Simplified Procedure: The Portuguese Experience

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The views expressed are personal and do not necessarily reflect those of the Portuguese Competition Authority
Simplified Procedure

- Creation of the Portuguese Competition Authority
- Competition Law 18/2003

- Simplified Procedure (internal procedure)

- New Competition Law (Law 19/2012)
- Public Consultation on New Notification Form (including a Simplified Notification Form)
Simplified Procedure

• Former Competition Law (Law 18/2012) did not establish a Simplified Procedure
• In 2007, the PCA approved a simplified procedure (called “Simplified Decision Procedure”)
  – Internal procedure
  – Communicated via press release
• To streamline the analysis of less complex mergers, with a decision in a shorter period of time
• Time period for review under simplified procedure was not publically disclosed
• Internally a review period of 20 working days
• Not a legally binding procedure – best efforts only
Simplified Procedure

• Simplified Decision: simpler decisions in terms of substantiation (limited to the essential)
  – A simplified decision describes the merger; the parties; the relevant markets and a short competitive assessment
  – Perhaps the PCA could move to even simpler simplified decisions
• Conditions which may permit a simplified decision (2007):
  – No significant change to the market structure, in particular when there is no overlap
  – Creation of joint venture with a foreseeable non-existent or negligible activity or not creating significant horizontal or vertical effects
  – The transaction does not constitute a concentration for the purposes of merger control or it is not subject to mandatory notification
Simplified Procedure

• The simplified procedure is not possible when it becomes necessary to send requests for information, when there are interested third parties and when a prior hearing is mandatory

• The simplified procedure was not linked to a simplified notification form (non-existent until 2012)

• Notification Form of 2009 allowed for some adaptation of the information submitted to the complexity of the merger cases
  – Compulsory information
  – Optional information (the PCA could waive the need to submit such information)
  – However, the Notification Form did not identify any criteria for the possibility of waiving information (at the PCA’s discretion)

• Main objective: celerity (average review period in 2011: 19 working days; 28 calendar days)
New Simplified Form

• New Competition Law (Law 19/2012):
  – “In the case of concentrations which, in a preliminary assessment, do not pose significant impediments to competition, in accordance with criteria to be laid down by the Competition Authority, the notification shall be submitted on a **simplified form** approved in a Competition Authority regulation” (Art. 44(4))

• In July 2012, the PCA launched a public consultation on a new regulation regarding the Notification Form, including a **Simplified Notification Form**: reduce notifying parties’ costs

• The new competition law did not however establish a simplified procedure – The PCA will review its internal procedure
New Simplified Form

Summary of Criteria:

• No horizontal overlap or vertical relationships, no presence in neighbouring markets (conglomereral relationship)

• Horizontal overlap, but
  – the parties combined market share is lower than 15%, or
  – the parties combined market share is above 15% but is under 25%, and the acquired market share is not above 2%

• Vertical relationship, but the individual or combined market shares, at any of the vertical levels (upstream or downstream) are not above 25%

• Presence in neighbouring or related markets, but the individual or combined market shares are not above 25%
New Simplified Form

• The fulfilment of any of the conditions for a Simplified Notification Form does not preclude the possibility of the PCA to require information from the Regular Notification Form

• Safeguards and exclusions
  – Difficult to define the relevant markets
  – Difficult to determine the parties’ market shares
  – High barriers to entry
  – High level of concentration in the markets or when there are known competition concerns
  – Need for additional information for an appropriate analysis of the merger

• The acceptance of the notification under the Simplified Form does not imply an acceptance by the PCA of the parties’ market definitions

• The acceptance of the notification under the Simplified Form does not imply any recognition of an absence of competition concerns
New Simplified Form

Main Mandatory Information in the Simplified Form

• Information on the Parties: main business, control and corporate structure, shareholdings and activities
• Notification to other Competition Authorities
• Description of the transaction
• Relevant information to decide upon the jurisdiction
• Proposed definitions on relevant and related markets
• Information on horizontal overlap, vertical and conglomerate activities and corresponding markets: market dimension, parties’ market shares and market shares of 3 main competitors, and corresponding basis for the presented estimates
# Criteria: PCA vs EC

<table>
<thead>
<tr>
<th>Criteria for Simplified Form</th>
<th>Portugal New Simplified Form</th>
<th>European Commission Regulation 802/2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>No horizontal overlap or vertical relationship</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>No conglomeral relationships</td>
<td>Yes</td>
<td>Not expressly referred in the criteria but materially allows for a simplified form to be submitted (as a safeguard the Regulation states that a notification under Form CO may be necessary where at least two parties to the concentration are present in closely related neighbouring markets)</td>
</tr>
<tr>
<td>Horizontal Overlap limited by Market Shares</td>
<td>Combined market shares under 15% or between 15% and 25%, if the acquired market share is not above 2%</td>
<td>Combined market shares under 15%</td>
</tr>
<tr>
<td>Vertical Relationship limited by Market Shares</td>
<td>Individual or combined market shares under 25%</td>
<td>Individual or combined market shares under 25%</td>
</tr>
<tr>
<td>Conglomeral Relationships limited by Market Shares</td>
<td>Presence in neighbouring or related markets, but the individual or combined market shares are not above 25%</td>
<td>No reference</td>
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## Criteria: PCA vs EC

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<td>Joint to exclusive control</td>
<td>Yes, if the party acquiring control does not have any interest (even if a minority stake without control) in the markets where the joint venture is present</td>
<td>Yes</td>
</tr>
<tr>
<td>Exclusive to joint control</td>
<td>Yes, if the party acquiring control is not an effective or potential competitor and does not have any interest (even if a minority stake without control) in the markets where the joint venture is present, in vertically related or in neighbouring markets</td>
<td>No reference</td>
</tr>
<tr>
<td>Creation of a joint venture</td>
<td>No reference</td>
<td>The joint venture has no, or negligible, actual or foreseen activities within the EEA: (a) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory; and (b) the total value of the assets transferred to the joint venture is less than EUR 100 million in the EEA territory</td>
</tr>
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Electronic Notification System

ENSMO – Electronic Notification System for Merger Operations

• Web-based platform adopted in July 2009
• Allows the notifying parties to electronically submit a formal merger notification and to submit any subsequent information (e.g. replies to information requests)
• First step towards the reduction/elimination of physical workflow
• Linked to the PCA’s Document Workflow System
• On-line access to file by the notifying party
• Warnings (automatic notes/reminders) concerning the procedure phases
• 71% of merger notifications in 2011
Thank you!

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