

market intelligence

Volume 3 • Issue 1

GETTING THE
DEAL THROUGH 

Merger Control

John Davies leads the global
interview panel

'Market transformational'
deals on the rise

Activity levels • Enforcement priorities • Keynote deals • 2016 outlook
Europe • North America • Asia-Pacific • Latin America

market intelligence

Publisher: Gideon Robertson

Senior business development manager:

Adam Sargent

adam.sargent@gettingthedealthrough.com

Business Development Manager:

Dan Brennan

dan.brennan@gettingthedealthrough.com

Readership Development Manager:

Rosie Oliver

Rose.Oliver@gettingthedealthrough.com

Product marketing manager: Kieran Hansen

subscriptions@gettingthedealthrough.com

Head of production: Adam Myers

Editorial coordinator: Eve Ryle-Hodges

Subeditor: Claire Ancell

Designer/Production editor: Nathan Clark

Cover: iStock.com/CSA-Images

No photocopying. CLA and other agency licensing systems do not apply. For an authorised copy contact Adam Sargent, tel: +44 20 3780 4104

This publication is intended to provide general information on law and policy. The information and opinions which it contains are not intended to provide legal advice, and should not be treated as a substitute for specific advice concerning particular situations (where appropriate, from local advisers).

Law

Business

Research

Published by

Law Business Research Ltd

87 Lancaster Road

London, W11 1QQ, UK

Tel: +44 20 3780 4104

Fax: +44 20 7229 6910

©2016 Law Business Research Ltd

ISSN: 2056-9025



ABA Section of
International Law
Your Gateway to International Practice



THE QUEEN'S AWARDS
FOR ENTERPRISE
2012

Strategic Research Sponsor of the
ABA Section of International Law

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

A note from John Davies, Panel Leader

A global trend towards consolidation of markets is visible in the increased volume of transactions, as well as in the proliferation of 'market transformational' deals – four to three or three to two mergers, where the transaction could be the last major consolidation possible in the relevant sector. The contributions in this issue of *GTDT: Market Intelligence – Merger Control* show that such mergers are likely to face more intense scrutiny by competition authorities, not least because of the heightened attention they may draw from third parties and from political spheres. Consequently, competition authorities are also likely to take a closer look at the kind of remedies they find acceptable.

In particular, mergers in fields as diverse as healthcare, food retail as well as media and telecoms have faced challenges in several jurisdictions. For example, in Germany, the Bundeskartellamt blocked a merger between two of the country's largest food retail chains, Edeka and Kaiser's Tengelmann (later cleared by governmental intervention). In the US, the FTC required the divestment of 330 Family Dollar stores as a condition of closing its investigation into *Dollar Tree/Family Dollar Store*. In China, MOFCOM cleared the acquisition of Alcatel Lucent by Nokia subject to conditions related to the licensing of standard-essential patents – notably after the transaction had already received unconditional clearance in the US and the EU.

In this environment, it is more essential than ever to have up-to-date advice on current trends from local experts who also understand the international landscape. This issue of *GTDT: Market Intelligence – Merger Control* presents views and observations from leading competition practitioners around the world, offering valuable insight into the evolving legal and regulatory landscapes in their respective jurisdictions.

We would like to express our gratitude to the interview panel for assisting with this project and providing their insights into major market, regulatory and enforcement trends, and the impact these are having on this complex field of practice.

Freshfields Bruckhaus Deringer LLP

March 2016

In this issue

Australia	2	Korea.....	79
Austria	8	Mexico.....	86
Belgium	12	Netherlands	92
Brazil	18	Nigeria	98
China	24	Norway	102
Denmark	29	Portugal	106
European Union.....	34	Russia	111
Finland.....	38	Spain	116
France.....	42	Sweden	121
Germany.....	47	Switzerland	126
India	53	Turkey	130
Indonesia	58	Ukraine	138
Ireland	63	United Kingdom.....	144
Italy	70	United States	149
Japan.....	74		



MERGER CONTROL IN PORTUGAL

Mário Marques Mendes is a partner at Gómez-Acebo & Pombo, leading the EU/competition group of the firm's Lisbon offices. He was formerly senior partner of the boutique firm Marques Mendes & Associados, which merged into Gómez-Acebo & Pombo in early 2015. He has a lifetime experience in merger control, restrictive practices, dominance and state aid matters, having represented national and international clients in cases conducted before the European Commission and the Portuguese Competition Authority and having handled important litigation before national and EU courts. He is a frequent speaker at conferences and seminars, having written extensively on various subjects of EU law, notably competition/antitrust; merger control; state aid; and state intervention; as well as of international trade law. Following his graduation from the Lisbon University Law School, he became a law graduate from the College of Europe,

Bruges and, as a Fulbright Scholar, an LLM graduate of the University of Michigan Law School, Ann Arbor. He was a founding member and first chairman of the board of the Portuguese Association of Competition Lawyers, having meanwhile served as chairman of the Advisory Council of which he is currently a member.

Pedro Vilarinho Pires is of counsel at Gómez-Acebo & Pombo and one of the members of the EU/competition group in the firm's Lisbon offices. He has significant experience in merger control, having advised important national and international clients in merger control proceedings before the Portuguese Competition Authority. Pedro was formerly partner of the Lisbon boutique firm Marques Mendes & Associados and has previously been IBM Portugal in-house counsel and director of legal services. He has authored and co-authored various writings on Portuguese competition law.

GTDT: What have been the key developments in the past year or so in merger control in your jurisdiction?

Mário Marques Mendes & Pedro Vilarinho

Pires: The economic crisis that strongly affected southern European countries, including Portugal, certainly had an impact on the merger control activity of the Portuguese Competition Authority (the AdC or the Authority) over recent years, leading to a constant decrease in the number of cases decided until 2014. Looking at such numbers, regardless of the type of decision (clearance without or with conditions, prohibition, non applicability), one can see that from 59 cases in 2010 and in 2012, and 50 cases in 2011, the numbers came down to 44 cases in 2013 and only 39 cases in 2014. Significantly, while the economy has shown some small growth in 2015 (reportedly 1.5 per cent), the number of cases decided was increased to 63.

Basically, no substantial changes can be found in the type of transactions assessed by the Authority.

As regards the Authority's decisions in 2015, none can be found that could be seen as a landmark or even particularly relevant. In fact, out of the 63 decisions adopted, 58 were clearance decisions without obligations or conditions attached, two were clearance decisions with conditions and obligations to ensure the fulfilment of the commitments offered by the parties, and in three cases the AdC decided to close the proceedings due to the withdrawal of the notification by the parties.

In the above scenario, the merger control decision affecting the Portuguese market that may be considered most significant was the acquisition of PT Portugal by Altice, a multinational cable and telecommunications company, a case assessed by the European Commission under the EU Merger Regulation. The transaction followed the merger by incorporation of Portugal Telecom, the former major Portuguese telecoms player, into the Brazilian company OI. Within that merger, Portugal Telecom contributed, among other assets, with its shareholdings in PT Portugal, its subsidiary that controlled the assets allocated to Portugal Telecom's telecommunications business in Portugal.

In the background of the *Altice/PT Portugal* transaction was the turbulence that the Portugal Telecom Group underwent following highly questionable investments in companies, meanwhile bankrupted, of the Espírito Santo Group, headed by the Espírito Santo family and, up to 2014, one of the most important Portuguese groups that notably controlled the Banco Espírito Santo.

The European Commission found competition concerns in the projected transaction which, the Commission said, as initially notified could reduce competition in a number of telecommunications



Pedro Vilarinho Pires

markets in Portugal. To overcome those concerns, Altice offered commitments, namely the sale of its two Portuguese subsidiaries Cabovisão (active in pay TV, fixed internet access and fixed telephony services essentially to residential customers) and ONI (active in the provision of services to business customers including fixed telecommunication services such as voice, data and internet access services, and IT services). The Commission eventually accepted those commitments and adopted a clearance decision conditional upon their fulfilment.

One interesting feature in the assessment of the case was the fact that the Commission received from the AdC a request to refer the case to the latter, invoking article 9(2)(a) and (b) of the EU Merger Regulation, taking into account the effects of the concentration on competition in Portugal. However, the Commission rejected the referral request because it concluded that due to its experience in cases in the telecoms sector and the need to ensure consistency in the enforcement of merger control rules in such sector across the European Economic Area it would be in a better position to assess the case.

GTDT: What lessons can be learned from recent cases to help merger parties manage the review process and allay authority concerns at an early stage?

MMM & PVP: Merger control rules, which were initially provided for in a separate statute (Decree-Law No. 428/88), have been dealt with since 1993



“...the Authority has been increasingly showing openness for informal discussions even outside the scope of the prior assessment contacts...”

(Decree-Law No. 371/93) in the statute covering the whole competition law regime, having evolved substantially since those early days, notably as regards the applicable thresholds and the timing for notification.

In the competition statute that followed, namely, Law No. 18/2003, a much criticised obligation to notify a notifiable operation within seven days as of the conclusion of the corresponding agreement was introduced. Conversely, an interesting provision established the possibility of a preliminary assessment by the Authority of concentration operations, prior to the notification thereof.

The latest competition law reform, brought about by Law No. 19/2012, eliminated this seven-day time limit obligation, while imposing that a notifiable concentration operation cannot be put into effect before it is notified or, if it was, before a clearance decision by the AdC.

This law kept the provision under which a preliminary assessment by the AdC may be carried out prior to the notification. These are voluntary proceedings, inspired by the principle of cooperation of the Authority with private parties. It is informal and confidential. By its very nature and characteristics, this prior evaluation by the AdC may be advisable when a complex operation is to be submitted to the Authority. It enables the parties to obtain guidance from the AdC as to the developments of the case and, if a notification is due, to discuss, on the basis of the information submitted, the key aspects it wishes to address in a possible formal notification, thereby enabling a substantial shortening of the deadlines for analysis of the operation (ie, 30 business days for Phase I and 90 business days for Phase II). These deadlines may be suspended (notably when the AdC requests further information) or extended by the Authority.

It must be stressed that the Authority has been increasingly showing openness for informal discussions even outside the scope of the prior assessment contacts, which may also contribute to a more swift and predictable procedure. Conversely, it should be underlined that, despite the openness shown by the Authority, no formal commitments from the Authority shall be obtained in the preliminary assessment proceedings or in any other contacts taking place prior to the formal notification process. This means that future stop-the-clock requests for information, or even decisions contrary to the direction initially foreseen cannot be excluded, particularly when subsequent facts change the position initially anticipated by the Authority.

THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

In-depth legal knowledge, particularly in the competition and antitrust law area; a good command of microeconomic theory and practice; professional experience; solid business judgement; an open mind; a combative but flexible attitude; and negotiation skills.

What are the key things for the parties and their advisers to get right for the review process to go smoothly?

Correctly identifying and addressing the main issues; careful preparation of the merger control filing from the beginning, particularly as regards an accurate market definition; making sure that the filing is complete, notably in terms of the data required. Currently, preliminary assessment contacts with the AdC prior to the notification provide the right setting within which key aspects of the envisaged operation may be discussed and possible difficulties overcome, thereby making the review process swifter and more predictable.

What were the most interesting or challenging cases you have dealt with in the past year?

The most interesting case is currently ongoing, and thus we cannot disclose the parties involved and the specifics of the case. The case concerns

the creation of a production joint venture in Portugal that shall sell a substantial part of its output to the parent companies. However, it is also being considered that the joint venture may also sell part of such output directly in the market. The main issue to be assessed at this stage is whether the joint venture fulfils the criteria, notably those established in the Commission Consolidated Jurisdictional Notice under the EU Merger Regulation, to be considered as a full-function joint venture. In this exercise, all aspects regarding the set-up of the joint venture are being assessed, including the joint venture's planned resources, its activities and those of the parent companies, the relationships with such parent companies in terms of purchase and sales or the planned duration of the joint venture. The assessment of such aspects should allow us to determine whether the creation of the joint venture amounts to a concentration, which could exceed the relevant thresholds and therefore be subject to a merger notification, or is an agreement which may be scrutinised under the relevant competition rules.

**Mário Marques Mendes &
Pedro Vilarinho Pires
Gómez-Acebo & Pombo
Lisbon
www.gomezacebo-pombo.com**

GTDT: *What do recent cases tell us about the enforcement priorities of the authorities in your jurisdiction?*

MMM & PVP: Over the past years, various public interventions of the Authority's top officials have identified areas and sectors of activity of increased competition concerns, such as the financial sector, ports and energy. However, it cannot be said that merger control is, at least in recent decisions, the area where such concerns have more visibly been reflected, as opposed to the restrictive practice areas where recent cases in those sectors have been decided or are still running.

Political considerations in enforcement policy in the area of merger control may nevertheless exist, not at the Authority's level, as such, but within the framework of the extraordinary appeal from prohibition decisions. Such extraordinary appeal, which was introduced in the initial 2003 Authority statutes and kept in the current statutes adopted in August 2014, may be lodged by the parties with the minister responsible for the economic area. The minister may reverse a prohibition decision when the

benefits deriving from a transaction for the attainment of fundamental strategic interests for the national economy exceed the disadvantages for the competition that the implementation of such transaction may bring. One single case of application of this appeal regime is on record regarding the acquisition of joint control of Auto-Estradas do Atlântico (AEA) by Brisa, an operation which had been prohibited by the Authority in April 2006.

GTDT: *Have there been any developments in the kinds of evidence that the authorities in your jurisdiction review in assessing mergers?*

MMM & PVP: Expert economic evidence is certainly useful and may even be essential in more complex cases, both in support of the relevant product and geographic markets' definition, particularly when such definition cannot be found in the Authority's or the European Commission's decision practice, and in the assessment of the effects of a notified transaction.

Third parties who may have rights or legally protected interests that may be affected by a

given notified operation are invited, through notices published by the Authority containing the essential elements of the notified transaction, to submit their observations. Our practice shows that such observations are, in general, taken into consideration by the Authority in the investigation of notified mergers, particularly when they are well-grounded and supported. Moreover, an Authority decision at the end of either Phase I or Phase II of the merger control proceedings is subject to the mandatory prior hearing of the third parties who have submitted observations on the notified transaction.

GTDT: *Talk us through any notable deals that have been prohibited, cleared subject to conditions or referred for in-depth review in the past year.*

MMM & PVP: As mentioned, in 2015 there were no concentrations blocked by the Authority.

As regards concentrations that went through a Phase II in-depth analysis, three cases may be found in 2015. According to the public records, in all such cases the Authority has considered that the transactions at issue were likely to create significant impediments to effective competition in the concerned markets.

One of the above cases was eventually cleared without conditions or obligations. In another of such cases, the notifying party has withdrawn the notification and the AdC closed the case. Finally, in a third case the concentration was approved with conditions and obligations to ensure the fulfilment of the commitments offered by the notifying party.

The last of the above cases concerned the acquisition by Via Marítima (a company of the Sousa group, active in the sector of sea transportation for the Portuguese Madeira and Azores Islands) of the whole share capital of Portline Containers International, an undertaking active in the sea transportation of goods in containers. The AdC identified 'significant' competition concerns, resulting from the potential coordinated effects of the concentration, which could create significant impediments to effective competition in the market for regular sea transportation of goods in the Portuguese mainland-Madeira route. Via Marítima has offered commitments, notably offering slots for a new entrant in the concerned route, which the AdC considered sufficient to remove the identified competition concerns.

Also noteworthy is the AdC's Phase I decision in the *EDP Renewables/ENEOP's* assets

concentration, in which the AdC has also imposed conditions and obligations to ensure the fulfilment of the commitments offered by the notifying party. EDP Renewables is a subsidiary of EDP, one of the largest Portuguese companies, active in the production, purchase, sale, import and export of energy (electricity and natural gas), as well as in its distribution and marketing mainly in Portugal, but also in Spain, Brazil and various other countries. The concentration concerned the acquisition by EDP Renewables of exclusive control over a number of companies that manage wind farms. To remove the competition concerns identified by the AdC, EDP Renewables proposed behavioural commitments which the AdC accepted. Such commitments are valid for an initial period (the duration of which is kept confidential in the AdC's decision). At the end of such period the commitments shall be reassessed and if the competition concerns remain the AdC may order either the divestiture of the acquired assets or, exceptionally, the renewal of the commitments. If the concerns remain at the end of the renewal period, the AdC shall determine the divestiture of the acquired assets. Divestiture may additionally be ordered if the commitments are due to be reassessed (owing to certain events or following a report by the monitoring trustee) and the competition concerns remain when such reassessment is carried out.

None of the above decisions show a more demanding position of the Authority in assessing the parties' commitments and in establishing the conditions to which a concentration may be subject. In particular, they do not deviate from the Authority's pre-existing guidelines on the matter, which follow the corresponding guidelines adopted by the European Commission in respect of the EU Merger Regulation.

GTDT: *Do you expect enforcement policy or the merger control rules to change in the near future? If so, what do you predict will be the impact on business?*

MMM & PVP: As already mentioned, the Portuguese competition legal regime went through a substantial reform in 2012, leading to the adoption of a new Competition Act, enacted by Law No. 19/2012. The Act itself provides for the possibility of its review in accordance with the 'evolution of the EU Competition Legal Regime'. No further changes are foreseen in the near future, particularly in the area of merger control.

Also available online



www.gettingthedealthrough.com



*Official Partner of the Latin American
Corporate Counsel Association*



*Strategic Research Sponsor of the
ABA Section of International Law*