TENDER OFFERS AND MERGER CONTROL RULES

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Abstract: *The Portuguese merger control rules and the tender offer procedures under the securities code have to be applied in parallel when a tender offer results in change of control of the target company. However, the two sets of rules raise several issues as to its coordination, in particular in what concerns the deadlines and time limits. This article analyses those issues on the basis of the existing cases and practice, with a reference to the European merger control rules.*

1. INTRODUCTION

A tender offer for the acquisition of shares in a company may have the objective of, or at least result in, the acquisition of its control. Under the Código dos Valores Mobiliários (Securities Code, hereinafter "CVM"), a tender offer may have as its object the totality of the shares of the target company (including necessarily its control) but, even in the case of a partial bid, it may lead to the acquisition of control. Thus, if the tender offer is successful, it may imply a change of control of the target company[1].

1 The text refers to a tender offer that aims at the acquisition of shares, which is the more frequent case. It should be noted that tender offers may have other kinds of securities as its object, such as bonds, warrants, etc.

When change of control is qualified as a concentration under the Competition Act[2], it can only be effected if a notification is filed with the Competition Authority ("AdC") – or, in the event of concentrations that have a Community dimension, with the European Commission under the European Merger Control Regulation ("EUMR")[3] –, and if an express or implicit decision of authorization is obtained under article 12 of the Competition Act – or, in the case of the European Commission, a decision declaring the concentration compatible with the common market under article 8 of the EUMR. Under article 9 of the Competition Act there is a concentration when an undertaking acquires or increases a market share above 30% in any relevant market, or when an undertaking whose turnover is above €150 million acquires control of another company which turnover is at least €2 million[4]. In the event of acquisition of joint control, those turnover and market share limits have to be met by the undertakings that acquire joint control.

The launching of a tender offer is itself subject to specific procedural and substantive requirements, through the registration with the securities regulator, Comissão do Mercado de Valores Mobiliários ("CMVM"). However, since the registration procedure can only be concluded when all other approvals have been obtained, including those of the merger control authorities, it follows that two separate regulatory procedures have to be lead in parallel:

1) the bid is subject to a preliminary announcement, immediately after any triggering event occurs. The preliminary announcement triggers several obligations, both for the offering company and for the target[5];
2) the merger filing with the AdC, or the European Commission, has then to be made and, once the approval is obtained;
3) the registration with the CMVM is completed and the tender offer is launched.

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2 Law No. 18/2003, of 11 June (hereinafter "Competition Act"). The reform of Portuguese Competition Law was launched by Decree Law No. 10/2003, of 10 January, which created *Autoridade da Concorrência*, the national competition authority and approved its statutes.

3 Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

4 The thresholds defining concentrations with community dimension, and thus the jurisdiction of the European Commission, are set in article 1 of the EUMR.

5 On the duties that fall on the board of the target, see Soares & Pinto, forthcoming.

This article aims at analysing the legal framework that applies to these parallel procedures and, on the basis of the existing cases and precedents, at identifying the main issues that arise from them. We will mostly review the law and precedents under the CVM and Competition Act and will not systematically consider EUMR issues.

2. THE TENDER OFFER PROCEDURE AND ITS INTERPLAY WITH THE MERGER CONTROL FILING

Under the CVM an offer to acquire securities is considered as a public offer and, in consequence, must comply with the tender offer rules, when (i) it takes place through multiple standard communications (even if addressed to identified addressee), (ii) is addressed to all shareholders of a public company, (iii) is preceded or accompanied by prospecting or solicitation of investors or by use of advertising or (iv) is addressed to more than 100 non-qualified investors with a residence or establishment in Portugal.

The primary duty of the offering company is to effect the announcement and preliminary register of the offer.

As soon as the resolution to launch a tender offer is taken by the empowered corporate body of the offeror (normally, the Board of Directors), the offeror must immediately publicly disclose its intention and submit the preliminary announcement of the tender offer. The tender offer procedure starts with such disclosure.

Until the publication of this announcement, all persons involved in the preparation of the offer are subject to a duty of confidentiality. The statutory contents of the preliminary announcement are set forth in Article 176 of the CVM.

The publication of the preliminary announcement obliges the offeror (i) to launch the offer on terms no less favourable to the addressees than those contained in this announcement, (ii) to apply for registration of the offer within a period of 20 days, extendable by the CMVM for up to 60 days for public offers for exchange and (iii) to inform the employees' representatives, or in their absence the employees, of the contents of the offer documents as soon they become public. The contents of the preliminary announcement are extremely important since they define the scope of the obligations of the offeror towards the market. The principle of the stability of the offer and the definition of the scope of the equality between the investors (see below) is to be determined primarily by reference to the preliminary announcement.

The registration filing with the CMVM must contain several documents relating to the offeror, the target company and the tender offer itself (project of the offer announcement and the prospectus). The CMVM's decision to grant or refuse the registration must be taken within 8 days of filing all the required documents (or, if additional information is requested by the CMVM, from the delivery of such information), otherwise the registration shall be considered as implicitly refused.

The authorization by the competent merger control authorities, when required, is one of the documents that have to be evidenced to the CMVM in order to complete the registration procedure. The merger control authorization (or equivalent act) is a condition to which the offer is subject, or, more precisely, it is a condition to which the registration of the offer is subject, since if that condition is not met the registration procedure will not be completed. The offeror has thus the duty to self assess any merger control needs to which it may be subject.

Although in practical terms the merger control decision is certainly one of the more important conditions that has to be met to allow the registration of the tender, it is not subject to any specific reference in the CVM. An obvious example of the difficulties that arise from this approach is the timing for the CMVM to adopt a registration decision. As explained above, the offeror has 20 days, which can be extended to 60 days in case of an exchange offer, to apply for the registration of the offer. These deadlines do not allow for the completion of a merger control filing under the Competition Act in the event the AdC opens an in depth investigation, which can take at least 90 business days. As a matter of experience, even a decision in Phase I, which, under Articles 34 and 35, takes at least 30 business days, may not be possible within the deadline of the CVM. If the 30 days period is suspended to seek further information from the parties, as it frequently happens, it is possible that the deadline foreseen in the CVM expires without a merger decision. As we shall see below, the amendment of the Competition Act by Decree Law No. 219/2006, which apparently aimed at solving the timing issue, did not meet its objectives.

The timing issue is not specific to mergers subject to the rules in the Competition Act. The same would happen under the EUMR, where a Phase I procedure takes at least 25 business days.

The position of the CMVM is to suspend its deadline for the registration until the merger control process is completed. Although this may solve the

problem from a practical perspective, in view of the possible consequences of the merger filing process, it would have been preferable that some sort of explicit coordination between the CMVM and the AdC was foreseen by the CVM, recognising the specific requirements of the analysis that the AdC has to undertake. It would also be advisable that the law foresees a formal contact between the AdC and the CMVM. When seen from the perspective of the filing undertaking, it is unusual that the law does not explicitly coordinate the roles of two independent regulators whose powers in a sense overlap.

Since, under article 11 (3) of the Competition Act, mergers filed but not yet approved are suspended (*i.e.* the acquirer cannot complete the transaction or, in any event, it cannot exert the rights associated to the shares purchased), the offeror cannot exert its controlling rights under the Competition Act, although it may purchase shares pending the conclusion of the tender offer proceeding.

2.1. The rules applicable to public tenders under the Competition Act

The specific situation of the offeror in a public tender is foreseen by the Competition Act. Under Articles 9 (2) and 11 (3), the preliminary announcement of a public tender is a triggering event for the merger control filing. Thus it is from this announcement that the seven business days for the merger control filing period starts running. Article 11 (3) allows for the launching of a public tender, which includes the acquisition of shares in the target, as long as the voting rights are not used. In itself this is an exception to the general rule that, pending the authorization, the undertaking that is acquiring control cannot close the underlying transaction. The offeror can purchase shares but cannot use the voting rights that are part of it, while in a merger that is not effected through a public tender the acquisition of shares will not be allowed.

Article 11 (3) and (4) also allows that, by way of an exceptional decision, the AdC can authorise the offeror to use its voting rights solely to protect the value of its investments. Conceptually, it may be easy to separate the mere protection of the value of an investment from the active use of any rights that may affect the competitive behaviour of the target company, but in practical terms the distinction may easily be blurred.

The law does not provide any tests or criteria for what can be acceptable as protection of the value of the investment made. In itself, this possibility is a consequence of the fact that the offeror is authorised to buy shares, and

not simply to undertake to buy them. Without the exceptional provision in article 11, the offeror could be put in the strange situation where he already owns shares (which are thus outside the control of the former shareholder) but is not allowed to use any of the rights related to them.

It should be assumed that such decisions by AdC are exceptional and, in view of the lack of a clear definition of what is the protection of value, any merger control authority would be cautious in granting the derogation. In the context of an hostile bid such derogations may be extremely important since the offeror may find itself in a more limited position than another shareholder that is not subject to a public tender obligation.

This exceptional procedure is a parallel to the rule in EUCR article 7 paragraph 2, although the European regulation, through the reference that the Commission will grant an *ad hoc* decision under Article 7 paragraph 3, may be construed as providing a detailed list of the issues, as mentioned in the latter rule, that the Commission will have to consider when assessing a request for the authorization to use voting rights.

We are not aware of any cases where the AdC has authorised the use of voting rights by an offeror in a tender offer, but there is clear practice of the Commission. Following the established practice of the AdC refering to european experience, it can be expected that any such request will be assessed considering the decisions of the Commission[6].

2.2. The possibility of multijurisdictional filings

Public tenders of companies subject to the jurisdiction of the CMVM will probably concern mostly companies that have limited activities outside the Portuguese market. However, there is a distinct possibility that tender offers trigger merger control filings in other jurisdictions. This will be the case in the following situations:

a) filing in another EU jurisdictions if the transaction does not have a Community dimension;
b) filings in other non-EU jurisdictions, whether or not there is a filing under the Competition Act or the EUMR.

6 On article 7 paragraph 2 EUMR and the existing practice of the Commission, see Boyd, 1996: 604 ss. and Koppenfels, 2006: 514 ss. For an example of a derogation under the 1989 merger control regulation (Regulation 4064/89), see the *Tetra Laval/Side*, case COMP/M.2416, although the existence of such a derogation does not appear from the final decision itself; see Christensen, Fountoukakos & Sjöblom, 2007: 545.

Since the EUMR relies on the principle of the "one stop shop", the jurisdiction of the European Commission is exclusive. In those cases, it may however be necessary to file under the national laws of non-EU countries where the transaction triggers the need to file.

When the transaction does not have a Community dimension but affects EU markets, it may have to be filed under those countries' rules. Also in this case, the transaction may also be subject to merger control filings in other non-EU countries.

In all the possibilities above, the CMVM should have the same approach, accepting the need to obtain the relevant merger control decision, or decisions, as a condition that has to be met for the conclusion of the registration process.

The possibility of several independent merger control filings may add substantial complexity to the registration process, in particular because there is no timing coordination between those procedures. The deadlines applicable to the proceedings, their triggering events and level of analysis may vary enormously. Since the merger control conditions, as set in the preliminary announcement, are cumulative, the (definitive) announcement can only proceed when all the conditions are met.

A recent interesting example is the public tender launched by Brasilian company CSN over Portuguese cement producer Cimpor. The preliminary announcement subjected the tender to the approval of merger control authorities, which were subsequently identified as the European Commission and the Chinese, Turkish and South African merger control authorities[7]. However, the offeror eventually decided to drop the condition related to the merger control authorizations[8].

The possibility of dropping conditions that have been initially set by the offeror is interesting in the perspective of the securities rules. If the offeror drops a condition that he had initially set, the consequence is that he will be bound by the terms of the announcement whatever the decisions of the merger control authorities. Even if one of the jurisdictions involved eventually decides to refuse to authorize the transaction, the offeror would still be bound on the terms of the announcement. Thus, even if the decision refusing to

7 See the announcements and documents available at the site of the CMVM, www.cmvm.pt. The tender was announced on 18/12/2009 and subsequently the offeror disclosed the list of the merger control authorities involved.

8 See Announcement of 27/01/2010, at §12.

authorise the transaction in a certain market affects the value of the company whose shares are the object of the offer, the offeror will continue to be bound by the scope, price and conditions included in the announcement.

A related issue is the possibility that the transaction also affects markets where filing is not made *ex ante* but may be required by the authorities after the transaction[9]. Here the risk that a decision is taken *ex post* that affects the value of the assets is also clear.

Registration with the CMVM implies the verification of the conditions and the approval of the tender offer prospectus. Approval of the prospectus and registration does not involve any guarantee as to the content of the information, the offeror's, issuer's or guarantors economic and financial situation, the feasibility of the tender offer or the quality of the securities which are the object of the offer.

3. THE SECURITIES REGISTRATION PROCEDURE AND THE MERGER CONTROL FILING: SCOPE AND OBJECTIVES

The public tender registration procedure and the merger control filing have different objectives and scopes, and those differences affect and condition the enforcement of the applicable rules. These objectives can also collide and give rise to specific conflicts.

3.1. The securities registration procedure

The registration with the CMVM is included in the supervision powers of that body. Public offers are subject to two main principles, the equality of treatment among investors and the stability of the offer, and the registration procedure aims, *inter alia*, at guaranteeing that those principles are applied, as well as the legality of the offer[10].

The protection of the equality of the investors follows a standard definition of the principle of equality: all investors are entitled to be treated equally (and fairly) and the offering company is not allowed to differentiate between the investors. The protection of public interest in the issuing and trading of securities, seen in particular as the protection of the equality between

9 This is the case in the UK, where filing is not mandatory but, if the thresholds are exceeded, the Office of Fair Trading may start an investigation and, within four months of the conclusion of the transaction or the moment when it became public, refer the case to the Competition Commission.

10 See Câmara 2009: 585 e ss. and, for the acquisition tender offers, 646 ss.

investors, and therefore of the capital markets, is thus an essential part of the CMVM registration procedure.

A related objective is the stability of the public offer, a principle that is usually interpreted as having a triple effect:

a) stability of the content of the offer, which has to be kept essentially the same along the tender offer procedure. This does not mean that the economic conditions of the offer have to be kept, since they can be reviewed upwards, notably as a reaction to the positions of other shareholders or the target company;
b) stability of the offer process, since it can only be interrupted or suspended through the CMVM;
c) non revocability of the offer, since the revocation can only take place under the control of the CMVM.

Since the merger control authorization is a condition for the conclusion of the tender offer, it may affect it. The tender offer procedure is conditioned by the timing of the merger control procedure and by the content of its final decision. Obviously, if the competent merger control authority refuses to authorise the merger, the tender offer will be withdrawn. In this case, the merger decision will effectively condition the outcome of the registration process. In what concerns the offer stability objective, there is at least one area where it can clash with the outcome of the merger control process. In the course of the filing process, it is possible that the offering undertaking accepts remedies, following discussions with the AdC, or that the agency imposes conditions that affect the substance of the offer. In this case, the offer should be revised in order to make it reflect the consequences of the situation created by the new conditions.

3.2. The merger control procedure

The merger control procedure has a very specific objective, namely the prevention of the creation or strengthening of a dominant position which may result in significant barriers to effective competition through the concentration of undertakings. This objective has to be seen in the context of the system (or systems) of competition law. Those systems are built around two different prohibitions, namely of agreements that restrict competition and of abusive behaviour by dominant undertakings (respectively articles 101 of the Treaty

on the Functioning of the European Union (TFUE) and article 4 of the Competition Act; and article 102 TFUE and article 6 of the Competition Act).

As the evolution of the enforcement of EU competition law clearly shows, depending on the public policy views and requirements of the competition regulatory agency, these two prohibitions have almost universally came to be considered insufficient. The rules that prohibit agreements or abuses of dominant position are inherently ill suited to be used to prevent the creation of excessive market power, as the controversy surrounding the European Court of Justice Continental Can decision of 1973 shows[11]. This lead the Commission to develop the need to create an autonomous system of merger control in the EU[12]. Although at the time of the adoption of the first merger control regulation, in 1989, only Germany had an effective system of merger control, other Members States followed the example enacting specific merger control rules[13].

Thus the objective of the merger control procedure is to avoid a very specific outcome. Under Portuguese law this is defined by article 12 paragraphs 3 and 4: concentrations that create or strengthen a dominant position that results in significant barriers to effective competition in the Portuguese market or in a substantial part of it shall be prohibited[14]. Contrarily to what happens in the CMVM tender offer proceedings, which aim at guaranteeing what appears to be a purely juridical objective – a rule of equality –, the assessment made by AdC under the Competition Act aims at a material or substantive result, which relies, or should rely, on an economic concept. The duty to guarantee that investors are treated equally can be construed as having a formal content. However, the decision on the authorization of a merger has to rely on a substantive test that has to be shown to meet the requirements of the applicable law (Competition Act or EUMR).

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11 *Europemballage and Continental Can /Commission*, C-6/72, Col. (1973) 215.

12 On the origin of the European merger control regulation, Drauz & Jones 2006: 2 ss. and Morais, 2006: 607 ss.

13 When the first merger control regulation, 4064/89, was adopted, the Portuguese Competition Act was Decree Law 422/83, which did not include any merger control rules. Subsequently Decree Law 422/88 created a system of preliminary notification of certain mergers. Both acts were revoked by Decree Law 371/93, which included rules on both anti-trust and merger control.

14 For convenience of reference, all quotations from the Competition Act use the English translation made available at the site of the AdC, www.autoridadedaconcorrencia.pt, although some of the solutions used are disputable.

4. THE COORDINATION OF THE MERGER CONTROL FILING AND THE TENDER OFFER REGISTRATION OBLIGATIONS

The need to conduct in parallel the tender offer registration with the CMVM and the merger control filing under the Competition Act rules clearly suggests that there are several possible instances where the scopes of both procedures may conflict, or at least where there is a difficult articulation between them.

In view of the limited number of relevant decisions available, there is not a level of practice or number of precedents that allow for the clarification of those issues and indeed some of them remain mere possibilities. Under the Competition Act there have been until now three tender offers registered with the CMVM where merger control filings have been done: Sonae/PT (filed on 20.02.2006, final decision of non opposition with conditions, after an in depth investigation, on 22.12.2006); BCP/BPI (filed on 31.03.2006, final decision of non opposition with conditions, after in depth investigation, on 16.03.2007); and Ongoing/Vertix/Mediacapital (filed on 8.10.2009; on 30.03.2010 AdC announced a decision of opposition to the concentration, without opening an in depth investigation, since the sector regulator, the Entidade Reguladora da Comunicação, had refused to authorise the merger on grounds that are specific to the media sector, namely the plurality of the media). To this can be added the CSN/Cimpor case, where a public tender was launched in Portugal but the transaction had Community dimension and was filed with the European Commission (filing of 14.01.2010; approval on phase 1 on 15.02.2010).

It is striking to realise that none of these four public tenders was successful. In both Sonae/PT and BCP/BPI the "success condition" was not met. Ongoing/Vertix/Mediacapital was eventually withdrawn after the decision of the ERC and AdC. CSN/Cimpor was also not successful.

On the basis of these cases, we can identify at least three issues that may arise in the context of the articulation between the public tender registration with the CMVM and the merger control filing with the AdC. The first is obviously the problem of calendar and timing, an issue that was discussed in the Sonae/PT and BCP/BPI cases and which lead to an amendment in the Competition Act. Two other issues may be identified at this stage, although they remain an hypothesis: the articulation with the sector regulators, to which the AdC is subject and the comparative position of other bidders that are not bound by any merger control duties.

4.1. The duration of the proceedings before the AdC and the deadline for decisions

The first, and most obvious of the potential problems arising from the need to coordinate the CMVM registration and the merger filing is the timing or calendar issue.

Under the CVM, the CMVM has up to 8 days to close the registration procedure (art. 118.º, n.º 1, al. *a*) CVM). Since this registration procedure obliges the offeror to submit all authorizations required to complete the transaction, including the merger control authorization, it follows that the offeror should have such decision within 28 days (the 20 days period that the offeror has to file the request for the registration within CMVM plus the 8 days period that CMVM has to make the register).

This necessarily collides with the timing for the decision of the AdC. Under the Competition Act, AdC has 30 business days, from the moment the merger control file is deemed complete, to issue a Phase 1 decision. Even if the offeror files under the merger control rules at the same time that he publishes the preliminary announcement, the deadline may be not sufficient unless the bid concerns an exchange offer, in which case the CMVM may extend the period that the offeror has by a further 40 days (article 175.º, n.º 2, al. *b*) do CVM).

The rules of the CVM are not aligned with the Competiton Act since the 28 days period (or 68, in case of an exchange offer) for the completion of the registration is a hard and fast rule that does not allow for an extension. In practical terms, the CMVM avoids any conflicts with the AdC timing by simply suspending its registration deadline until the procedure is complete. Although this is a commendable solution, it would be obviously better to have a coordination rule or procedure that would rely in something more solid than a mere administrative practice, no matter how sound it may be.

On the merger control procedure, the situation is more complex since the Competition Act does not accommodate any specific timing issues arising from the securities rules.

It is true that the Competition Act recognises the specifity of the launching of a public offer as a triggering event for the filing of a merger control procedure (see articles 9 and 11). It is also true that, in principle, the AdC could allow a shareholder to take control of the target company. But these are, and probably will remain, exceptional decisions.

In both the Sonae/PT and BCP/BPI cases, referred to above, the duration of the analysis undertook by the AdC was criticised. It is true that, with the number of markets affected in both cases, it is extremely difficult to limit the time required for the merger control assessment, particularly in an in depth investigation where a detailed market assessment is required. But it is also true that a lengthy merger control analysis has a serious impact both on the offeror and the target. These are not so much legal problems but the simple practical consequence of the suspension of the transaction – a necessary outcome of the merger control proceeding –, on the side of the offeror; and of the limited powers of the target board during the offer, which is a necessary outcome of the securities rules.

On the side of the offeror, it is extremely difficult to keep all the necessary commitments, in particular in what concerns the funding of the tender, for a period that, as experience shows, can take up to one year. Also, he may be obliged to amend the offer if the outcome of the merger control proceeding affects its economic substance.

On the side of the target it is also difficult to remain with the limited powers of a simple caretaker management for such a long period.

There is no simple solution to these issues. Following the discussions on the Sonae/PT and BCP/BPI cases, the Competition Act was amended, by Decree Law No. 219/2006, of 2 November. Since one of the reasons for the duration of the AdC merger filing was the suspension of the procedure in order to request for further information, article 36 of the Competition Act was amended in order to limit the in depth investigation to a maximum duration of 90 days, which start to run from the filing and not from the end of the phase I proceeding. The original wording of this provision started the 90 days in depth investigation period from the day of the phase I decision. Thus, in practice the AdC "lost" at least the 30 days of a standard phase I.

Moreover, the law now also limits the duration of the suspensions of the deadlines, which can be for no longer than 10 business days. The amendment will obviously put extreme pressure on both the parties to the concentration and the AdC, since it will have to solve whatever information needs it has within a preset time limit. This will be contrasted to the situation under the EUMR, where the Commission is allowed to suspend the time for the final decisions if one of the undertakings does not respect the time to reply to a

request for information[15]. It is submitted that a more flexible solution, as that in the European regulation, is certainly more reasonable that the imposition of a strictly limited possibility of extension, as is now the case.

The amendments to the Competition Act introduced by Decree Law No. 219/2006 are probably a hasty reaction to a specific problem (what was perceived as the excessive duration of the two merger filings in Sonae/PT and BCP/BPI), which is rarely the source of good law.

The AdC, faced with the amendment to Article 36 of the Competition Act, issued an interpretative note where it states that the 10 days limit for the requests for information is to be construed as applying only to the in depth investigation and not to phase I proceedings[16]. The reading of the AdC is based on the fact that Article 34, paragraph 2, of the Competition Act empowers the AdC to suspend the 30 days period of phase I whenever it needs further information, and to issue requests for documents or information to the parties. Thus, arguably, the new rule in article 36, where such requests for information are limited to 10 days, is solely applicable to in depth investigations and phase I proceedings can be suspended to request for information, regardless of the length of the suspension.

Ultimately it is for the courts to decide what is the best reading of the new amendment. It could be argued that Article 34 paragraph 2 merely clarifies the issue of the powers of the AdC to decide on the allocation of time to respond to requests for information. Whatever the doubts that arise from the cross reading of articles 34 and 36, the latter can be construed as imposing an absolute limit to the suspension of proceedings to reply for requests for information.

The consequences of uncertainty in this field are extremely serious. If the reading defended by AdC is not followed by the courts, there could be a situation of tacit approval of a merger, which, considering the complexity of the issues raised in in depth investigations, and the interests affected by a public tender, are certainly an outcome to be avoided.

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15 See EUMR, articles 10, paragraph 4 and 11. See also the comments of Christensen, Fountoukakos & Sjöblom, 2007: 547 and 556. On the scope of powers of the Commission on this matter, Case T-310/01, *Schneider Electric/Commission*, ECR (2002) II-4071.

16 Orientação Geral dos Serviços da Autoridade da Concorrência definida pelo seu Conselho e relativas às alterações à Lei nº 18/2003, de 2 de Novembro, de 1 de Fevereiro de 2007.

4.2. The issues arising from the articulation between the powers of the AdC and the sector regulators

Article 39 of the Competition Act requests the AdC to hear and consult the sector regulators whenever a public tender affects a regulated market[17]. This obliges the AdC to consult and hear the sector regulators, which may result (in the case Entidade Reguladora da Comunicação – "ERC" – is one of the concerned regulators) in an extension of the duration of merger control proceedings, since the AdC has to consult and hear, but the position taken by the sector regulator is not binding for the AdC.

However, in the recent Ongoing/Vertix/Mediacapital public tender, the main asset of the targets was a television channel. Since the television act subjects the change of ownership of television channels to the binding decision of ERC, the scope of analysis of the AdC is effectively emptied if, as happened in this case, the sector regulator either is opposed to the merger or submits it to conditions that are not acceptable to the parties. There is no overlap of competences between the ERC and the AdC, since the former overviews the pluralism of the media. However, in practical terms the effect of the intervention of the ERC can be the blocking of a merger. It is interesting in this context to note that, even in the context of the EUMR, the plurality of the media is one of the exceptional circumstances that, under article 21, paragraph 4, allows a Member State to adopt measures that affect the scope of the control undertaken by the Commission. However, as is settled case law, the fact that a Member State uses the exceptional clause in this article is subject to a discussion with the Commission, who has to approve the request made. At least the system is clear inasmuch as the final decision (on whether or not to accept the competence of the Member State) lies with the agency that is competent for merger control.

4.3. The position of bidders that are not subject to merger control obligations

It is possible that, in the context of a public tender that is under registration, a third party launches a parallel competing tender. Under the rules of the CVM, the initial tender benefits from a form of "priority", since it will be the first to complete the registration procedure and any competing bids will have to wait for the approval of such registration by the CMVM. Thus, although the

17 See in general Ferreira & Anastácio, 2009, and the input by one of the authors of this article, Correia, 2009: 720.

initial offeror has to face the delay that arises from the merger control decision timing, the CVM rules effectively oblige the competing offeror to wait for the end of merger proceedings before it can proceed with its registration.

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