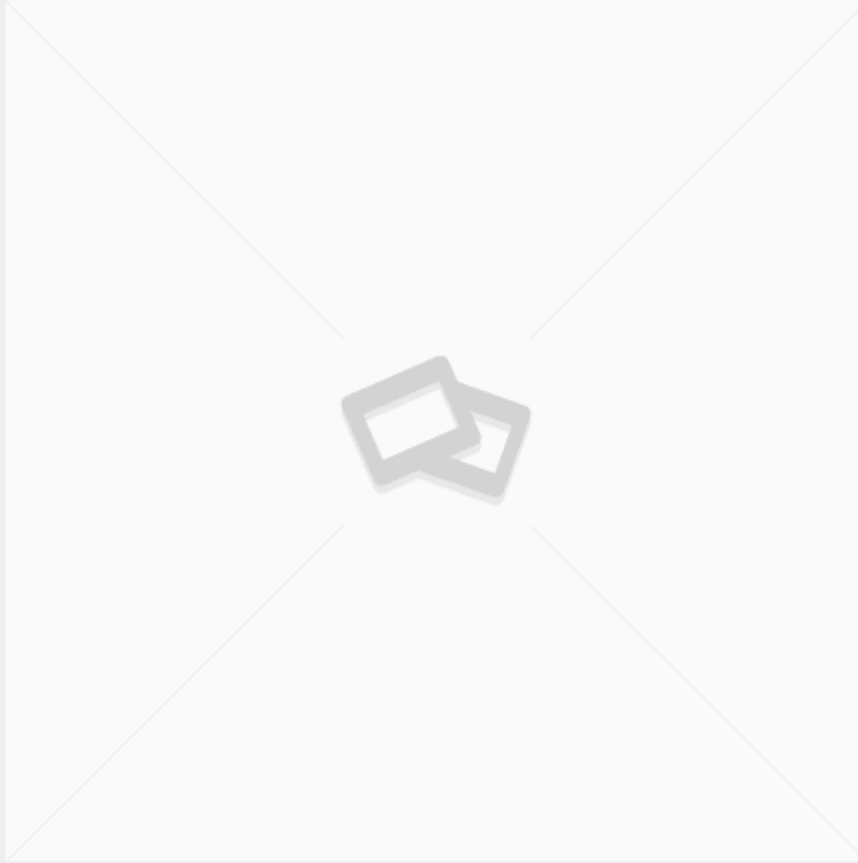


ADAPTIVE BEHAVIOUR: LEARNING LESSONS FROM THE ADC - MORAIS LEITÃO GALVÃO TELES SOARES DA SILVA & ASSOCIADOS

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An analysis of previous successes and failures before Portugal's National Competition Authority can help ensure that a party is adequately prepared, say JJ Vieira Peres and Carlos Botelho Moniz of Moraes Leitão Galvão Teles Soares da Silva & Associados.

Having played a role in a substantial amount of merger notifications before Portugal's National Competition Authority (Autoridade da Concorrência – AdC), and an equally significant number of antitrust cases, JJ Vieira Peres and Carlos Botelho Moniz of Moraes Leitão Galvão Teles Soares da Silva & Associados, are clear that important clients lessons have been learnt.

“Our experience tells us that there are important ways in which clients can both structure their deals and manage antitrust investigations but perhaps the most important lessons learnt have been in how to deal successfully with the procedural requirements of the AdC,” says Botelho Moniz, Head of the firm's EU Competition practice.

Merger clearance

The past year has seen the final outcome of two very significant hostile public company takeover attempts involving important merger analysis by the AdC – BCP Millennium-Banco BPI and Sonaecom-Portugal Telecom (PT) – both of which were ultimately unsuccessful, in part say lawyers because of the length of time and demands of its own deliberations.

“The BCP-BPI and Sonae-PT cases were tremendously complex transactions requiring intricate analysis and ultimately complicated remedies,” says competition partner Vieira Peres. “In these cases the merger timetable lasted almost a year and clearly required a considerable effort from the AdC.”

Subsequent merger clearances they say have however been much less contentious, and efficient. “Parties have been able to learn and apply the lessons from previous experiences with the AdC,” adds Botelho Moniz. “Significant has been the emphasis on managing the procedural requirements and to focus on the most important issues, to set aside the accompanying ‘noise’.”

But lessons have also been learned by the AdC, believes Vieira Peres. “In the most recent major takeover transactions in which we acted – TAP Portugal-PGA Portugalia Airlines, and Sonae Distribuição-Carrefour (Portugal) – the AdC was also keen not to get distracted by asking for lots of information on less important matters. All the sides were therefore trying to concentrate on the most relevant issues at all times, and which ultimately proved successful for all involved.”

Such success they say was evidenced by the speed in which the merger clearances were approved. “The Sonae-Carrefour transaction was approved in only five months, and during the preliminary Phase I investigation stage. While the TAP-Portugalia takeover entered Phase II investigations, the focus was however on very specific issues, and was ultimately cleared in six months,” explains Vieira Peres.

Preparedness

In order for parties to advance their notifications as quickly and as far as possible, they also need to be mindful however that there is no “stop-clock mechanism” in Portuguese merger clearance assessment, says Vieira Peres. “Preparation is key. So that when the AdC does request new information the inhouse team is ready and able to give the correct answer.”

It is important therefore for external lawyers to be able to identify the likely main issues in advance with the general counsel, to build a very good relationship with the inhouse department, and to ensure that a dedicated team follows the issue. Company management also needs to fully understand what is going on, he emphasises.

“There needs to be a soundness and consistency of information and to be able to access it in as short a time as possible, when and where required.”

In order for clients to maximise their effectiveness in front of the authorities, it is also important that those dealing directly with the authorities cultivate the most appropriate relationship, adds Botelho Moniz.

“In merger control there is an emphasis on developing an ongoing relationship, and it is important therefore that companies are able to ensure that there will be co-operation. Antitrust investigations

are clearly more confrontational. There will be opposing sides, but again it is important that the lawyers are able to develop a very frank relationship with any AdC case team."

In any event, what is required of all sides is professionalism they emphasise. That perhaps, is the most important lesson of all.