

Takeover bids and the merger control regime in Portugal

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In February 2006, Sonaecom embarked on a hostile bid for its main domestic rival, Portugal Telecom (PT), while in March 2006, Banco Comercial Português (BCP) launched a bid for rival Banco Português de Investimento (BPI).

Both were unsurprisingly subject to merger control, and given the media attention that surrounded each the Portuguese Competition Authority (PCA) enjoyed a golden opportunity to clarify its role in the assessment of market concentrations and in the enforcement of competition policy.

Intervention

Despite the strength of the conclusions reached by the PCA in its forward assessment of the competitive environment of both markets post-merger the merger control process itself was subject to strong criticism – notably regarding the time it took to make its assessments.

Sonaecom/PT was notified in February 2006 although a final decision was not adopted until 22 December 2006, while the BCP/BPI notification has (at the time of writing) yet to receive a final decision.

The merger control time limits applicable to the bids was 120 working days – 30 working days for the first phase investigation, and 90 additional working days for the second phase investigation. However, this term can in practice be extended and the PCA is able to stop the clock when it chooses, to request from parties the provision of further information or to clarify information previously provided.

Such events have led the Portuguese Government to use the opportunity offered by the implementation of the European Takeover Directive (Directive 2004/25/CE) to amend – for the first time – the Portuguese Competition Act (Law 18/2003 of 11 June 2003).

The effect has predominantly been to reduce the merger control time limits, and the impact of PCA interventions. It now has an overall term of 90 working days (30 + 60) to assess operations of concentration, plus a maximum of 10 additional working days suspension time.

Response

The fact that the PCA is now constrained by time limits that in practice did not previously exist, should be applauded.

But while a faster and more efficient merger control regime is welcome, particularly for hostile takeovers, the change is nonetheless seen by some as excessive and against the spirit of competition policy in other Member States. It may not allow sufficient time for the analysis and the market testing required in complex concentrations, and may ultimately impair the PCA's ability to reach well-grounded, solid and unambiguous decisions.

Unsurprisingly the PCA shares these concerns. Shortly after the amendments were made public, its own Internal Guidelines for the Assessment of Concentrations sustained a controversial interpretation of the new legislation, in particular concerning the revised 10 working day limit for suspensions of the overall term.

Uncertainty

The PCA's view is that during second phase investigations each suspension may not exceed 10 working days, but no limit to the number of suspensions is applicable. It is questionable whether this interpretation improves the current legal scenario.

Revision of the current legal scenario is much needed, however we share the view that further legislative amendments may not suffice and also that the PCA may be unable to cope with the workload by itself.

Takeover bids, particularly those involving hostile bids or requiring highly complex merger control analysis, need to be reviewed in a timely and efficient manner, and with the enhanced cooperation of the parties with the PCA.

Notifying parties need to undertake a fair risk assessment and the PCA must not fall into the temptation of using this opportunity to test revolutionary antitrust assessments and market structures. Also bidders in hostile takeovers may require additional legal certainty in order to anticipate the impact of commitments required to mitigate competition issues that may arise.

Such an approach may only be possible in a more mature stage in the evolution of comprehending competition policy in Portugal.

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En este artículo, Ricardo Bordalo Junqueiro, de Vieira de Almeida nos acerca a la situación acaecida con las OPAs de Sonaecom/Portugal Telecom y Banco Comercial Português/Banco Portugues de Investimento, donde ambas se han visto sujetas a una fuerte regulación y control. En este entorno y con la creciente atención por parte de los medios de comunicación, la Autoridad para la Competencia Portuguesa aprovechó la oportunidad para redefinir su papel regulador en las valoraciones de concentración de mercado y en la aplicación de la política de competencia entre otras.