

INFORMATIVE NOTE

Guidelines on the Procedure of Pre-assessment of Concentrations

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Decree-law n.º 219/2006, of 2 November 2006, modifying Law n.º 18/2003, of 11 June 2003 (hereinafter "**Portuguese Competition Act**"), provided for the possibility of pre-assessment of concentrations by the Portuguese Competition Authority (hereinafter "PCA"). Such possibility of handling a procedure of pre-notification of concentrations has been granted, for several years, by the European Commission in relation to concentrations with a Community dimension under its jurisdiction and, likewise, by competition authorities of several Member States of the European Union. Taking into account the obvious practical advantages of this type of procedure, the same had been, for a long time, requested by undertakings obliged to notify concentrations to the PCA.

Further to the mentioned legislative amendment, the PCA has published, on April 16, 2007, its "Guidelines on the procedure of pre-assessment of concentrations" (hereinafter "**Guidelines**"), with the purpose of informing the interested parties about the conduct it will adopt in the analysis and treatment of requests of pre-assessment of such transactions. The Guidelines have admittedly been inspired by the procedure set up by the European Commission for pre-notification contacts in its "DG Competition Best Practices on the conduct of EC merger control proceedings".

Purposes of the pre-assessment procedure

Firstly, this procedure will permit to fix the concerned companies on their actual obligation (or non-obligation) to notify a certain transaction to the PCA, therefore avoiding all the inconveniences of those companies having to file, in case of doubt, a notification that subsequently comes to be declared unnecessary.

Secondly, it may help companies in filing the notification form and in gathering the necessary elements to its submission, thus reducing the risk of declarations of incompleteness of the notifications and the need of additional information requests. In this sense, the pre-assessment will contribute to time reduction of the notified concentrations' assessment.

Thirdly, and to the extent the elements provided with the pre-assessment request so allow, such request may permit the identification and informal discussion, between the undertakings concerned and the PCA, of the most problematic competitive issues raised by the projected transaction.

Principles underlying the pre-assessment request

Two fundamental principles underlie this pre-assessment procedure: the principle of voluntariness and the principle of confidentiality.

The first one ensures that this procedure is merely optional and is intended to achieve, to the extent possible, the purposes mentioned in the previous point, as a mechanism to help companies possibly subjected to the obligation to notify a concentration.

The second principle ensures that the pre-notification contacts are absolutely confidential. The confidential information and documents shall only be identified, in a duly justified manner, on the moment of the notification of the concentration at issue, non-confidential copies having to be provided.

The pre-assessment procedure

The pre-assessment request shall always be submitted previous to any obligation to notify, i.e. before the notification is due. The obligation exists, under Article 9, paragraph 2 of the Portuguese Competition Act, after the execution of the agreement at issue or, should that be the case, after the date of publication of the preliminary announcement of a takeover bid or of an exchange bid, or after the publication of the announcement of the acquisition of a controlling stake in an issuer of shares admitted to trading. Further to the occurrence of one of these facts, the notification shall be filed within 7 working days.

According to the Guidelines, the pre-assessment request shall be submitted within a reasonable period before the expected date of notification filing. The reasonableness must be assessed in concrete but shall never be less than fifteen days (an equal period is foreseen in the European Commission Best Practices document, mentioned above).

The pre-assessment procedure begins with the submission of the corresponding request to the PCA, with a brief description of the main features of the projected concentration which shall include elements relative to: identification of the concerned undertakings; characterization of the legal nature and type of transaction at issue and nature of the acquired control; information on the turnover of the undertakings concerned; duly founded proposal for the relevant markets' definition;

estimate on the market shares of the undertakings concerned and of their main competitors; identification and brief description of barriers to entry in the relevant market. Whenever possible a preliminary version of the concentrations' notification form shall be sent to the PCA.

Further to the submission of a pre-assessment request, the PCA shall take a decision regarding the type of contacts to be established with the undertakings. Such contacts may consist, in simpler cases, in addressing the companies a list of the optional elements indicated in the notification form that the PCA considers will be necessary, or in the most complex cases, in meetings between the undertakings and the PCA. These meetings will seek to discuss the relevant procedural features, to prepare the PCA team that will carry on the procedure of assessment and to identify the main competitive concerns raised by the transaction at issue.

Similarly to the European Commission Best Practices, the Guidelines also safeguard the PCA possibility of adopting a final decision different from the position it has taken in the pre-assessment phase.

Final appraisal

The possibility of a pre-assessment procedure will undoubtedly be very much appreciated by companies subject to the obligation to notify concentrations, and may contribute to the clarification of relevant doubts not only as regards the obligation (or non-obligation) to notify a certain transaction, but also regarding the information that shall be provided in case a notification comes to be made and the competitive concerns related to the transaction at issue.

Although, as mentioned, the PCA does not consider to be bound by the position it has adopted during the pre-assessment, this seems to apply only to the possibility of adopting a different decision in case a notification is actually filed. A similar solution does not seem to be applicable when the PCA finds during the pre-assessment procedure that a notification is not necessary. In this case we believe the Guidelines shall be interpreted as binding the PCA to its announced pre-assessment. However, proper clarification of this issue by the PCA would be convenient.

Finally, the Guidelines do not mention any fees to be applied in the procedure of pre-assessment of concentrations. Therefore, we assume such procedure will be free of charge.

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