has issued over 780 merger decisions, of which 86% were clearance decisions (671 decisions), 5% were clearance decisions with remedies (36 decisions), and six mergers were prohibited<sup>3</sup>.

6. In this submission, we will describe the substantive test for merger assessment carried out by the PCA, which is guided solely by competition considerations (section 1.1). However, in exceptional circumstances, other public interest considerations may be taken into account, namely in the interaction with sector regulators (section 1.2), and under the extraordinary appeal to Government (section 1.3). We will conclude with final remarks.

#### 2.1 Substantive test for merger assessment

7. Under the Portuguese Competition Act, mergers are reviewed in order to determine their effect on market structure taking into consideration the need to protect and promote effective competition in the market, for the benefit of intermediate and final consumers (Article 41 of the Portuguese Competition Act).

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<sup>1</sup> Approved by the Decree-Law No. 125/2014, of 18 August 2014.

<sup>2</sup> Law No. 19/2012, of 8 May 2012.

<sup>3</sup> Other decisions relate to e.g. withdrawal by the parties, referral to the European Commission or non-notifiable transactions.

8. The PCA assesses mergers under the significant impediment of effective competition (SIEC) test, similar to the test applied by the European Commission and other jurisdictions of the European Union.

9. The substantive test is established in Article 41 of the Portuguese Competition Act as follows: “*Concentrations which are likely to create significant impediments to effective competition in the domestic market or a substantial part of it, in particular if the impediments derive from the creation or reinforcement of a dominant position shall not be authorized*”.

10. The SIEC substantive test was introduced in the Portuguese Competition Act in 2012, replacing the dominance test established in the 2003 Portuguese Competition Act, under which the PCA would prohibit mergers creating or strengthening a dominant position that could result in significant barriers to effective competition in the Portuguese market or in a substantial part of it<sup>4</sup>.

11. When carrying out merger review, the PCA is precluded from taking into account any considerations unrelated with competition, under the criteria laid down in the Portuguese Competition Act<sup>5</sup>.

12. This was further clarified in the legislative reform of 2012, with the elimination of the assessment criterion of “*contribution of the merger to the international competitiveness of the Portuguese economy*” foreseen in the former Competition Act of 2003.

13. In practice, that criterion was construed in the sense that the competitiveness of the economy is strengthened by an effective competition in the market, which reduces prices of goods and services, improves quality and choice, and fosters innovation. Nevertheless, the legislative change in 2012 further clarified that the assessment by the PCA is strictly based on competition criteria.

## 2.2 *Cooperation with Sector Regulators*

14. When mergers occur in regulated markets, the Portuguese Competition Act foresees cooperation mechanisms between the PCA and Sector Regulators during the merger review procedure, which include the duty of the PCA to request an opinion to the relevant regulator before adopting a final decision (Article 55 of the Portuguese Competition Act).

15. As a general rule, the opinions of Sector Regulators are not binding to the PCA. The opinion of sector regulator informs the merger review process but it does not play a role in the substantive assessment of the notified transaction.

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<sup>4</sup> The dominance test was foreseen in Article 12 of the former Portuguese Competition Act, Law No. 18/2003, of 11 June.

<sup>5</sup> Article 41 (2) of the Portuguese Competition Act states that, when reviewing mergers, the PCA shall take into account: “*a) The structure of the relevant markets and the existence or absence of competition from undertakings in these markets or in separate markets; b) The position of the undertakings concerned in the relevant markets and their economic and financial power, compared with those of their main competitors; c) The purchaser’s market power and its ability to prevent the reinforcement of situations of economic dependence vis-à-vis the undertaking that results from the concentration, pursuant to article 12 of this law; d) Potential competition and the existence, in fact or in law, of barriers to entry into the market; e) The possibility of choice for suppliers, clients and users; f) The access of various undertakings to sources of supply and markets for their goods; g) The structure of existing distribution networks; h) Developments in the supply and demand of the products and services at issue; i) The existence of special or exclusive rights conferred by law or stemming from the nature of the products being traded or the services supplied; j) The control of essential facilities by the undertakings concerned and the possibility of access to these facilities provided for competing undertakings; k) Any technical and economic progress that does not constitute an impediment to competition, provided there are efficiency gains that benefit consumers, stemming directly from the concentration*”.

16. The exception is the case of a negative opinion by the Regulatory Authority for the Media (ERC – Entidade Reguladora para a Comunicação Social) when it deems that the merger creates a risk to freedom of speech and diversity of opinions, under Article 4B of the Portuguese Television Act (Law No. 27/2007, of 30 July 2007).

17. In these cases, the PCA is bound to block the merger, irrespective of the substantive competition assessment undertaken. This exception is based on the protection of constitutional rights related to freedom and pluralism of the media.

18. In practice, since 2003, there has only been one case in which a merger was prohibited following the negative opinion of the media sector regulator (case Ccent. 41/2009 – Ongoing/prisa/Media Capital<sup>6</sup>).

### **2.3 Extraordinary appeal to Government**

19. Under Article 41 of the 2014 PCA's By-laws, an extraordinary appeal to the Government can be filed by the notifying parties against a prohibition decision by the PCA. The decision by the Council of Ministers must be grounded on fundamental strategic interests of the national economy, which specifically outweigh the detriment to competition stemming from the merger<sup>7</sup>.

20. The extraordinary appeal is submitted the notifying parties to the Ministry of the Economy within 30 days of the date of notification of the PCA's decision prohibiting the merger. The decision to approve a merger which had been prohibited by the PCA is adopted by a fully reasoned decision of the Council of Ministers, which must also impose remedies to mitigate the negative impact on competition of the merger.

21. The final decision is published in the Official Journal and it can be subject to an administrative appeal to be lodged before the Competition, Regulation and Supervision Court.

22. This mechanism was first established in the 2003 PCA's By-laws<sup>8</sup>, and reviewed in 2014.

23. In 2014, three important amendments to the appeal mechanism were introduced, which enhance transparency of the extraordinary appeal's procedure.

24. On the one hand, the decision to approve the merger is now taken by the Council of Ministers, and not only by the Ministry of Economy as established in 2003. On the other hand, there is a legal obligation to publish the decision in the Official Journal, which was not foreseen in 2003. Finally, the decision to reverse the PCA's prohibition of the merger must now be accompanied by

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<sup>6</sup> Decision available on:  
<http://www.concorrencia.pt/vEN/Mergers/Decisooes/Pages/pesquisa.aspx?pNumb=41&yearNot=2009&pag=1&doc=True&est>

<sup>7</sup> A completely separate procedure from merger control is established in Decree-Law No. 138/2014, of 15 September 2014, which sets the framework concerning acquisitions of control of strategic assets, aimed at guaranteeing the defence and national safety and the safety of supply of the country in services which are fundamental for the national interest, in the areas of energy, transports and communications. Acquisitions of control over strategic assets in these areas, by a person or undertaking from a non-EEA country, may be subject to an evaluation by the member of the Government responsible for the area at stake and may be blocked when the Government considers that the transaction may seriously hinder defence and national security or the safety in the provisioning of services fundamental to the national interest. The decisions taken by the Government can be appealed in Court.

<sup>8</sup> Approved by Decree-Law 10/2003, of 18 January 2003. The extraordinary appeal was foreseen in Article 34 of the 2003 PCA's By-laws.

conditions to mitigate the negative impact on competition, whereas under the 2003 By-laws this was only optional.

25. Since 2003, this mechanism was triggered only once in a merger between highway concession companies – case CCent. 22/2005 – Via Oeste (BRISA) / AEO / AEA. The PCA prohibited the merger in 2006, after concluding it was likely to create or strengthen a dominant position from which anticompetitive effects could arise in the markets for highway operations in the Lisbon-Leiria route and in the Lisbon-Porto route. An extraordinary appeal to the Minister of Economy was filed, who authorised the merger operation, with certain conditions.

26. Although the extraordinary appeal could be perceived as weakening the PCA's independence, it can also be viewed as clarifying the scope of the assessments made by the PCA – which is solely based on competition criteria – and by the Council of Ministers – which is grounded on fundamental strategic interests of the national economy –, setting a clear separation of responsibilities. Moreover, it should be highlighted that the extraordinary appeal can only be lodged against prohibition decisions, which renders it very exceptional and allays concerns of using this extraordinary appeal as a means of protectionism.

### **3. Concluding remarks**

27. The substantive assessment of mergers carried out by the Portuguese Competition Authority is guided solely by competition considerations.

28. However, that other public interest considerations may play a role in the outcome of the merger by the intervention of other public bodies, namely through the opinion of the Regulatory Authority for the Media and the extraordinary appeal to Government.

29. These mechanisms are clearly defined in the law, including rules on transparency and the duty to state reasons, and are subject to judicial review, thus enhancing legal certainty for notifying parties and accountability of decision-makers.