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

#### AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Portugal --

28-29 November 2016

*This document reproduces a written contribution from Portugal submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.*

*More documents related to this discussion can be found at [www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm](http://www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm)*

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**-- PORTUGAL --**

**1. Summary**

1. In Portugal, merger analysis under Article 41(4) of the Portuguese Competition Act prohibits mergers that 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.

2. The Portuguese Competition Act also foresees that, at any time of the proceeding, the Parties present remedies to eliminate the concerns identified by the Portuguese Competition Authority (PCA). Notifying parties to the merger should follow the Guidelines on Merger Remedies issued by the PCA on 28 July 2011. These Guidelines are the result of accumulated substantial experience by the PCA which has fine-tuned its standards of remedies analysis and implementation. The Guidelines are also inspired on the practice and guidelines of the European Commission and other competition authorities.

3. The PCA's overall experience with the remedies procedure has been positive, as it has allowed the PCA to address competition concerns swiftly, in the benefit of consumers and businesses, thus allowing it, in the last five years, to issue 9 conditional clearance decisions. During this period the PCA also blocked 1 merger in the media sector as remedies offered by the parties were not considered to sufficiently and effectively address the competition concerns identified during the assessment.

4. One conditional clearance decision of the PCA was challenged in Court by a third party to the concentration. The Court ruled in favour of the PCA.

**2. Legal Framework**

5. In Portugal, merger analysis under Article 41(4) of the Portuguese Competition Act<sup>1</sup> prohibits mergers that 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.

6. The Portuguese Competition Act also foresees that, at any time of the proceeding, the Parties may present remedies to eliminate the concerns identified by the PCA, following the Guidelines on Merger Remedies issued by the PCA on 28 July 2011<sup>2</sup>.

7. The PCA rejects those remedies presented by the Notifying parties which are to be considered insufficient, inadequate or of uncertain implementation. Furthermore, the Portuguese Competition Act has also explicitly enabled the PCA to refuse any remedies offered by the parties which are deemed dilatory. Such refusal may not be subject to judicial review.

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<sup>1</sup> Law No. 19/2012 of 8 May.

<sup>2</sup> The Guidelines are available on [www.concorrencia.pt](http://www.concorrencia.pt).

### 3. Portuguese Competition Authority's Merger Remedies Guidelines

#### 3.1 Methodology

8. PCA's Merger Remedies Guidelines are based on the experience of the PCA, as well as on the practice and guidelines of the European Commission and other competition authorities, and covers both the procedural aspects as well as the substantive analysis of the remedies.

9. The Guidelines describe the various types of remedies according to the risk analysis entailed, emphasizing the fact that the risk of remedies execution is borne by the Notifying party as a general rule. As main principles, the following are underlined:

- *Effectiveness* – the commitments must be likely to eliminate the identified competition concerns. Effectiveness also implies that the commitments are feasible, entailing an evaluation of both the implementation and monitoring costs. Furthermore, the time-frame of the remedies has to be taken into account. In order to ensure the effectiveness of merger remedies, the PCA will only accept those which have a high degree of certainty and remove the competition concerns identified.
- *Efficiency* – the commitments correspond to the solution with lower costs, among those which are likely to eliminate the competition concerns identified. Costs of market distortion resulting, in particular, from the implementation of behavioural commitments, whether related with static efficiency (e.g. efficiency in resource allocation and cost efficiency), or with dynamic efficiency (e.g. incentives to innovate) are taken into account. Likewise, costs that result from the elimination of potential synergies and efficiencies that would result from the merger, and which could be passed to the consumer, are also included in the analysis.
- *Proportionality* – the commitments should eliminate the competition concerns identified, balancing the means and the objective.

#### 3.2 Selection of the type of remedies

10. As a general rule, the PCA, in line with the European Commission, has a preference for structural remedies over behavioural remedies. Indeed, it is considered that a structural solution is more effective, since it entails a modification into the market structure, deemed to solve the identified competition concerns. Furthermore, this kind of remedy usually does not require a high level of monitoring by the PCA and, in the case of an infringement of the remedies, it is easier to detect.

11. Nevertheless, the selection of the type of remedies – structural, behavioural or hybrid – and the appraisal of the associated risks are always made on a case by case basis, according to the principles of effectiveness, efficiency, and proportionality. This approach does not differ in horizontal or vertical mergers.

12. The usual approach by the PCA can be summarised as follows:

- i) The PCA usually requires the divestiture of an existing viable stand-alone business. However, taking into account the principles of proportionality and efficiency, it may also accept the divestiture of businesses which have existing links or are partially integrated with businesses retained by the parties and therefore need to be 'carved out'.

In what concerns assets divestiture, in particular brands and/or licenses<sup>3</sup>, it is considered by the PCA that the divestiture of a business generally appears preferable to the divestiture of licenses and/or IP rights. Indeed, it is considered that a divestiture consisting of a combination of certain assets which did not form a uniform and viable business in the past creates risks as to their viability and competitiveness. However, the PCA may accept this type of divestiture if the viability of the business is ensured, notwithstanding the fact that the assets did not form a unified business in the past.

- ii) In certain cases, the PCA may consider behavioural commitments offered by the merging parties. These types of remedies may be designed with the aim of improving market contestability.

The PCA may accept measures intended at creating or strengthening the ability and incentive of competitors to dispute the merging parties' customers, which may imply a reduction of some barriers to entry or expansion, such as:

- Measures imposing restrictions on the conduct of the merging parties (e.g. not requesting a particular license for a period long enough so as to increase the scope for entry and expansion by competitors in the relevant markets).
- Measures designed to alleviate the switching costs faced by the merging parties' customers (e.g. limiting practices aimed at enhancing customer loyalty)<sup>4</sup>.
- Measures aimed at reducing/eliminating the establishment of exclusive contracts or long-term contracts by the merging parties. These measures may consist of imposing the revoke of some contractual clauses if they are found to restrict effective competition, e.g., exclusive long-term supply agreements which limit upstream competitors' access to clients in the downstream market.
- Measures imposing the termination of distribution agreements between the merging parties and their competitors, e.g., if they are found to facilitate or promote the co-ordination of certain commercial behaviours.
- Measures restricting the adoption of certain business conducts, such as bundling or cross-selling.
- Measures ordering the merging parties to grant access to: (i) infrastructures, in particular networks; (ii) essential raw materials; (iii) licenses and leases; (iv) technologies; and (v) patents, know-how or other intellectual property rights. In these cases, the access of third parties must be made according to a transparent and non-discriminatory process, especially when vertical effects that could raise competitive concerns are identified.
- Concerning minority shareholdings, which may generate perverse effects but whose associated financial benefits do not entail, by itself, competition concerns, the PCA may consider a mere waiver of all rights inherent to that minority stake, such as rights of representation on the board of directors, veto rights and rights to information, allowing however the possession of the capital share<sup>5</sup>.
- Periodical information report obligations.

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<sup>3</sup> Cfr. Ccent. 22/2008 – Sumolis/Compal. Clearance decision subject to remedies of 14 August 2008.

<sup>4</sup> Cfr. *ibid* Ccent. 5/2013 - Kento\*Unitel\*Sonaecom/ZON\*Optimus.

<sup>5</sup> Cfr. Ccent. 38/2012 – Arena Atlântida/Pavilhão Atlântico\*Atlântico. Clearance decision subject to remedies of 21 August 2013.

Some behavioural commitments may imply a restriction on proprietary rights as for example the establishment of a temporary lease agreement with a third party concerning a part of the portfolio of assets of the merging firms (e.g. a power plant or brand).

- iii) The PCA may also, in very specific conditions, accept remedies that intervene directly in the behavioural conduct of the merging parties, namely in what concerns product quality and/or variety, quantity offered or production capacity, aimed at limiting/eliminating the predicted adverse competitive effects of the merger.

This type of behavioural commitments are, however, only accepted under very exceptional circumstances, since they do not act on the causes of the competitive problems (e.g. in terms of market structure or the level of market contestability), but only restrict the adverse effects of the merger until competition in the market is restored. The assessment of the adequacy of this kind of measures will consider both the costs and benefits of the short-term intervention. Furthermore, they may be justifiable in the context of a broader set of remedies, as a transitory measure until effective competition is restored or when the application of structural commitments or other behavioural commitments would be disproportionate.

This is based on the type and duration of the competitive problems identified, in particular when it is foreseeable that effective competition in the market will be restored in the short term.

### 3.3 *Third parties role*

13. According to the Portuguese Competition Act, consultation of third parties is mandatory for those with a legitimate interest to oppose the merger and voluntary for all other third parties considered relevant by the PCA.

14. Third parties may bring useful information on the remedies proposed by a Notifying party to the file concerning remedies<sup>6</sup>, even though they only have access to a non-confidential version of the remedies package.

### 3.4 *PCA's experience on mechanisms that minimise the risk of ineffective implementation of remedies*

15. (i) When assessing the remedies offered by the Notifying party, the PCA assesses the risks associated with their implementation. In divestiture remedies, it is important to ensure conditions aimed at preventing that the competitive potential of assets or businesses to-be-divested deteriorates before their divestment. In this respect, the set of remedies has to guarantee the maintenance of the commercial value and competitiveness of the businesses or assets, avoiding the possibility of the loss of their economic viability, for example, as a result of the loss of customers or employees.

16. In the analysis of divestiture remedies, the PCA puts great attention to the extent in which they ensure the protection of the to-be-divested assets or businesses prior to divestiture. The remedies package offered by the Notifying party may include a number of sufficient obligations to preserve the to-be-divested assets or business. When this is not the case, the PCA may impose an additional set of orders aimed at protecting the to-be-divested assets or business for the Notifying party to comply with, which become part of its final decision.

17. Therefore, in its decisions, the PCA provides for the separation of the divested business in relation to the activities retained by the parties, ensuring that it is managed as a separate entity intended for sale.<sup>7</sup>

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<sup>6</sup> Cfr. *ibid* Ccent. 5/2013 - Kento\*Unitel\*Sonaecom/ZON\*Optimus is a good example.

18. In order to ensure the enforceability of the set of commitments, the PCA has appointed monitoring trustees in past decisions. The PCA may issue orders and instructions to the monitoring trustee, and the latter may propose to the parties any measures it considers necessary for the performance of their duties. The parties, however, are forbidden to give instructions to the trustee without previous agreement from the PCA.

19. In the PCA's perspective, the monitoring trustee should protect the integrity and independence of the to-be-divested business during the period between the implementation of the merger and the acquisition of control by the future acquirer. As such, the monitoring trustee will be responsible for supervising and reporting the efforts made by the parties to find an acquirer, submitting reports to the PCA (periodical or upon a specific request by the PCA), namely describing the implementation of the set of remedies.

20. In cases of separation of the activities, the monitoring trustee may also be responsible for assigning the personnel between the to-be-divested business and the activities held by the parties.

21. In some cases, the PCA may also consider that it is necessary to appoint (following a proposal from the parties) a hold-separate manager, independent from the parties. This person will integrate the divesting businesses, with direct knowledge of the business or assets to be divested, being responsible for their daily management, under the supervision of the monitoring trustee. This management is performed independently of the Notifying party and in the best interest of the business or assets to be divested, with the aim of maintaining its economic viability, marketability and competitiveness.

22. (ii) The PCA considers that the deadlines established for the divestment of businesses or assets must be short, so as to prevent risks associated with the deterioration of their competitive value in the period of time between the adoption of a final decision by the PCA and the divestiture.

23. Based on its experience, the PCA considers that a 6 months period would normally meet this criterion, although longer time frames may be accepted on a case by case basis. This period comprises both phases established for the divestment procedure, namely a first one in which the Notifying party attempts to accomplish the divestment and a second one in which a divestiture trustee promotes the sale. In the context of this second phase, the divestiture trustee may be given the option of selling the business/assets with no minimum price limit ("fire sale clause").

24. The PCA also considers the possibility of including clauses of divestiture of property of the type of "crown jewel", normally offered as an alternative and subsequent commitment to a first sale attempt. In fact, this type of clause can expedite the divestiture process, by reducing the incentives of the merging parties in delaying the sale.

25. Moreover, the appointment of monitoring and divestiture trustees, which is accounted for, as a general rule, in the PCA decisions, clearly envisages making the divestiture process successful and more expeditious.

26. In some cases, as previously mentioned, it may also be necessary to appoint (following a proposal from the parties) a hold-separate manager<sup>8</sup> for the daily management of the divesting business, under the supervision of the monitoring trustee, ensuring the maintenance of the economic viability, marketability and competitiveness of the business to-be-divested.

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<sup>7</sup> Cfr. Ccent. 12/2009 – TAP/SPdH. Prohibition decision subject to conditions of 11 November 2009.

<sup>8</sup> Cfr. *ibid* Ccent. 12/2009 – TAP/SPdH.

27. In its Merger Remedies Guidelines, the PCA states that the main way to mitigate the risks associated to a divestiture, in particular those related with finding a purchaser, is to require the Notifying party to celebrate a binding contract with a buyer, either prior to the implementation of the transaction (buyer pre-implementation "up-front buyer") or prior to the decision of the PCA (buyer pre-decision or "fix-it-first"). Nonetheless, these two mechanisms are only feasible in very exceptional cases.

28. (iii) The PCA usually includes periodical reporting obligations to the Notifying party and the trustees, namely in what concerns the evolution of the negotiations underlying the divestiture process and the identification of potential buyers, together with a general reporting obligation concerning any matter relevant to the remedies implementation. Compliance with the remedies imposed is usually monitored by the case handlers.

#### **4. Prohibition decision and conditional clearances in Portugal**

##### **4.1 Merger prohibition decision**

29. In the past five years the PCA has adopted only one prohibition decision<sup>9</sup>. This merger concerned the telecom sector. By the proposed transaction, PT<sup>10</sup> would enter into an already existing Joint Venture (Sport TV) between ZON Optimus and Controlinveste. Sport TV had been the sole supplier of Sports premium pay-tv subscription channels until Benfica TV (premium) started broadcasting in July 2013. Pre-merger, Sport TV was a 50/50 joint venture between ZON Optimus and Controlinveste.

30. As a result of the merger, ZON Optimus and PT would each hold 25% of Sport TV' share capital and Controlinveste the remaining 50%.

31. The PCA's assessment resulted in major concerns in terms of vertical effects. Regarding customer foreclosure (i) the share of pay-tv subscribers enjoyed by non-integrated (with Sport TV) telecom operators would be reduced from around 50% to 10%; (ii) a reduction on PT's incentives to promote the entry/expansion of premium Sports channels would most likely occur; (iii) there would be an increase of ZON Optimus' incentives for customer foreclosure.

32. Also, important concerns were identified relating to input foreclosure: (i) how would the concentration increase Sport TV's market power; and (ii) how incentives to foreclose would increase as a result of the proposed concentration.

33. There were also competition concerns with coordinated effects in pay-TV and triple-play, as the merger would have (i) resulted in the creation of structural links between rival telecoms, (ii) increased the symmetry in terms of vertical integration, (iii) reduced the scope and incentives for differentiation via Sports Premium contents, (iv) harmonized the degree of information on competitors accessible by both ZON Optimus and PT, (v) harmonized cost structures, (vi) increased transparency creating fora for information exchange and (vii) strengthened barriers to entry as a result of the input and customer foreclosure effects.

34. The parties presented a package of remedies, which the PCA considered insufficient since it did not address some of the concerns (e.g. coordinated effects) and addressed ineffectively other competition concerns identified. Therefore, the PCA issued a prohibition decision.

<sup>9</sup> Cfr. Ccent. 4/2013 - Controlinveste\*ZON Optimus\*PT /Sport TV\*Sportinveste\*PPTV, prohibition decision of 31 July 2014.

<sup>10</sup> At the time, PT was the largest Portuguese telecom holding company.

#### 4.2 *Mergers clearance subject to remedies*

35. As stated on its merger remedies' guidelines, the PCA has a preference for structural remedies and has accepted these type of remedies in the majority of past cases. This option derives from both the type of competition concerns identified and the adequate way of addressing them. The PCA can also accept behavioural remedies if it finds them appropriate. Often, a combination of both has been a solution frequently adopted during the last five years.

36. For instance, in a merger concerning the wind-power electricity generation market<sup>11</sup> in which EDP Renewables acquired the sole control over a number of wind-power parks, belonging to ENEOP, the PCA accepted behavioural remedies and also structural remedies.

37. This merger raised concerns because of the potential impact in the complementary services market as a result of the merger.

38. In fact, a rise of the levels of intermittence and unpredictability of wind-power electricity generation, in particular as a result of EDP Renewables' potential strategic behaviours in the management of both the power capacity and the effective electricity production by its own wind-power parks, would have resulted in an increase of the need to resort to complementary services markets (secondary and tertiary regulation) in order to adjust generation and consumption needs in real-time.

39. As the main beneficiary of the referred to increase to recourse to complementary services reserves - due to its overwhelming position in the complementary services market – the EDP Group would have the incentive to adopt strategic behaviours when managing its own wind-power parks with negative effects to consumers.

40. EDP Renewables offered behavioural remedies that were considered adequate and sufficient to eliminate the competition concerns. However if competition concerns would still remain following the cessation of the behavioural remedies, a divestment remedy will be applied.

41. The PCA has also accepted a combination of both structural and behavioural remedies in a merger case in the telecom sector<sup>12</sup>. The merger concerned the acquisition by Ms. Isabel dos Santos and Sonae, of the joint control of a vehicle company ZON, after incorporating, by merger, the company Optimus.

42. ZON is a provider of electronic communications services (mainly broadband internet access, fixed telephony and pay-TV services). ZON is also active in the production, distribution of audio-visual content and in cinema exhibition. Optimus is a company also active in electronic communications markets including, fixed and mobile services, broadband internet access and pay-TV services.

43. This transaction required an extensive analysis of the electronic communications markets, including the pay-TV, triple-play and quad-play markets, as well as of those vertically related audio-visual content markets.

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<sup>11</sup> Cfr. Ccent. 9/2015 – EDP Renewables/Ativos ENEOP. Clearance decision subject to remedies of 14 August 2015.

<sup>12</sup> Cfr. Ccent. 5/2013 - Kento\*Unitel\*Sonaecom/ZON\*Optimus. Clearance decision subject to remedies of 28 August 2013.

44. The PCA's assessment concluded that, despite the small market-share of Optimus in most of the relevant markets, the transaction would be likely to result in barriers to effective competition in those areas where Optimus had access to a fiber-optic network. This was due to the fact that, on the one hand, Optimus and ZON were close competitors in those areas, and, on the other hand, the transaction would be likely to reduce Optimus' incentives to maintain the access of its competitor Vodafone to the former's fiber-optic network and, thereby, resulting in a decreased competitiveness of Vodafone, particularly in geographic areas where the provision of services for the latter dependent on accessing the Optimus' fiber network.

45. To overcome these concerns, a clearance decision was accompanied by several remedies, including, namely, (i) the extension of the time-frame during which Vodafone may access Optimus' fiber-optic network, (ii) Optimus would have to present to Vodafone a call-option agreement for the purchase of Optimus' fiber-optic network, (iii) Optimus would be impeded to charge its triple-play fiber customers payment of any amounts due by virtue of contractual fidelity clauses and (iv) Optimus also agreed to provide non-discriminatory access to its fiber-optic network on a wholesale basis.

46. Similarly, the PCA adopted a clearance decision with remedies regarding a merger case in the maritime transport sector<sup>13</sup>. The case concerned the acquisition of sole control of Portline Containers Internacional ("PCI") by Via Marítima, a company belonging to Group Sousa, one of the main groups operating in maritime transport between the Portuguese mainland and the Madeira Archipelago.

47. The PCI provided regular, scheduled services for the maritime carriage of cargo by container to West Africa and also in routes between the Portuguese mainland and both the Archipelagos of Madeira and Azores. As the execution of these last two were based on slot-capacity charter agreements, the PCA considered both unilateral and coordinated effects, and determined that, in particular with a special focus on the route between the Portuguese mainland and the Madeira Archipelago, a number of concerns could not be ruled out.

48. These concerns resulted, among other facts, from the high concentration existing in the market (only two operators would remain) and the existence of barriers to entry, as well as from several other market-characteristics which rendered it vulnerable to behavioral coordination. Some of them were: symmetries between the remaining cargo shipping companies and respective procurement offers, the existence of structural and commercial multimarket contacts and relations between them, low elasticity of demand, stability and predictability of the level of the demand, frequent and repeated transactions and the existence of some transparency in the market.

49. In order to eliminate competition concerns – both unilateral and coordinated effects - on the market for the maritime carriage of cargo by container (on a regular basis) in the route between the Portuguese mainland and the Madeira Archipelago, the parties offered the following remedies, which the PCA assessed and accepted:

- i) Allow for the awarding of a two year slot-capacity contract for the route between the Portuguese mainland and the Madeira Archipelago to an eventual future entrant, or – pursuant to public consultation by public regional authorities for the same activity and route – to an operator which engages in mixed transport (passengers and cargo) by ferry;
- ii) In the event of not-fulfilling the previous commitment, namely due to the possibility of a new operator not coming forward, and within a period of nine months following the PCA's clearance decision, award to any operator engaged in the referred to route a slot-capacity agreement and/or a cross-booking slot-capacity agreement. This/these agreement(s) would last for a period of 5 years following the PCA's decision;

<sup>13</sup> Cfr. Ccent. 24/2015 – Via Marítima / PCI. Clearance decision subject to remedies of 23 December 2015.

- iii) Abstain from presenting a proposal for the purposes of the (at the time) current market consultation to operate in mixed transport (passengers and cargo) by ferry in the route between the Portuguese mainland and the Madeira Archipelago

50. The methodology followed in the referred to cases closely followed PCA's Merger Remedies Guidelines.

## **5. Judicial Review of Merger Cases in Portugal**

51. In the last five years, only one PCA's clearance decision subject to remedies has been assessed by the Competition, Regulation and Supervision Court, case Ccent 38/2012 - Arena Atlântida/ Pavilhão Atlântico\*Atlântico<sup>14</sup>.

52. Following PCA's Phase II clearance decision subject to remedies, the company Take-Off, a third-party to the procedure, appealed to the Court. Essentially, it alleged that the PCA had not pursued an effective Phase II investigation and that the remedies imposed were neither sufficient nor adequate to eliminate or mitigate the concerns and problems identified by the PCA during its assessment on the merger.

53. After reviewing the facts of the case, and those put forward by Take-Off and by the defendants, the Court concluded that the PCA enjoys a considerable margin of discretion when assessing merger cases, including the assessment of remedies. In this respect, the Court stated that, among other aspects, the principle of separation of powers should ensure that the Courts' reviewing powers remain limited to determine whether the PCA has incurred in a manifest error of law or procedural malpractice<sup>15</sup> (intentional or negligent).

54. With this in mind, the Court concluded that – unless any of referred to situations occurred - it is barred from revisiting the case based on the merits, as this falls within the powers of the PCA, legally recognized in its By-laws and in the Portuguese Competition Act.

55. The Court is, therefore, prevented from replacing the PCA on its mission of assessing mergers cases, including aspects related to remedies, thus rejecting the appeal.

## **6. Concluding Remarks**

56. The PCA's overall experience with the remedies procedure has been positive, as it has allowed the PCA to address competition concerns swiftly, in the benefit of consumers and businesses, enabling it to issue nine conditional clearance decisions in the last five years. During this period the PCA blocked one merger, as remedies offered by the parties were considered not to sufficiently and effectively address the competition concerns identified during the assessment.

57. The PCA's merger cases of the period at analysis closely followed the PCA's Merger Remedies Guidelines. The selection of the type of remedies – structural, behavioural or hybrid – and the appraisal of the associated risks were made on a case by case basis, according to the principles of effectiveness, efficiency, and proportionality.

58. Although the PCA's Merger Remedies Guidelines state that the PCA has a preference for structural remedies, the last years have shown that a combination of both remedies (structural and behavioural) has been a frequent solution.

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14 Decision of 21 March 2013.

15 Such as absent or manifest insufficient legal or de facto basis to issue the decision, or disregard or violation of third-party's procedural rights.