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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Working Party No. 3 on Co-operation and Enforcement

JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

-- Note by Portugal --

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This document reproduces a written contribution from Portugal submitted for Item 5 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm*

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PORTUGAL

1. Merger notification thresholds in Portugal

1. In Portugal, a system of mandatory pre-notification of mergers is in place, based on a twofold threshold of market shares and companies turnover in Portugal, foreseen in Article 37 of the 2012 Portuguese Competition Act (Law No. 19/2012, of 8 May 2012).

2. The notification thresholds are as follows:

- Acquisition, creation or reinforcement of a market share of at least 50 per cent in the relevant national market;
- Acquisition, creation or reinforcement of a market share of at least 30 per cent but less than 50 per cent, in the relevant national market, provided that the individual turnover of at least two participating undertakings (registered in Portugal) in the preceding financial year exceeds €5 million;
- The aggregate turnover of the participating undertakings in Portugal, in the preceding financial year is over €100 million, provided that the individual turnover in Portugal of at least two of the undertakings exceeds €5 million.

3. In this contribution, we will discuss the 2012 legislative reform of the Portuguese Competition Act, which amended the notification thresholds (section 2.1) and increased the possibility of pre-notification contacts (sections 2.2), and conclude with final remarks.

2. The 2012 legislative reform

4. In 2012, the Portuguese Competition Act was reviewed as part of the structural measures set out in the Memorandum of Understanding on Specific Economic Conditionality between Portugal and the European Commission, the European Central Bank and the International Monetary Fund (MoU), which envisaged the increased effectiveness of competition law enforcement in Portugal.

5. As set out in the MoU, the new competition law should “(...) establish the necessary procedures for a greater alignment between Portuguese law on merger control and the EU Merger Regulation, namely with regard to the criteria to make compulsory the ex-ante notification of a concentration operation” (May 2011).

6. Moreover, the new merger control regime incorporated the PCA’s nine years of experience in applying the former Competition Act of 2003¹.

7. The 2012 legislative reform introduced important amendments to the merger review system in Portugal, including the change of the substantive test for merger assessment, the notification thresholds, and procedural aspects, among others.

¹ Law No. 18/2003, of 11 June 2003.

2.1 *Amendments to the merger notification thresholds in Portugal*

8. In 2012, pre-merger notification rules were amended both regarding the market share and the turnover thresholds.

9. A comparison of the 2003 and 2012 notification thresholds can be found in the table below:

	2003 Competition Act	2012 Competition Act
Market share threshold	Acquisition, creation or reinforcement of a market share of at least 30% in the relevant national market	<ul style="list-style-type: none"> Acquisition, creation or reinforcement of a market share of at least 50% in the relevant national market Acquisition, creation or reinforcement of a market share between 30% and 50%, in the relevant national market, provided that the individual turnover of at least two participating undertakings (registered in Portugal) in the preceding financial year exceeds €5 million
Turnover threshold	The aggregate turnover of the participating undertakings in Portugal, in the preceding financial year is over €150 million, provided that the individual turnover in Portugal of at least two of these undertakings exceeds €2 million	The aggregate turnover of the participating undertakings in Portugal, in the preceding financial year is over €100 million, provided that the individual turnover in Portugal of at least two of the undertakings exceeds €5 million

10. The new thresholds aim at striking a balance between three main factors: (i) ensure that mergers that are more likely to raise competition concerns are under the PCA's scrutiny, (ii) reduce administrative burdens by excluding transactions from merger review which are unlikely to result in significant negative effects on competition, and (iii) the need to take into account the specificities of the Portuguese economy, namely the small scale of many markets.

11. During the preparation of the 2012 Competition Act, an assessment of the impact of potential changes in the notification thresholds was carried out on the basis of the PCA's experience of over 500 mergers reviews.

12. From that analysis, it became evident that a significant part of problematic transactions would run the risk of falling outside the scope of PCA review, if the notification thresholds were limited to turnover thresholds.

13. Moreover, the legislator also took into account the fact that the Portugal is a small economy susceptible to mergers involving firms with high market-shares and low turnovers.

14. Had the legislator opted for turnover as the single notification criterion², nearly 25 per cent of the transactions that had raised competition concerns in the past would not have been notified to the PCA³.

15. On the other hand, the increase of the market share threshold to trigger notification from 30% to 50% allows for a reduction in the number of notifications of less problematic transactions, while enabling the PCA to focus on the mergers which may actually raise competition concerns.

² Considering the new threshold where the individual turnover in Portugal of at least two of the undertakings exceeds €5 million.

³ Phase I decisions with commitments and phase II decisions from March 2003 to March 2011.

16. In parallel, the introduction of a notification threshold combining market share (30%-50%) and the parties' local turnover (five million euros) keeps under the PCA's scrutiny transactions which, when looking solely at turnover, are less likely to raise competition concerns but, due to the high market shares involved, may potentially be problematic.

17. With regard to the levels of turnover that trigger merger notifications, the combined turnover of the parties in Portugal was lowered while the levels of individual turnover was increased.

18. According to the analysis based on past experience carried out before the legislative reform of 2012, the sole increase in the minimum cap of individual turnover from €2M to €5M would reduce notifications by 25%, without compromising the assessment of problematic transactions.

19. Therefore, the amendments of 2012 aimed at adapting the notification criteria to the specific characteristics of the national economy, limiting the scope of merger review by the PCA (with a reduction of approximately 30% in the number of notifications), while maintaining scrutiny over mergers most likely to raise competition concerns in small economies such as Portugal.

20. The new notification thresholds are also designed to increase legal certainty, avoid unnecessary costs associated with merger filing and delays for undertakings, while enabling the PCA to better allocate its resources.

2.2 Pre-notification procedure

21. In 2012, the time-limit to formally notify the merger was eliminated, thus providing parties a more ample opportunity to consult the PCA on jurisdictional issues before notifying the merger, under the pre-notification procedure.

22. The former regime of 2003 set a time-limit of seven working days after the conclusion of the agreement for the parties to notify the merger⁴. This obligation often presented a heavy burden on the notifying parties and, as a consequence, a significant number of notifications did not satisfy the minimum information requirements necessary for the PCA to proceed with its assessment.

23. The 2012 merger control regime eliminated the obligation to notify within a given period, maintaining however the stand-still obligation until a clearance decision by the PCA is issued.

24. Following the legislative amendment, in December 2012 the PCA published Guidelines on pre-notification contacts and procedure, to enhance legal certainty and transparency to parties consulting the PCA⁵.

25. As the market share threshold may entail a degree of legal uncertainty for the parties, as it requires a definition of the relevant market in order to ascertain whether the threshold is met or not, the promotion of the use of pre-notification contacts has been an important means to mitigate this concern.

26. Through pre-notification contacts with the PCA, companies may directly interact with the PCA and clarify all relevant aspects regarding the notification threshold.

27. The number of pre-notification contacts has on average more than doubled since 2012 and a significant number of pre-notification contacts did not lead to notifications (more than 50%).

⁴ Or after the publication date of the announcement of a takeover bid, an exchange offer or a bid to acquire a controlling interest (Article 9(2) of Law No. 18/2003, of 11 June).

⁵ Available on www.concorrenca.pt.

28. Therefore, our experience shows that there are effective means of overcoming the potential challenges that a market share threshold may pose to firms.

3. Concluding remarks

29. The evolution of the merger control regime in Portugal since 2003 has consistently sought to enhance legal certainty and streamline procedural rules, building on international best practices, the PCA's experience and the interaction with relevant stakeholders.

30. The reforms on notification thresholds have reached a balanced approach, ensuring the necessary local nexus and adapting the Portuguese merger control regime to the specific challenges of a small economy, while avoiding to impose unnecessary burdens on merging parties and the PCA.