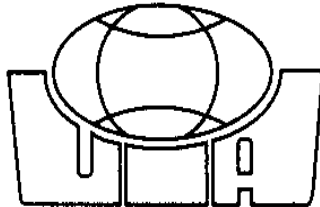


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ACQUIRING REGULATED BUSINESSES: MERGERS AND ACQUISITIONS AND COMPETITION LAW PERSPECTIVES

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1. TRANSACTION AND MERGER CONTROL

1.1 Initiation of Merger Control Clearance

1.1.1 At what point in time will merger control proceedings actually be started?

Merger control proceedings are initiated from the time the Portuguese Competition Authority – the *Autoridade da Concorrência (AC)* – is notified of the proposed merger by means of submission of the notification form for a concentration operation.

Operations subject to this requirement include:

- Merger of two or more companies;
- The acquisition by an existing shareholder already in control of one or more companies of direct or indirect control of another company or companies. A situation of control is deemed to exist if a certain act implies the possibility of exerting, single-handedly or not, in the face of the existing factual and legal circumstances, a determinant influence of another company, namely:
 - Acquisitions of the totality of a target's share capital, or of a controlling shareholding therein, or of rights granting the former a predominant influence over the composition of the latter's corporate bodies or over the resolutions passed by such bodies;
 - Acquisitions of the totality or of a substantial part of a target's assets;
 - Establishment, by two or more companies, of a new company, under whatever form, if it will act as an independent economic entity,

Notifications are subject to payment of a fee and only take effect on the date of payment. Hence the respective **proof of payment** document should be sent to the AC, once payment has been made or it should be sent along with the notification if made at an earlier date.

The base fee is set in accordance with the turnover of the companies participating in the concentration operation as follows:

- EUR 7,500 if the aggregate turnover is below or equal to EUR 150 million;
- EUR 15,000 if the turnover is more than EUR 150 million and below or equal to EUR 300 million; and
- EUR 25,000 if the turnover is more than EUR 300 million.

Notification is required if one of the following circumstances would arise as a result of the operation:

- When market share increases to 30 per cent or higher for a particular product or service or in a substantial part of it; or
- In the preceding financial year the total combined turnover in Portugal of the entities taking part in the concentration exceeded EUR 150 million (net of directly related taxes), and the individual turnover in Portugal of at least two of these undertakings exceeded EUR 2 million.

Mergers carried out in a foreign jurisdiction but which produce effects in Portugal are also subject to mandatory notification, provided they meet one of the above conditions.

If, however, the concentration is subject to notification to the European Commission under the Merger Regulation then no notification is required in Portugal.

Concentration operations that are subject to prior notification cannot proceed until such time as the AC has been duly notified and a final decision of non-opposition (express or implied) has been reached.

The notification must be made to the AC within seven working days after the agreement is concluded or, if necessary, before the publication date of the take-over bid or the change or acquisition of a controlling interest.

In the case of mergers resulting from a tender offer to acquire, exchange or purchase of a controlling interest, the AC shall be notified by the date of publication of the public offer announcement.

1.1.2 Which party is typically in charge of the filing?

Filing of the notification should be carried out respectively by the following entities:

- In mergers – by all companies involved in the merger;
- Where the acquisition of exclusive control is concerned – by the individual or company making the acquisition;
- In the case of the creation of a joint venture which, on a lasting basis, carries out the functions of an independent economic entity – by the individuals or companies that will exercise control of such entity;
- In acquisitions of joint control – by the individuals or companies that will exercise that control.

Joint notifications must be presented by a common representative with power of attorney to send and receive documents on behalf of all the notifying parties.

The notified concentration operations will be analysed to determine whether or not, and if so how, they affect the competition structure in light of the need to preserve and further the interests of consumers and effective competition culture in Portugal. Approval shall be based on the following key factors:

- Structure of relevant markets and existence or non-existence of competing companies established in the relevant or different markets;
- Position of competing companies in the relevant market or markets and their financial and economic power;
- Potential competition and the existence of entry barriers to the market;
- Structure of existing distribution networks;
- Evolution of forces of supply and demand in relation to the relevant market;
- Existence of special rights;
- Control of the essential infrastructures of the market and access to said infrastructures;
- Evolution of technical and economic resources, providing that progress remains favourable to consumers;
- Contribution to the national and international economy.

If a decision is not made by the AC within 30 days this will be deemed as tacit approval of the concentration operation.

In cases where an in-depth investigation is required the time limit for the final decision shall be a further 90 working days from the date of such a decision.

Time limits are suspended in the cases laid down by the law, in particular whenever additional information is requested from notifying parties. In practice this often occurs.

1.1.3 Can this be achieved while still maintaining confidentiality? What are the pros and cons of doing so?

Generally, information concerning the proposed concentration operation will fall within the public domain. No more than five days starting from the date on which the notification takes effect, the AC publishes in two nationally circulated newspapers (at the expense of the notifying party) the essential elements of the application to enable any interested parties to file their comments within the time period established (a minimum of 10 days).

Where a notifying party believes that information supplied as part of the notification amounts to a trade secret or is commercially sensitive and should remain confidential, such information should be clearly marked as such. If the confidentiality request is approved the information will not be disclosed to third parties. It is worth noting that AC employees must at all times observe strict obligations of professional secrecy enshrined in the organisation's statutes and could also face criminal prosecution under the appropriate Criminal Code provisions on breach of secrecy by civil servants.

The parties to the deal should be careful about information sharing when discussing the merger and surrounding issues, in order to avoid any suggestion of substantive "gun jumping". This occurs when the merging parties, who are competitors, coordinate their competitive conduct prior to the actual conclusion of the transaction. One approach that may be taken is to exchange information on a "lawyers only" basis or within a ring-fenced team with appropriate confidentiality agreements in place.

The potential downside of providing information on a confidentiality basis may become apparent if the need arises for one or more antitrust authorities to review the merger: the non-disclosure of sensitive information may obstruct the review, resulting in delays to the merger control process and potentially prejudicing the deal where time is of the essence.

Furthermore, extending confidentiality to certain types of information may frustrate the rights of third parties to assert their interests in such merger.

1.2 Closing and Merger Clearance

1.2.1 Assuming that a filing in multiple jurisdictions is required would the closing of the transaction typically depend upon clearance being obtained in all jurisdictions?

Yes, in order to facilitate cross-border merger operations monitoring of the completion and legality of the decision-making process in each merging company should be carried out by the relevant national authority. Monitoring of the completion and legality of the cross-border merger shall be carried out by the national authority having jurisdiction over the entity resulting from such operation. The national law determining the date on which the cross-border merger takes effect, i.e. the law to which the company resulting from the cross-border merger shall be subject, should also be specified.

In a cross-border merger where at least one of the merging companies has headquarters in Portugal, and another company has been established under the laws of a Member State, the merger process will be based on the joint project called cross-border merger. It will necessarily have to be approved by all participating companies, and respective jurisdictions.

The legality of the merger is determined essentially by the finding that the joint merger has been approved by each company involved and the legal framework enforced in each national jurisdiction in the exact same terms.

These issues can have far-reaching consequences. There are currently dozens of jurisdictions that require pre-merger notification and more considering the introduction of such systems. In an increasingly borderless global business climate, the result is often a regulatory jungle for companies and a burdensome workload for competition authorities.

Among the AC's responsibilities is the requirement to maintain contact with competition authorities in other countries, establishing co-operation links with them as well as with EU and international authorities.

1.2.2 How would a closing have to be structured if the seller can request a closing but the buyer not having received the necessary clearances? Would the buyer have to line up a trustee or another third party who takes delivery of the shares or assets of the business to be sold?

So as to ensure the necessary merger control clearances have been obtained by the time of closing, the parties may at the outset of negotiations of the SPA agree on the stipulation of the appropriate condition precedent to closing.

The parties may also agree to pay the purchase price into an escrow account, only releasable on confirmation that the proposed operation has successfully passed through merger control.

The buyer may also line up a trustee or financial institution that provides fiduciary services, and when the consideration is in shares will safeguard them until the necessary clearances have been duly acquired. In such circumstances, the fiduciary agent has the dual role of guardian and being responsible for verifying the status of the clearances.

2. MERGER CONTROL RISK

It is within the purview of the AC to block a potential merger or acquisition transaction in order to

prevent excessive market concentration or, if approved, to formulate and impose conditions and obligations that may prove costly and which could undermine the commercial logic of the deal. Fortunately these sorts of instances are extreme and tend to be fairly uncommon, however, the complexity of the typical deal which comes before the merger control process invariably encompasses a range of "risk factors" which could potentially prejudice the value of the transaction.

Effective management of merger control risk therefore remains a vital consideration and should be addressed with care in order to maximise shareholder value from the transaction. A further benefit of focusing on this important aspect of M&A derives from strengthened negotiating positions.

A potential outcome of proceedings which should be avoided at all costs is the possible triggering of a second stage review, involving an in-depth investigation, which in Portugal generally takes up to 90 days. In this sense, the parties to the deal should be proactive in their engagement with the AC, especially by ensuring that the notification is filed accurately with all necessary information provided.

2.1 At what point in time will a seller typically require information from the purchaser about the likelihood that merger control proceedings will have to be initiated? Will the seller request from the purchaser a written assessment of the merger control risk?

When a transaction gives rise to competition issues it is critical that information is obtained at the earliest stage possible to assess the extent of merger control requirements and to decide on the best strategy to implement.

The seller will normally require a written assessment, from the buyer, of the likelihood of the envisaged deal structure and resulting new business operation being caught by merger control proceedings and on the risk of proceeding with a transaction conditional on merger control clearance.

Assessments can also be used as a tool to explore a range of merger options, and potential reactions by the AC, for the sector in question. This allows the individuals in charge of the potential deal to weigh merger control risks against other commercial drivers to select the most appropriate business structure in the circumstances.

2.2 Would the seller typically seek (and obtain) a contractual assurance about the merger control risk from a purchaser? What form would typically take e.g. a purchaser warranty regarding the accuracy of a market data delivered to the seller at the outset? Or in the form of a guarantee or indemnity against the consequences of the risk of not obtaining the merger clearance?

Focusing in on the transaction documentation and incorporating appropriate contractual clauses is central to an effective approach to handling merger control risk issues, and should be dealt with close to the outset of the potential operation.

In some cases, guarantees or commitments will be given in relation to the target company's past conduct and, in particular, regarding the enforcement of competition laws. Such guarantees and commitments will cover responsibility for fines and payment of damages for infringement together

with the associated impact, for instance, of an announcement of a cartel investigation into the agreed price. The aforementioned concern is crucial in the sale of an unincorporated business. Usually the said guarantees and commitments relate to the knowledge of the seller or target of initiation of proceedings in the event of legislative violations. Where alleged violations were already under investigation, this may bring along a claim for compensation, fines and damages.

It may, however, be worth dealing with competition law concerns that are likely to complicate the merger control process, prior to the notification being submitted by modifying the deal in order to eliminate the likelihood of uncertain and draw-out proceedings before the AC. Such modification, for example, could be carried out by excluding particular assets or businesses. Failing this, where commercially viable remedies can be identified that would mitigate antitrust concerns then the parties may find it useful to consider at what point during merger control they might be put forward and keep this ace card up their sleeves.

2.3 To what extent will a purchaser be prepared to accept a contractual undertaking in the SPA that he will comply with disposal requirements by the merger control authorities?

Usually, the parties will enter into a binding agreement but make closing conditional upon the necessary approval from antitrust authorities.

The purchaser will certainly be more prepared to enter into contractual undertakings that address potential disposal requirements by the merger control authorities where the appropriate variation conditions precedent to closing are established at the onset of negotiations concerning the terms of the SPA. It is essential for the notifying parties to establish a clear cut route of what is contractually and from the business point of view acceptable, as well as beneficial for both in light of the specific transaction subject to such merger control proceedings.

It is worth noting that the AC does not in principle provide any informal guidance before formal notification, unlike in some other jurisdictions. Therefore any attempts to seek informal guidance are rarely successful and this approach may not be relied upon to gather information as to the potential likelihood of clearance.

3. CONTRACTUAL PROTECTION AGAINST ANTI-COMPETITIVE BEHAVIOUR

3.1 What type of contractual protection would a seller typically require in respect of the occurrence of dawn raids or investigations by the competition authorities occurring between signing and closing?

Typically, a seller would try to exclude competition compliance investigations from representations or represent that dawn raids on investigations had no grounds and would not result in proceedings against the company.

Furthermore, the seller would require the buyer to agree contractually that dawn raids and investigations would not affect the purchase price, the decision-making process to enter into the deal

and therefore, to such extent, that the buyer would not seek remedies such as annulment of the contract, reduction of the purchase price or indemnities.

3.2 By which contractual means would a seller require protection in respect of competition compliance in the past? How much would a buyer be prepared to accommodate such a request?

A seller would try to limit his maximum exposure in respect of competition compliance in the past. Typically, the objective is to try and establish a cap lower than the purchase price for any potential claims and exclude as many types as possible. In this respect, warranties given to the buyer will see a squeeze on time limits within which warranty claims can be brought, and categories of claims and survival periods made as short as possible.

Often, the seller will try to exclude liability for facts that are or should be well known to the buyer. Conversely, the seller may try to negotiate the splitting up of financial risk in respect of potential breaches of competition compliance in the past.

On the other hand, the buyer will try to obtain total contractual protection in respect of competition compliance in the past requiring deferred payments, indemnity arrangements and, ultimately, insurance coverage.

One very common type of contractual protection for the seller in respect of breach of warranties and representations of competition compliance in the past is seller's indemnity insurance. This covers against claims of which the seller was not aware at the time of entering into the SPA and closing.

4. NON-COMPETE UNDERTAKINGS

4.1 To what extent are non-compete undertakings of a seller of a business or controlling stake in a business permissible? Does the answer differ if the seller did not hold and sell a controlling stake?

Non-compete agreements/clauses are considered by the Portuguese Competition Authority and relevant legal framework as ancillary restraints, frequently forming an essential part of a transaction – whether contained in the SPA itself or a separate contract – as a means to protect the buyer's investment in a company acquisition.

A valid non-compete clause whereby the seller (irrespective of holding a controlling stake) agrees not to pursue a similar trade in a particular place or way in competition against the buyer, is a contract provision and as such binds the seller by general contractual requirements and principles regarding consideration, good faith and contractual balance.

Non-compete agreements are therefore enforceable, provided that unreasonable limits are not imposed and that clause creates a well balanced discipline conjugating the buyer's business interests against the seller's right to thrive. Other factors may come into play, such as whether the restrictions will harm the public or if they will unlawfully impede or hinder competition.

Non-compete provisions may indeed in some circumstances be deemed as agreements that restrict free trade and competition between economic agents, with potentially negative consequences for a free competitive market. Wide-ranging and/or long-term non-compete provisions are considered void wherever excessively burdensome for the seller.

In fact, the validity of non-compete clauses in terms of their extent depends on compliance with the following requirements:

- Non-compete clauses shall only be legally binding as long as they establish reasonable limitations concerning the period of time in which the seller must not compete.
- Restrictions on the seller's right to compete must be no greater than the necessity to protect a buyer's legitimate interest in the business.

A reasonable period of time would be the duration necessary to protect the buyer in order to ensure the usefulness of the transaction by adequately securing the transfer of all of the business' profitability and value to the buyer. Non-compete limitations imposed on the seller must also be supported by adequate consideration.

While non-compete agreements are common they are often accompanied by other restrictive covenants with specific purposes and providing specific rights and remedies, such as compensation-for-competition agreements, non-disclosure/confidentiality agreements, anti-piracy agreements or invention assignment agreements.

5. INTERFERENCE WITH A THIRD-PARTY TRANSACTION

5.1 It is possible to intervene in the merger control process which one or two competitors have entered into in order to block a transaction? Can this be done:

5.1.1 During a pending merger control process?

Third parties may clearly be affected by the outcome of a finding as to whether or not a concentration is compatible with the common market.

After the AC has published details of the notification in two national newspapers, any interested third party is allowed to submit observations regarding the proposed concentration within the timeframe which the AC sets (no less than 10 business days).

Prior to arriving at a decision the AC must also engage with third parties that hold concerns regarding the concentration, by means of a hearing which suspends the normal deadlines for merger control. The AC allows them access to the non-confidential version of the notification application.

5.1.2 After a merger control clearance has been issued?

Third parties can intervene in a merger control process after clearance has been issued by appealing to the Lisbon Commerce Court, which is competent to hear appeals against the AC's decisions to clear or prohibit a concentration or with regard to the application of fines to undertakings.

Interested third parties may request the Court to order interim measures, including suspension of the decision's effects.

Judgments can be appealed to the Lisbon Appeal Court and, where decisions not involving the application of fines are concerned, to the Supreme Court. The latter route of appeal is, however, limited to points of law only.

Proceedings for pursuing entities found in infringement of the competition rules are subject to limitation periods of three and five years, depending on the gravity of infringement.

6. MERGER CONTROL AND PUBLIC BIDS

6.1 Can a takeover bid be subject to the condition that all merger control clearances are obtained? Does this differ whether a voluntary takeover bid or a mandatory bid is launched?

Only a voluntary takeover bid may be subject to the fulfilment of predetermined conditions. These must be clearly laid out in the preliminary offer announcement.

Typical conditions are the following:

- success conditions based on a minimum or maximum amount of securities to be purchased;
- successful registration of the offer with the CMVM and merger control clearances;
- economic conditions referring to material variations of the target company's assets or financial situation.

However, it is not admissible to make the success of the takeover bid subject to conditions that depend on or are controlled by the bidder (*condições potestativas*).

6.2 What is the impact of unforeseen delays in the merger control proceedings upon individual acceptances of the bid?

The AC is the competent body to assess the admissibility of concentrations in light of relevant Competition law provisions.

Pursuant to applicable competition law provisions, the AC has 30 working days, from the date of receipt of notification of the merger, to make a decision. If no decision is made within that timeframe, the concentration will benefit from tacit approval.

However, where the AC has requested further information from the parties this deadline is suspended which could, in the worst case scenario, ultimately lead to expiry of the takeover bid.

6.3 Is the bidder free in its decision whether to accept conditions by the merger control authorities?

When merger control authorities impose conditions precedent to the success of the merger one of two scenarios are available to the bidder depending on the initial structure set out for the success of the deal.

If the offer was made conditional to specific control clearances and these are not fulfilled or merger control clearance conditions are imposed on the bidder that he can not accept the deal will not precede. If the public offering is not made precedent to the fulfilment, the bidder may still either try to negotiate amendments on the conditions imposed by the merger control authorities and ultimately comply with them if deal is to be successful.

6.4 Does the bidder have to make a corresponding statement in the offer document?

The offer memorandum or prospectus must contain complete accurate clear and lawful information and last but not least, disclose all the relevant aspects of the structure of the deal that will permit investors to properly appraise the content of the offer and the advantages and potential pitfalls of the deal put forward by the bidder.

As such statement of the offeror undertaking to comply with any conditions that may be imposed by the merger control authorities for the clearance of the transaction must also be enshrined in the offer memorandum or prospectus to which it refers.

7. FORCED DISPOSALS FOLLOWING A LIMITED MERGER CONTROL CLEARANCE

7.1 Merger control authorities sometimes only clear a transaction subject to the buyer disposing of a part of the target or another part of its existing business.

7.1.1 How much will the competition authorities interfere with such disposal process?

The AC frequently establishes obligations for periodic reporting on market conditions by the notifying parties so that it can monitor future developments in the same markets. Monitoring has been up to present conducted by the AC itself, although there are indications that in the future trustees will be appointed to monitor compliance with behavioural and structural commitments.

Where merger control authorities make clearance of the transaction conditional on the buyer disposing of part of the target or another part of the existing business, such clearance will not be given in full until such time as the disposals in question have been effected.

In order to monitor compliance with forced disposals the parties must report to the AC, at least on three-monthly intervals, with regard to progress made and efforts to sell the business or assets and to fulfil the compliance conditions imposed.

7.1.2 Will the competition authorities try to impose deadlines upon such process? What would be the consequence if the disposal is not made in time?

Time periods for implementation should be as short as is possibly feasible. The description of the divestitive package must be sufficiently comprehensive in order to allow clear identification of all relevant assets, activities and services included in the package within the imposed timeframe.

The timeframe for divestment is not made public or even disclosed to third parties. Nonetheless, if a prohibition decision is to be avoided, remedies have to be implemented within the requested time period.

8. REGULATED INDUSTRIES

8.1 In regulated industries (e.g. banking, insurance, energy or telecoms) special authorities are often involved in the review/approval of a sale or takeover of a business.

8.1.1 How much will the special regulator interfere with the structure of the transaction?

In mergers involving companies subject to sectoral regulation, such as banking and financial services, securities markets, insurance, energy or telecom companies, sectoral regulators shall issue a non-binding opinion on the merger upon request by the AC. The latter subsequently has the final say in either authorising or prohibiting the merger.

In addition to approval by the AC, the applicable Competition Law provisions stipulate that mergers involving financial, insurance or media sector companies must also be approved by the competent sectoral regulatory authorities, as follows:

- **Insurance** - The acquisition or increase of a qualified shareholding in an insurance company must be notified to the Insurance Institute of Portugal – the *Instituto de Seguros de Portugal (ISP)* – which may oppose the operation if it considers that prudent management of the merged entity cannot be guaranteed.
- **Banking** - The acquisition or increase of a qualified shareholding in a bank or credit institution must be notified to and approved by the Bank of Portugal – *Banco de Portugal*. Banks and credit institutions are prohibited from holding more than 25 per cent of the voting rights in a commercial company for one or more periods exceeding a total of three years (five years if held through a risk capital fund). In principle, acquisitions by credit institutions meeting these criteria are not deemed to constitute concentrations in accordance with the applicable Competition Law provisions.
- **Media** - Acquisitions of shareholdings in media companies must be notified to the Portuguese Communications Regulatory Authority – the *Entidade Reguladora para a Comunicação Social (ERC)* – under the applicable provisions governing the Press and Television. In addition, if the transaction is notified to the AC, the sectoral regulator must issue a binding opinion which will effectively block the operation if it is deemed to threaten freedom of

speech or plurality of the media. As stipulated by the applicable legislation, changes of control over radio companies must also be notified to and approved by the ERC.

- **Listed Companies** - The Portuguese Stock Market Supervisory Authority – the *Comissão do Mercado dos Valores Mobiliários (CMVM)* – must be previously informed of transactions in listed companies under the provisions of the Securities Code. Mergers following public takeover bids must also be previously registered with and subject to a formal review by the CMVM.

8.1.2 How will the competition authorities and the other regulators interact with each other?

The AC and sectoral regulatory authorities cooperate in implementing and upholding the sectoral aspects enshrined by Competition Law.

When the AC becomes aware of events occurring in a regulated sector or market, and if such events are capable of being classified as restrictive practices, immediate notice is given within a reasonable time period to the relevant sectoral regulatory authority.

Whenever a sectoral regulatory authority analyses (*ex officio* or upon request) matters within its scope that may constitute a breach of Competition Law provisions, immediate notice must be given to the AC.

In both cases AC is entitled either to initiate or proceed with an ongoing investigation, as deemed appropriate.

Before adopting a final decision, the sectoral regulatory authority will disclose a draft final decision to the AC so that an additional opinion is provided within reasonable time.

8.1.3 How will the parties typically try to deal with this in structuring the transaction?

In regulated industries where merger control clearances are subject to tighter and more restrictive provisions, the approval of a specific transaction will depend on the structural and behavioural remedies provided by the parties in response to recommendations issued by the said regulatory authorities. In fact, there are occasions when the relevant authorities may authorise a previously prohibited concentration to be carried out, if certain conditions or obligations attached thereto are met. In a post-concentration scenario, the same type of measures will encompass appropriate structural remedies to re-establish effective competition, such as divestiture.

Divestitures are the most commonly employed structural remedies, and are an effective method of addressing prohibition concerns or fulfilling the mandatory conditions imposed on a transaction.

In essence, a divestiture seeks to remedy an M&A transaction either by creating a new source of competition through the disposal of a business or set of assets to a new market participant, or by strengthening an existing source of competition through the disposal of a business or assets to an existing market participant independent of the merger parties. Divestitures shall be often accompanied

and completed by ancillary behavioural remedies imposed upon the parties to the transaction and the acquirer of the business or assets.

However, divestitures will only be deemed as appropriate remedies insofar as the authorities can conclude with a sufficient degree of certainty that it will be possible to implement them, and that a significant impediment to effective competition will not materialise.

To be effective in restoring or maintaining rivalry in a market where the AC has decided that there is an anti-competitive position, a divestiture remedy should involve the sale of an appropriate divestiture package to a suitable purchaser through an effective divestiture process.

General requirements on the identity and capability of the acquirer of the assets must be met for a divestiture to be considered an appropriate measure to eliminate the competition concern entirely and to reassure the competent authorities that competition will be effectively restored or maintained.

Therefore, the acquirer should have no significant connection to the merger parties and must have access to sufficient financial resources, expertise and assets in order to constitute or become an effective competitor. The divestiture itself may not raise or create any prospect of further competition concerns. Divestitures made to weaker competitors of less competitive assets or businesses are construed by the competent authorities as a better type of divestiture, allowing for greater competitiveness.

8.1.4 Will risk and responsibility for special approvals by such regulator be allocated between the parties in a similar way to the competition issues?

Yes, risk and responsibility for special approvals concerning mergers in sectorally regulated industries, is allocated between the parties in a similar way to competition issues. In a similar vein, regulatory compliance risks fall harder on the acquirer.

The risks of non-approval in a merger control process in regulated markets are key issues to be addressed in preliminary negotiations. At the earliest stage of an acquisition or merger pertaining to a regulated business, well-drafted letters of intent should address the process under which the acquirer will obtain licenses and approvals. Such letter must summarise the notice and approval process and assign responsibilities between the parties.

Risk allocation clauses must then be negotiated after efficient information disclosure and due diligence takes place, through the disclosure, access and perusal of sensitive documents, including regulatory communications if no waiver from the regulatory authorities is issued. Due diligence on the target can also be accompanied by target and acquirer meetings with regulators.

In the acquisition of a regulated business, the target's relationship with its regulator is often the subject of representations. As an essential component of risk mitigation strategy, buyers will often negotiate the involvement of warranties and representations obtained directly from top-level directors and executives, on behalf of the target. This allows claims to be produced against the party that did not disclose all relevant or sufficiently accurate information, and as a result was responsible for the non-

approval of the merger or acquisition.

Indemnification provisions for breaches of representations and warranties are often included, namely against fines, penalties, costs and expenses relating to past violations and non-compliances prior to closing.

In order to allocate risk between the parties, closing conditions will provide that the transaction will be subject to regulatory approval or, alternatively, termination clauses whereby the parties will be entitled to rescind the agreement should approval be denied.

These clauses will inevitably increase the pressure over the parties and the risks involved in such transaction. It is worth noting that the consideration value will generally fall directly in line with the scope of such warranties and representations, as sellers react to them.

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