Questionnaire for Topic 3:

"Public Capital and Private Capital in the internal market. Securing a level playing field for public and private enterprises[1]"

Portuguese Report

By Jorge de Brito Pereira and Luís Miguel Romão[2]

Contents

[1] Piet Jan Slot, Professor of European Law University of Leiden.

[2] Jorge de Brito Pereira is a Partner of PLMJ - A.M. Pereira, Sáragga Leal, Oliveira Martins, Júdice e Associados - Sociedade de Advogados and an Adjunct Professor of Universidade Católica Portuguesa. Luís Miguel Romão is a Senior Associate of PLMJ. The authors wish to thank the assistance of Maria João Rodrigues, Marisa Larguinho and Tiago Assunção, Lawyers also from PLMJ, in the drafting of the present report.

III. *National law*

III. A. Constitutional law or other fundamental/framework laws

Q 13.Please state whether the Constitution of your Member State contains rules that require certain goods or services to be provided by the government.

In the aftermath of the political, social and military revolution of 1974, Portugal experienced a major period of nationalizations, in particular in the banking, energy, transportation and media sectors. The 1975 Constitution of the Portuguese Republic ("CPR"), in its original version, provided for several areas of the economy to be solely owned by the State or by public undertakings, based on the ideas of the irreversibility of nationalizations and on the constitutional imposition of the prohibition of private initiative in certain sectors. However, nowadays a provision of such nature can no longer be found. The CPR now contains several rules requiring the provision of certain goods by the State, but not in an exclusively and solely manner. In its current version and following several amendments[3], Part II (Organisation of the economy), Title I (General principles) of the CPR establishes in Article 80 (Fundamental principles) the general principles that guide the country's social and economical organization, e.g., that public, private and cooperative and social sectors shall coexist in the ownership of the means of production; that there shall be, within the overall framework of a mixed economy, freedom of business initiative and organisation; that when so required by the public interest, natural resources and the means of production shall be publicly owned; and that the cooperative and social sector shall enjoy protection in relation to the ownership of the means of production.

Article 82 of the CPR, under the heading *"Sectors of ownership of the means of production"*, provides that the coexistence of **three sectors of ownership** of the means of production shall be guaranteed. The **public sector** shall comprise such means of production as should rightly belong to and be managed by the state or other public bodies. On the other hand, the **private sector** shall comprise such means of production as should rightly belong to or be managed by private individuals or private groups. Finally, the **cooperative sector** shall specifically comprise (i) the means of production that cooperatives possess and manage in accordance with cooperative principles, without prejudice to such specific provisions as the law may lay down for cooperatives in which the public sector holds a stake and are justified by the special nature thereof; (ii) community means of production possessed and managed by local communities; (iii) means of production operated by worker collectives; and (iv) the means of production possessed and managed by non-profit bodies corporate, the primary objective of which is charitable, particularly bodies of a mutualist nature.

[3] Constitutional revisions of 1982, 1989, 1992, 1997, 2001, 2004 e 2005. Of all said amendments, the 1982 revision was the most influential as regards the setting aside of several areas and activities that private undertakings or persons were not allowed perform.

In addition that what was said above, it should be mentioned that Article 61 of the CPR establishes a general principle according to which private economic enterprise shall be undertaken freely within the overall frameworks laid down by the Constitution and the law and with regard for the general interest. Moreover, Article 62 of the CPR establishes that everyone shall be guaranteed the right to private property and to the transmission thereof in life or upon death, providing that requisitions and expropriations in the public interest shall only occur on a legal basis and upon payment of just compensation.

Further to these general provisions concerning private property and the ownership of the means of production, there are several other articles of the CPR that provide for the obligation of certain socio-economic sectors to be supplied, at least partially, by the State. For example, Article 75 CRP determines, regarding educational matters, the State's obligation to create a network of public education establishments that covers the needs of the whole population[4]. As for physical education and sports, the State was charged, in cooperation with schools and sporting associations, with promoting, stimulating, guiding and supporting the practise and dissemination of physical education and sport, and preventing violence in sport (Article 79(2) of the CPR). As regards public health, there is an universal right of health protection guaranteed in the Constitution, to be fulfilled by means of a national health service that shall be universal and general and with particular regard to the economic and social conditions of the citizens who use it and which shall tend to be free of charge (Article 64 of the CPR)[5].

Finally, Article 86 of the CPR provides that the state shall encourage business activity, particularly that of small and medium-sized enterprises, and shall supervise the fulfilment of the respective legal obligations, especially by undertakings engaged in activities that are of general interest to the economy. According to Article 86(2) of the CPR, the state shall only intervene in the management of private businesses on a transitional basis, in cases that are expressly provided for by law and, as a general rule, subject to a prior judicial ruling. However, the CPR provides, in its Article 86(3), that the law may define basic sectors in which private businesses and other bodies of a similar nature are forbidden to act.

Q 14. Are there special laws that lay down similar requirements? The term special laws refers to laws that have a special hierarchical nature in the sense that they have priority over ordinary laws.

In order to comply with the 1976 CPR, Law No 46/77, of 8 July 1977, set the economic activities and sectors which could not be pursued by private undertakings. Among these were entire sectors like banking and insurance, electricity and gas

[4] Notwithstanding, in these educational matters, the CPR allows both private and cooperative education, although under State supervision.

[5] The State is nevertheless responsible for the regulation and supervision of corporate and private forms of medicine and their articulation with the national health service, in such a way as to ensure adequate standards of efficiency and quality in both public and private healthcare institutions (Article 64(1)(d) of the CPR). The State is also responsible for regulate and control the production, distribution, marketing, sale and use of chemical, biological and pharmaceutical products and other means of treatment and diagnosis (Article 64(1)(e) of the CPR).

production and distribution, air and railway transportation and the industries of armament, siderurgy, petrol, petrochemical, fertilizers and cement industries.

However, Law No 88-A/97, of 25 July 1997, that finally revoked Law No 46/77, of 8 July 1977, now establishes that private undertakings are solely not allowed to develop the following economic activities, except if such activities are already under a concession's regime:

(i) Collection, treatment and distribution of water for public consumption;
(ii) Collection, treatment and rejection of urban residual waters;
(iii) Collection and treatment of urban solid waste/residues;
(iv) Postal services that constitute the public postal network;
(v) Railway transportation (public service); and
(vi) Exploitation of maritime ports[6].

Q 15. Does the Constitution of your Member State contain guarantees that certain activities are reserved for the private sector?

There are no specific provisions in the Portuguese Constitution that guarantee that certain activities are reserved for the private sector.

Q 16. Are there any rules that prohibit nationalizing undertakings or certain sectors of the economy?

There is no constitutional or legal provision that prohibits the nationalization of undertakings or certain sectors of the economy.

Q 17. Are there rules that subject nationalizing to procedures or specific rules?

Article 83 of the CPR states that *"The law shall lay down the means and forms of intervention in relation to, and for the public compulsory purchase of, means of production, together with the criteria for setting the applicable compensation"*.

Given its importance, the means and forms of nationalizations are, pursuant to Article 165(1)(l) of the CPR, of the exclusive competence of the Parliament unless it authorises the Government to do so.

Recently, further to the nationalisation of Banco Português de Negócios, S.A. ("BPN"), the legal regime for nationalisations of private undertakings was enacted by Law No 62-A/2008, of 11 of November 2008. Article 1 of said legal diploma states

[6] Access to the armament industry is also mentioned, with some principles established to be developed by further legislation. Law No 49/2009, of 5 August 2009, that came to regulate the access and exercise of commercial and industrial activities of military goods and technologies, allows, in its Article 4, for private undertakings incorporated and with head offices in Portugal and persons residing in the country to exercise said activities. Undertakings and private individuals duly authorised to exercise any such activities in other EU Member States are also permitted to do so in Portugal (Article 4(1)(d)).

that, for exceptional and duly grounded reasons, private companies' share capital may be partially or totally nationalised, to the extent that such may reveal to be necessary to the safeguard of the public interest[7]. Such acts of nationalisation must assume the legal form of Decree-Laws that shall always evidence the recognition of the underlying public interest and observe the principles of proportionality, equality and competition. Said Decree-Laws shall contain all elements and conditions of the operations to be performed[8].

According to Article 5 of Law No 62-A/2008, compensation shall be granted to the owners of nationalised undertakings, by reference to the value of the respective financial and patrimonial situation at the date of the entry into force of the act of nationalization. For said purpose, an evaluation procedure shall be performed by, at least, two independent entities, within 30 days, to be appointed by the Minister for Financial Affairs. On the basis of said evaluation and after hearing the representatives of the former shareholders of the undertakings in question, said Minister will decide on the amount of the compensation to be granted[9].

For all legal purposes and regardless of any formalities, the shares of the companies comprised by the nationalisation act are to be considered as transmitted to the State, free of any encumbrances or charges. The change in the property of the shares of such companies is to take place directly by virtue of the relevant Decree-Law and shall be opposable against any third parties regardless of its registry. This shall however not affect the possibility of having the shares in question transferred to other companies in which the State may held, directly or indirectly, the total respective share capital (Articles 6(1) to (3) of Law No 62-A/2008).

Companies nationalized under said procedure are nevertheless to maintain their legal personality and nature, without prejudice to subsequent merger decisions (Article 7(2) of Law No 62-A/2008).

All previous assets, rights, duties and legal or contractual obligations (including labour relationships) of companies to be nationalized are to be maintained and such undertakings shall carry on all its activities, in accordance with all relevant legal and contractual provisions (Articles 8(1) and (2) of Law No 62-A/2008).

Should the nationalisation comprise the whole or the majority of the shares of a company, its corporate bodies are considered as immediately dissolved as well as those of companies belonging to the same group of companies[10] and no indemnity rights shall arise in this regard, even if contractually foreseen.

---

[7] The legal regime established is also applicable, with the necessary adjustments, to the social and cooperative sectors by virtue of Article 15 of Law No 62-A/2008.

[8] Nationalized share capital pertaining to companies admitted to trading in the stock market imply the suspension of trading in such a market by the competent authority, in order to assure the normal functioning of market and the investors' interests (Articles 2 and 3 of Law No 62-A/2008).

[9] This right to obtain a compensation shall nevertheless be suspended in so far as there are pending judicial inquiries or procedures against the former direct or indirect shareholders for *indicia* of harmful practices of the patrimonial interests of the undertaking in question and until such time as a *res judicata* decision is obtained, from which results their non-indictment.

[10] Any such members are to hold offices until the appointment of new members, are obliged to provide all relevant information and cannot perform any actions or sign any contracts other than those of a

The management of nationalised companies may be attributed to third state entities, by order of the Minister for Financial Affairs, which shall also appoint the members of the corporate bodies (Article 11(1) of Law No 62-A/2008). To such third public entities may also be granted the definition of the management objectives of the companies in question, upon prior approval of the Minister for Financial Affairs (Article 11(2) of Law No 62-A/2008).

To the Minister for Financial Affairs were also granted the necessary powers to determine further ancillary conditions and to adopt all the necessary execution acts to said purposes (Article 13 of Law No 62-A/2008).

Q 18. Are there, in the absence of such rules, other procedures or mechanisms that have to be followed for the nationalization of undertakings?

Not applicable.

Q 19. Are there rules for the acquisition or sale of shares of enterprises by the government?

Article 37(1) of Decree-Law No 558/1999, of 17 December 1999[11] that enacted the regime of the State Business Sector, establishes that, without prejudice of special legislation, the participation of the State or other state entities, as well as of public companies, in the incorporation of companies or in the acquisition or sale of share capital is subject to the authorization of the Minister for Financial Affairs and the minister responsible for the respective sector (except for cases of payment of debts, donation, renunciation or abandonment). Any such requests should be accompanied by a feasibility and interest study as regards the operation in question and the absence of said authorization will result in the deal being null and void[12].

As regards the sale of state owned companies, Article 293(1) of the CPR establishes a special regime for the re-privatisation of property nationalised after the 25 April 1974 Revolution. Said Article states that *"a framework law passed by an absolute majority of all the Members in full exercise of their office shall regulate re-privatisations of the ownership of, or the right to use, means of production and other property nationalised after 25 April 1974"*.

---

normal current management nature (even if only in execution of decisions undertaken previously to the dissolution) – Article 9(2) to (5) of Law No 62-A/2008. In cases where the nationalization is merely partial, the State is entitled to designate one or more members to the corporate bodies of the undertakings regardless of any statutory limits providing otherwise (Article 10 of Law No 62-A/2008).

[11] As last amended by Decree-Law No 300/2007, of 23 August 2007 and Law No 64-A/2008, of 31 December 2008.

[12] For the exact same provision regarding public regional companies and the participation of the Region of Azores, that shall be approved by the Azores Regional Government, see Article 46 of Regional Legislative Decree No 7/2008/A of 24 March 2008, which enacted the legal regime of the business public sector of the Autonomous Region of Azores.

As regards small and medium-sized businesses that have been indirectly nationalised and are situated outside the basic sectors of the economy may be re-privatised as laid down by law (Article 293(2) of the CPR).

For the purpose of implementing said Article of the CPR, Law No. 11/90 of 5 April 1990 was enacted[13], which starts by providing that the share capital of companies having as their main activity any of the economic areas that cannot be pursued by private companies can only be privatized up to 49% (Articles 1 and 2 of Law no. 11/90).

The re-privatisation of state-owned companies shall be conducted, alternatively or cumulatively, by way of a sale of shares or an increase in the companies' share capital (Article 6(1) of Law No 11/90). As a general rule, such re-privatisation shall be conducted by public tender[14], offer on the stock exchange or public subscription (Article 293(1)(a) of the CPR and Article 6(2) of Law No 11/90)[15]. However, when so required by virtue of the national interest or the strategy defined for the sector or when it may be advisable in light of the economic/financial situation of the company at stake, a direct sale procedure[16] may be adopted, as well as an open tender procedure for specially qualified candidates, as regards an allotment of non-dividable shares, with guarantees of shareholding stability and abidance by circumstances considered as relevant to the company, having regard to corporate, market, technological or other developing strategies (Article 6(3) of Law No 11/90). Should any of these two latter procedures be followed, the shares to be sold shall be nominative and its non-transmissibility during a given period may be established (Article 6(4) of Law No 11/90).

A percentage of the share capital of companies to be re-privatised shall be reserved for small subscribers and the companies' own workers and emigrants may also benefit from the inherent special conditions. Notwithstanding, such shares cannot be sold during a specific period of time following their acquisition nor their holders are able to vote in general assemblies during any such periods (Article 293(1)(d) of the CPR and Articles 10 to 12 of Law No 11/90).

---

[13] And revoked the previous regime set in Law No 84/88 of 20 July 1988.

[14] Such procedure is to be set in a Decree-Law which shall also provide for the existence of the relevant contract documents that shall contain all the conditions required from the potential candidates. The final decision on the candidates' selection and proposals shall be adopted by the Council of Ministers (Articles 7 and 14 of Law No 11/90).

[15] In cases where any of these procedures comes to be adopted, no collective or singular entity (including those with simple holdings among themselves or more than 50% of reciprocal shares in one or that are controlled by one and the same shareholder) may acquire or subscribe more than a given percentage (to be defined in the relevant re-privatisation Decree-Law), in which case it may be determined that the exceeding share capital should be sold, no votes should be granted to it or that such exceeding acquisition may be declared null and void (Articles 13(2) and (4) of Law No 11/90).

[16] I.e., adjudication without any tender procedure to one or more acquiring parties of the shares in question, to be decided by the Council of Ministers, which shall also establish the specific conditions for the acquisition of the shares that shall be part of the relevant contract documents (Articles 8 and 14 of Law No 11/90).

State companies to be re-privatised shall be first converted into share companies that will then be governed by the general rules applicable to all private companies[17]. Said conversion shall be made by way of a Decree-Law which shall also approve the companies' by-laws, the relevant procedure, the special conditions for special subscribers and unavailability periods for sale (Articles 4 and 13(1) of Law No 11/90). Exceptionally and due to reasons of national interest, said Decree-Law may also determine that the voting of certain subject matters (which should be identified) is to be conditioned to the approval of an administrator appointed by the State or provide for the existence of privileged shares, to be held by the State, which irrespective of their number, shall confer on the State a right of veto over amendments to the company's statutes and over other decisions in a particular field, duly specified in the articles of association (Articles 15(1) to (3) of Law No 11/90).

The means of production and other property that are to be re-privatised shall be the object of prior valuation by at least two independent entities, to be chosen from those pre-qualified in a public tender procedure (Article 293(1)(e) of the CPR and Article 5 of Law No 11/90). A Commission of Supervision of Re-privatisations, appointed by the Prime-Minister, was set up to provide technical support to the government and to ensure the application of the principles of transparency, rigor, legality and impartiality in the re-privatization procedures, in all of their phases (Article 20 of Law No 11/90).

The revenue obtained from re-privatisations shall be used solely, and separately or jointly, to redeem the public debt and the debts of state-owned companies, to service the debt resulting from nationalisations or for new capital investment in the productive sector (Article 293(1)(b) of the CPR and Article 16 of Law No 11/90).

The workers of companies that are the object of re-privatisation shall retain all their rights and obligations in the re-privatisation process (Article 293(1)(c) of the CPR and Article 19 of Law No 11/90).

Article 13(3) of Law No 11/90 left open the possibility for the Decree-Law operating the conversion into a share company to limit the amount of shares to be acquired by foreign entities or by entities whose share capital was held (majority) by foreign entities, as well as to set the maximum value of their respective share capital and control.

This limit came to be set in 25% by Decree-Law No 65/94, of 28 February 1994, which made an exception for those cases where said limited was greater than said percentage and had already been established in the relevant re-privatisation procedure. And Decree-Law No 380/93, of 15 November 1993, had already enacted a regime of prior administrative authorisation, insofar as provided that the acquisition by a single natural or legal person, of shares representing more than 10% of voting capital, and the acquisition of shares which, when added to those already held, exceeded that limit,

[17] The legal regime set in Law No 11/90 shall be applicable, *mutatis mutandis*, to the re-privatisation of state-owned companies that are not qualified as such.

in companies to be re-privatised required the prior authorisation of the Minister for Financial Affairs (Article 1)[18].

In 1996, the Portuguese Government enacted Decree-Law No 24/96 of 20 March 1996, which, in its single Article, provided that Article 13(3) of Law No 11/90 was not to be applied to entities of nationality or with residence in any of the EU Member States and therefore no limits as to the acquisition of share capital in the re-privatisation of undertakings, whether already in course or in the future, should be applied to any such entities. However, the Parliament refused to ratify said Decree-Law by way of its Resolution No 19/96, of 28 May 1996.

Since the EC Commission asserted that Article 13(3) of Law No 11/90 and Decree-Laws No 380/93 and 65/94, represented a failure to comply with Articles 52 (now Article 43 EC), 56 (now Article 46 EC), 58 (now Article 48 EC), 73(b) (now Article 56 EC) et seq. and 221 (now Article 294 EC) thereof, and Articles 221 and 231 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties, it brought an action under Article 169 of the EC Treaty (now Article 226 EC) against the Portuguese Republic before the ECJ on October 1998.

In case C-367/98[19], the ECJ decided in favour of the Commission but limited the infringement to the failure of the Portuguese Republic to comply with its obligations under Article 73(b) of the EC Treaty (now Article 56 EC).

Finally, Law No 11/90 was amended by Law No 102/2003, of 15 November 2003, which revoked all the rules establishing limits to holdings owned by foreign enterprises in the share capital of companies subject to re-privatisation (including Article 13(3) of Law No 11/90 and Decree-Law No 65/94)[20].

Lastly, one should also keep in mind that Law No 11/90 was also previously scrutinized by the European Commission, that by Decision of 6 August 1993[21] and in so far as privatisations may involve state aid under Article 87 of the EC Treaty, approved the Portuguese program of privatisations, conditioned by the fact that any privatisations to be held by direct sale procedures should be previously notified to it in accordance with Article 88 of the Treaty[22].

---

[18] Article 1(1) and (2) of Decree-Law No 380/93 were declared unconstitutional by the Portuguese Constitutional Court by judgment of 9 April 2003 (case 192/2003, OJ of 1 July 2003), as it infringed the wording of Articles 85(1) and 296 of the CPR (now Article 293).

[19] Judgment of the Court of Justice of 4 June 2002, *Commission v. Portuguese Republic*, ECR 2002, page I-4731.

[20] Decree-Law No 380/93 was only revoked by the single Article of Decree-Law No 49/2004, of 10 March 2004.

[21] State Aid case C42/92 (ex NN 140/91).

[22] This was the case at stake, e.g., in the EC Commission's decisions of 20 September 2000 (TAP's first re-privatisation phase in which the SAirGroup was to acquire a 34% stake in the Portuguese airline - State Aid case N336/2000) and of 14 December 2004 (State Aid case NN63/2004, regarding the re-privatisation of SPDH, TAP's ground handling subsidiary). Please refer to the state aids' area of DG Competition's website at http://ec.europa.eu/competition/index_en.html).

Q 20. Are these rules different depending on whether the acquisition leads to control or not? And do different rules apply to a sale leading to a loss of control?

The only specific difference in this regard seems to result from the legislation on municipal, inter-municipal and metropolitan companies, since any decisions on the acquisition of shares that confer a dominant influence[23] are to be taken, respectively, by municipal assemblies (under proposal of the city councils), inter-municipal assemblies (under the proposal of the board councils and upon favourable opinion of the municipal assemblies of the relevant constituencies) and metropolitan assemblies (under proposal of the metropolitan boards and upon favourable opinion of the municipal assemblies of the relevant constituencies). Said acquisition decisions are also to be communicated to the General Inspection for Financial Affairs and to the relevant regulatory authorities (Article 8 of Law No 53-F/2006).

Q 21. Are contracts concluded by state-owned enterprises subject to normal civil law? Please specify.

Without prejudice to the rules set in the legal regime of the State's Business Sector[24] and in the legal diplomas that have approved their respective by-laws, State public companies are to be governed by private law[25].

Municipal, inter-municipal and metropolitan areas companies are governed by their respective legal regime[26], their by-laws and, in a subsidiary way, by the legal regime of the State Business Sector and the rules applicable to private companies[27]. This type

---

[23] Which occurs when there is a majority of share capital or voting rights or the right to appoint or to dismiss the majority of the board members, as per Article 3.

[24] Enacted by Decree-Law No 558/1999, of 17 December 1999, as last amended by Decree-Law No 300/2007, of 23 August 2007 and Law No 64-A/2008, of 31 December 2008. The State Business Sector is composed primarily by state public companies and participated companies. **State public companies** are those which have been incorporated in accordance with private commercial law but in which the State or other State public entities may exercise, individually or jointly and directly or indirectly, a dominant influence by virtue of the holding of the majority of share capital or voting rights or the right to appoint or to dismiss the majority of the members of the board or fiscal council. **Participated companies** are business organizations other than state public companies in which the State (or any other state public entities, of an administrative or business nature and directly or indirectly) has a permanent stake, i.e., stakes that do not have exclusive financial objectives, without any intention of influencing the management or the strategy of the company, and as long as such stakes are not held overall for more than one year. Stakes greater than 10% of participated entity are presumed to be of a permanent nature, except those held by companies in the financial sector (Article 2 of Decree-Law No 558/1999). Decree-Law No 558/99 also foresees legal persons of public law, with a business nature, that may be incorporated by the State (by Decree-Law which shall also approve its by-laws) and that are called "**public business entities**" ("Entidades Públicas Empresariais"). Public business entities are also considered as state public companies (Article 3 of Decree-Law No 558/1999). Such entities are autonomous, from the administrative, financial and patrimonial point of view and structure of their corporate and supervisory bodies as well as the remuneration of their statutory share capital is to be made according to the rules applicable to private shareholding companies (Articles 23 to 27 of Decree-Law No 558/1999).

[25] Article 7(1) of Decree-Law No 558/1999. Article 7(3) provides for the submission of participated companies to the rules of commercial, labour and fiscal law and of rules of other nature applicable to companies whose share capital and control is exclusively private.

[26] Enacted by Law No 53-F/2006 of 29 December 2006.

[27] Article 6 of Law No 53-F/2006 of 29 December 2006.

of companies should adopt transparent and non-discriminatory mechanisms for concluding contracts and ensure equal opportunities to all interested parties, without prejudice to applicable EC law (Article 12(1) of Law No 53-F/2006 of 29 December 2006). To select private entities, said type of companies shall apply the tender procedures set in the legal regime for concessions of public services and, in a subsidiary way, in the legal regime for public procurement whose object may be more adequate to the said companies' activities. Direct contracting is only admissible in exceptional situations foreseen in said legal diplomas (Articles 12(2) and (3) of Law No 53-F/2006 of 29 December 2006).

Q 22. Is there a rule or practice that one ministry is responsible for enterprises that are controlled by the government or are there different ministries responsible according to their sectorial responsibilities?

This issue is governed by the legislation on the regime of the State Business Sector, which was enacted by Decree-Law No 558/1999 and that also includes the general bases of the state's public companies[28] statute and is applicable to all companies held, directly or indirectly, by all state entities[29].

Article 10(1) of Decree-Law No 558/99 establishes that the rights that the State holds as a shareholder are to be exercised by the Directorate-General of the Treasury and Finance, under the direction of the Ministry for Financial Affairs, which may nevertheless delegate its powers, upon coordination and joint order with the ministers of the respective sector[30].

Similar rights of other public state entities are to be exercised by the respective management bodies, although the latter should respect the guidelines resulting from the superintendence exercised upon them (Article 10(2) of Decree-Law No 558/99).

In any event, the aforesaid rights may be exercised indirectly through companies which share capital is exclusively public (Article 10(3) of Decree-Law No 558/99).

The entities that are responsible for the exercise of shareholding functions should nevertheless be represented in the corporate bodies of state public companies, by a non-executive member or, if no such members exist, in the supervisory body (Article 10(4) of Decree-Law No 558/99).

---

[28] State public companies are those which have been incorporated in accordance with private commercial law but in which the State or other State public entities may exercise, individually or jointly and directly or indirectly, a dominant influence by virtue of the holding of the majority of share capital or voting rights or the right to appoint or to dismiss the majority of the members of the board or fiscal council (Article 3 of Decree-Law No 558/99).

[29] The mission of State public companies and of the State's Business Sector should be guided in the sense of obtaining levels of adequate satisfaction of the needs of the collective, as well as to be developed according to demanding parameters of quality, economy, efficiency and effectiveness, and at the same time contribute to the economic and financial equilibrium of the overall public sector (Article 4 of Decree-Law No 588/99).

[30] The shareholding rights of the State or of other state public entities in companies where, even jointly, they do not hold a determining influence, are to be exercised, respectively, by the Directorate-General of the Treasury or by the management bodies of the entities holding such shares (Article 36(1) of Decree-Law No 558/99).

As regards the definition of the exercise of public undertaking management, Article 11(1) of Decree-Law No 558/99 states that it shall be issued by resolution of the Council of Ministers strategic management guidelines for the entire business state sector. Nevertheless, guidelines may be issued, for such purpose, jointly by order of the Minister for Financial Affairs and the respective sectorial Minister, for state public companies in the same activity sector, as well as specific guidelines, issued jointly by order of the Minister for Financial Affairs and the respective sectorial Minister or shareholder resolution, consonant of whether is a public business entity or a company, respectively, destined individually to a state public company (Article 11(2) of Decree-Law No 558/1999). Such guidelines should then be reflected by the public representatives in the General-Assemblies or, in the case of public business entities, in the preparation and approval of their activities and investment plans and may involve quantified objectives and agreements to be signed between the State and state public companies (Articles 11(3) and (4) of Decree-Law No 558/1999).

As regards financial control, such state public companies are subject to the control of the Court of Auditors and the General Inspection for Financial Affairs, in order to ascertain the legality, economy, effectiveness and efficiency of its management (Article 12 of Decree-Law No 558/1999).

Without prejudice to the private legal rules as regards shareholders' information, state public companies are subject to special rules as regards the rendering of information to the Minister for Financial Affairs and the relevant sectorial Minister as well as to the contents of their annual reports (Articles 13 and 13-A of Decree-Law No 558/1999). Also, the management bodies of such companies should publish in the Official Journal, on an annual basis, certain information as regards, e.g., the structure of its corporate bodies, identity and CV of its holders and remunerations, selection process of its independent administrators and other functions held (Article 13-B of Decree-Law No 558/1999).

In what concerns municipal inter-municipal and metropolitan companies, the rights of the shareholders are exercised, respectively, by city councils, board councils and metropolitan boards, which shall also define strategic guidelines regarding the objectives for the promotion of local and regional development (Articles 15 and 16 of Law no. 53-F/2006)[31].

Q 23. Are there rules that restrict the possibilities for other governmental bodies, states, provinces, municipalities etc. to participate in the capital of private enterprises?

According to Article 37(1) of Decree-Law No 558/99, the participation of the State or other state public entities, as well as of state public companies, in the incorporation of companies or in the acquisition or sale of its share capital is subject to the authorization of the Minister for Financial Affairs and the Minister responsible for the

[31] The constituencies, the associations of constituencies and the metropolitan areas of Lisbon and Porto may nevertheless delegate powers in the companies that they have incorporated or in which they hold, as long as this is expressly set in their by-laws (Article 17).

relevant sector (except for cases of payment of debts, donation, renunciation or abandonment). Any such requests should be accompanied by a feasibility and interest study as regards the operation in question and the absence of said authorization will result in the deal being null and void.

Municipal, inter-municipal and metropolitan companies may not be incorporated and may not hold shares in other commercial companies (even of a non-dominant influence nature) that have activities of an exclusive administrative nature or with a predominantly mercantile object or whose purpose does not integrate the competences of the respective constituencies or associations of constituencies[32].

Q 24. Is there any indication that the exceptions provided for under the mandatory requirements have been perceived as insufficient to protect public interests?

To the best of our knowledge, no such considerations have been made or claimed.

Q 25. Has there been any discussion about the need to have recourse to Art. 295 EC for the protection of national public interests?

To the best of our understanding, there have not been any particular discussions in this regard. Notwithstanding and to the best of our knowledge, Article 295 EC has been invoked by Portugal in order to try to defend *"national public interests"*, e.g., in case C-367/98[33], where it was dismissed by the ECJ.

III.B. Company law

The rules of company law of a Member State can be seen as the basic charter for private business, outlining the rules of the game for the market sector. The rules may contain specific features that impact on the distinction between private and public capital. The following questions are designed to draw out such features.

Q 26. What was the reaction to the ECJ judgments in the *Golden Share* cases in your Member State? Have there been measures taken to amend legislation?

As is well-known, the rules on the internal market also include harmonization of legislation. In the area of company law, directives on harmonization of national company law rules have had a major effect.

To the extent that Case C-367/98 can be considered as a *Golden Shares'* case, and as reported in more detail above, Law No 11/90 was finally amended by Law No

[32] Article 5 of Law No 53-F/2006.
[33] Judgment of the Court of Justice of 4 June 2002, *Commission v. Portuguese Republic*, ECR 2002, page I-4731.

102/2003, which revoked all the rules establishing limits to holdings owned by foreign enterprises in the share capital of companies subject to re-privatisation.

Nevertheless, the Portuguese State is still under the European Commission's scrutiny due to the holding of special rights in some publicly listed companies (Portugal Telecom, EDP and Galp Energia). And in 2008 and 2009, the Commission decided to refer Portugal to the ECJ as it considers that the special rights held by the State in Portugal Telecom[34], EDP[35] and Galp Energia[36] discouraged investment from other Member States in violation of EC Treaty rules.

Q 27. Have there been any specific characteristics of the company laws of your Member State that were deemed to be imperiled by the EC company law directives? E.g. the German system of co-determination (*Mitbestimming*).

To the best of our knowledge, no.

---

[34] In the privatisation of Portugal Telecom, the Portuguese State and other state entities were allocated privileged shares (A-shares). Although the number of A-shares was reduced over the successive reprivatisation phases, their privileges were maintained. These privileges include veto rights (i) on the election of one third of the Board of Directors (including its Chairman and one or two of the executive directors, depending on whether the executive committee has 5 or 7 members), of the Chairman of the General Assembly, of the Chairman of the Audit Committee and of the Chartered Accountant, as well as on (ii) other important corporate decisions, such as capital increases, changes in the articles of association and the approval of the acquisition of holdings above 10% of the company's ordinary shares by shareholders engaged in a competing activity. The European Commission considered that, in violation of EC Treaty rules, these special powers constitute an unjustified restriction on the free movement of capital and the right of establishment (Articles 56 and 43 of the EC Treaty), insofar as they hinder both direct investment and portfolio investment. Advocate-General Paolo Mengozzi delivered his Opinion on 2 December 2009, suggesting that the Court should declare that, by maintaining special rights for the State and other public sector bodies in Portugal Telecom SGPS SA attributed in connection with the State's privileged shares in Portugal Telecom SGPS SA, the Portuguese Republic has failed to fulfill its obligations under Article 56 EC (Case C-171/08, *European Commission v. Portuguese Republic*, pending).

[35] The legal framework governing the privatisation of EDP and its articles of association provide for special rights for the Portuguese State in the company. The European Commission has pointed out the following special rights: (i) veto rights on (a) resolutions to amend the company's articles of association, including capital increases, mergers, divisions and winding-up; (b) resolutions on entering into parity and subordination group contracts; (c) resolutions on abolishing or limiting shareholders' rights of preference as regards capital increases; and (ii) the right to oppose the election of a number of directors and the right to appoint a director in the company. In addition, the European Commission has highlighted that EDP's articles of association impose a limit on voting rights in the general meeting for all shareholders holding more than 5% of the voting rights corresponding to the share capital of the company, except for the Portuguese State or equivalent entities (this provision of the articles of association is still effective). Similarly to the previous case, the European Commission considered that these special powers constitute unjustified restrictions on the free movement of capital and the right of establishment (Case C-543/08, *European Commission v. Portuguese Republic*, pending).

[36] The legal framework governing the privatisation of GALP Energia and its articles of association provide for special rights for the Portuguese State in the company, including: (i) veto rights on any resolutions purporting to authorise the execution of equal partner or subordinate group agreements and further, any resolutions which may, in any way whatsoever, endanger the supply of oil, gas and electricity or other derivatives thereof to the country and (ii) the right to appoint the Chairman of the Board of Directors. Similarly to the previous cases, the European Commission considered that these special powers constitute an unjustified restriction on the free movement of capital and the right of establishment (Case C-212/09, *European Commission v. Portuguese Republic*, pending).

Q 28. Do the national company rules provide guarantees that secure a level playing field when the government pursues its objectives by way of undertakings which it controls wholly or partially? Please note that such guarantees may (also) be found in specific regulation as referred to above in section III.A Q 16-20.

According to Article 8(1) of Decree-Law No 558/99, state public companies are subject to the general rules of national and EC competition law. Moreover, Article 8(2) adds that the relationships between state public companies and the State or other public entities cannot result situations that in any way may be susceptible of impede, distort or restrict competition in part or the whole of the national territory.

However, this principles are to be applied without prejudice to special duly grounded derogatory regimes, whenever the application of the general rules of competition law may be susceptible of obstruct, in law or in fact, the tasks of state public companies entrusted with the operation of services of general economic interest or that support the management of State property (Article 9 of Decree-Law No 558/99)[37]. These are defined as those companies whose activities must assure the universality and continuity of the services rendered, the social and economic cohesion and consumer protection, without prejudice to the economic efficacy and the respect for the principles of non-discrimination and transparency. As a general rule, the terms under which the management of such companies is to be granted and exercised should be part of a concession contract (Article 19(1) and (2) of Decree-Law No 558/99)[38].

In addition, state public companies may also exercise certain State powers and prerogatives, e.g., (i) as regards expropriations due to public utility, (ii) use, protection and management of public service infra-structures; and (iii) licensing and concession, in accordance with the relevant legislation on the use of the public domain, of the occupation or the exercise of any activity on the grounds, edifications and other infra-structures therein. Such special powers may be granted by legal diploma, in exceptional situations and on the basis of the strictly necessary for the pursue of the public interest, or shall be part of a concession agreement (Article 14(1) and (2) of Decree-Law No 558/99)[39].

However, it should be stated that even private companies that are entrusted with the operation of services of general economic interest, via the granting or concession of special or exclusive rights, are subject to the main legal rules of Decree-Law No 558/99 in such regard (Article 36(4) of Decree-Law No 558/99).

---

[37] For a similar rule, please refer to Article 3(2) of the Portuguese Competition Act (Law No 18/2003, of 11 June 2003).

[38] A number of "guiding principles" as regards state public companies entrusted with the operation of services of general economic interest is set in Article 20 of Decree-Law No 558/99, raging from rendering services to the whole of the national territory to guarantying services legally prohibited to be rendered by private companies or to specific obligations as regards issues of security, quality and environmental protection. To these ends, the State may revert to the signing of agreements with such state public companies which could result in compensatory indemnifications, which should be quantified and validated, and the Minister for Financial Affairs should produce a previous opinion as well as supervise the execution of its financial clauses (Article 21).

[39] Article 18(1) of Decree-Law No 558/99 provides for the equivalence of state public companies actions and agreements signed in the exercise of such special powers, to administrative authorities, as regards judicial *locus standi*. For all other litigious situations, the general rules on jurisdictional competence are to apply (Article 18(2)).

There have been some discussions and accusations from private companies that compete directly with state public companies, in particular as regards the issue of compensatory indemnifications granted to the latter for the operation of public service obligations and the way this may distort competition. This discussion has been more visible in the specific sector of public state television, particularly when raised together with the issue of advertising in TV channels of the incumbent state operator RTP[40]. The case of notaries is also worth mentioning, in so far as the association of private notaries as complained to the Portuguese Competition Authority that the legislation enacted by the State for public state notaries was discriminatory and favoured the latter in detriment of the private notaries.

Q 29. Are there rules that allow or oblige the government to make use of a special form of company if it wants to pursue public interests?

The pursue of public interests should in principle be made through the most adequate forms of companies (on a case-by-case basis) set either in the State's Business Sector legal regime or in the legal regimes of the Business Sectors of the Autonomous Regions or the constituencies, as described above.

Q 30. Are there rules blocking unfriendly take-overs? Discuss the attitude of your Member State towards the take-over directive (Directive 2004/25, the "Volkswagen directive").

In the context of the "Volkswagen Directive's" implementation, the Portuguese State has undertaken in particular the following options in regard to the so-called "public companies" or "*sociedades abertas*" (which does not mean State-owned companies, but *inter alia* listed companies and other private companies qualified by law as such):

- A mandatory takeover offer rule applicable once anyone exceeds one third or one half of the voting rights of a "public company", thus envisaging discouraging partial bids;

- The management bodies of offeree companies are forbidden to carry out any frustrating measures (i.e., actions that may materially change its financial condition and affect the offeror's goals) unless so authorised by the general meeting, on its normal business of business or for the purpose of implementing preceding undertakings; these neutrality rule does not apply should the offeror or its controlling company not be subject to equivalent rules;

[40] See the state aid saga of one of the Portuguese private TV operators in the judgments of the CFI of 10 May 2000, case T-46/97, *SIC – Sociedade Independente de Comunicação, SA v. EC Commission*, and of 26 June 2008, Case T-442/03, *SIC – Sociedade Independente de Comunicação, SA v. EC Commission*. See also judgment of 19 February 2004, Joined Cases T-297/01 and T-298/01, *SIC - Sociedade Independente de Comunicação, SA v. EC Commission*.

- Companies subject to the Portuguese Law are entitled to set forth in their articles of association that, during the offer period:

    - restrictions (foreseen in the articles of association of the offeree or in shareholders agreements) on the transfer of shares (or of other securities giving the right to acquire shares) are suspended, thus being ineffective in relation to the transfer following the acceptance of the offer;

    - restrictions (foreseen in the articles of association of the offeree or in shareholders agreement) on voting rights are also suspended[41];

    - whenever, following a public takeover offer, at least 75% of the share capital carrying voting rights is achieved, the restrictions on transfers and voting rights referred to in the preceding paragraphs shall not apply to the offeror nor any extraordinary appointment rights can be exercised;

    - the articles of association providing for the rules foreseen in the preceding paragraphs may also establish that those rules do not apply should the offeror or its controlling company not be subject to equivalent rules.

Q 31. To what extent are the 2005 OECD Guidelines on Corporate Governance of State-owned Enterprises taken into account?

In the scope of the *Corporate Governance of State-owned Companies*, the Portuguese State has approved the following rules/measures:

- Decree-Law No 71/2007, of 27 March 2007, as amended by Law No 64-A/2008, of 31 December 2008, has approved the statutes for public sector managers, which, *inter alia*, defines the regime of incompatibilities and impediments of public managers;

- Council of Ministers' Resolution No 49/2007 establishes the principles of good governance for public sector companies. The referred Resolution establishes some rules to: (i) avoid the cumulative exercise of functions and (ii) to prevent the public managers to be involved in decisions in which they have a direct and/or indirect interests; and

- The Court of Auditors also defined some recommendations aiming the implementation of best practices in the public sector.

[41] Consequently, such voting rights can not be counted in general meetings of the offeree convened to authorise the board of directors to perform frustrating measures during the offer period.

Q 32. Are there any special features in your Member State's legislation that may be relevant for our topic?

The following features may have some relevance:

- State-owned companies are not subject to the minimum number of shareholders required for private companies whose majority of the share capital is not owned directly or indirectly by the State;

- Companies in which the majority of the share capital is held by the State or an equivalent entity or who benefit from a guarantee of the latter are subject to specific rules on the issue of debt;

- Directors appointed by the State or an equivalent entity are subject to specific rules.

III.C. Competition law
Article 81, 82 and 86 EC

As was noted above, it is for the Member States to define which activities are in the domain of the public sector and which are not.

Q 33. Has there been a debate about whether the provision of certain goods or services should be undertaken by the government or by the private sector? Please specify whether and to what extent such a debate has taken place on a general level or on a specific level, i.e in the context of sector specific regulation?

This public/government *versus* private sector has been the object of much political debate, in particular as regards areas like health care services, education, social security and even justice.

This debate has been even more intense due to the fact that two left wing political parties (Comunist Party and Bloco de Esquerda) have inserted into their political projects that the largest undertakings in strategic sectors (all or most of which used to belong to the state after the 1974 revolution and were totally or partially privatized) should be nationalised.

On the one hand, Bloco de Esquerda has criticized in particular the privatizations that were undertaken in the financial, energy, waters, transportation and telecommunications sectors. But it is mainly in the energy sector (e.g., electricity, gas and fuel) that Bloco has focused its attention and is calling for nationalisation. From that Political Party's point of view, the enlargement of public policies should comprise two ideas: a proper financing of the local power political/administrative institutions in order to assure the public services of proximity and, additionally, the assumption by the State of a direct and responsible regulation, based on a system of democracy controlled supervisors/regulators responsible to the electorate.

On the other hand, the Communist Party has urged for the suspension of the ongoing privatisations' programme and the integration in the public sector, by nationalisation and/or proper negotiation, of privatised companies, thus reaffirming a strong, dynamic and decisive state business sector in basic and strategic areas of the economy, e.g., banking and insurance; energy; water supply and waste management; telecommunications; transportation and roads and basic industries. In sum, in all key sectors/markets for the economic development, the CP is striving for the affirmation of a State with a productive role and not as a mere regulator.

To the extent that there is no general legislative framework for answering such fundamental questions, there may be specific laws or policy documents.
Q 34. Please identify such laws and/or policy documents.

Please refer to above.

Q 35. For the new member states, it would be interesting to describe how the reform process of the economy whereby large sectors of the economy were privatized has taken place.
Even if it is decided that certain activities are to be carried out by undertakings, governments may still want a specific regime for them.

Please refer to above.

Q 36. Has there been any discussion of the question whether certain services should be guaranteed by identifying them as services of general economic interest? What are the questions that were discussed?

The matter in question has been subject to a major political debate, as aforementioned. The questions raised respect, basically, the identification of certain areas and sectors of the economy, like health care services, education, social security or justice, as services of general economic interest and in which their provision should be maintained in the State's sphere or within the State's Business Sector or revert to it.

It is also interesting to mention that the preamble of Decree-Law No 558/99 specifically mentions that without prejudice to the fact that several aspects of the Draft Project of Public Services Chart of the European Centre for Public Enterprises (CEEP) were taken under consideration, it was deliberately avoided to exhaustively typify categories of services of general economic interest in so far as such solution was considered to be too rigid and limitative. Said preamble also mentions that the general principle introduced by the (then) new Article 7D of the Amsterdam Treaty (Article 16 EC) was also considered.

Q 37. Has the implementation of the Services Directive 2006/123 led to a debate about services of general economic interest?

The enactment of such legal diploma has not, to the extent of our knowledge, led to a debate of such matter.

Q 38. Has the introduction of Article 16 EC with the Treaty of Amsterdam given rise to a debate about the function of services of general economic interest and/or services of general interest?

Please refer to our answers above.

Q 39. Has the equivalent of Article 81 (3) EC in your national competition law been interpreted so as to allow exceptions for the protection of public interest? And has this led to a situation whereby public enterprises have been favoured over private enterprises? [42]

The correspondent legal provision in national law is Article 5 of the Portuguese Competition Act[43], that is identical to Article 81 (3) EC.

So far and to the best of our knowledge, Article 5 of the Competition Act has never been interpreted or applied in any cases in order to allow for the protection of public interest.

Q 40. Do the merger control rules in your member state provide for special authorization of mergers when public interests are deemed to be at stake?

This matter is indirectly addressed in Article 3 of the Portuguese Competition Act. Said provision, that is similar to Article 86 EC, provides that state public undertakings and those to which the state has granted special or exclusive rights are covered by the provisions the Portuguese Competition Act, without prejudice to the provisions of paragraph 2. This paragraph states that undertakings legally charged with the management of services of general economic interest or which have the nature of legal monopolies are subject to the provisions of the Act, insofar as the application of these rules does not constitute an impediment in law or in fact to fulfilment of the particular mission entrusted to them.

In this context, it should also be mentioned that Articles 12(2)(h) and (l) of the Competition Act provide that for the appraisal of concentrations and the determination of their effects over the competitive structure, account should also be taken to the existence of special or exclusive rights legally granted or arising from the nature of

---

[42] In Case C-203/96, *Dusseldorp*,[1998] ECR I-4075 and Case C-209/98, *Entreprenorforeningens Affald v. Copenhagen*, [2000] ECR I-3743, the questions were raised under the heading of Art. 90(2) but one could have imagined a discussion under Art. 81(3) if the government had invited enterprises to conclude agreements with similar purposes.

[43] Law No 18/2003, of 11 June 2003, as last amended by Law No 52/2008, of 28 August 2008.

the relevant products or services and the contribution of the concentration to the international competitiveness of the national economy.

Article 34 of the Portuguese Competition Authority's statutes, approved by Decree-Law No 10/2003, of 18 January 2003, provides for an extraordinary appeal by the notifying parties to the member of the Government responsible for the economy (usually the Minister for Economical Affairs) which may, with a duly justified decision, authorise a merger prohibited by the PCA whenever the resulting benefits to fundamental national economic interests exceed the inherent disadvantages for competition.

According to Article 34(2) of said Statutes, the ministerial decision that authorises a concentration between undertakings may contain conditions and obligations that mitigate its negative impact on competition.

Nonetheless, besides this similar provision to Article 86 EC and Article 12 of the Competition Act, national merger rules do not provide for any special authorization regarding matters where public interest are deemed to be in stake.

Q 41. Have such powers been used? Give a brief overview of the cases.

The PCA has so far prohibited four concentrations from taking place. In one of those cases, Brisa and Auto-Estradas do Oeste notified on March 2005 to the PCA the acquisition of joint control of Auto-Estradas do Atlântico[44].

The Brisa Group constructs, operates and maintains motorways and holds the toll road franchise for the entire A1 motorway between Lisbon and Porto. In addition, the Group held the franchise of the Litoral Centro motorway between Leiria and Mira, which was still under construction.

Auto-Estradas do Oeste also constructs, operates and maintains motorways and had the exclusive franchise on the A8 motorway between Lisbon and Leiria.

According to the PCA, as a result of the notified concentration, a 100% market share would be created in the Lisbon/Leiria motorways' section (where previously there were two competitors) and a 75% market share in the Lisbon/Porto motorways (reduction from three to two operators were Brisa would hold said market share).

Furthermore, the A8 motorway would be including soon a new corridor, linking Lisbon and Porto and which would also take in the Litoral Centro stretch (Leiria/Mira, already held by Brisa) and the Costa de Prata stretch (Mira/Porto, held by Aenor).

The PCA also reported that the operation would result in losses for users resulting from the disappearance of/or reduction in competitive pressure in road tolls (e.g., prices and packages with different prices according to the time of day or vehicle type or even "frequent user" options), in the services provided over the journeys and the

[44] Case DOPC - 22/2005 – VIA OESTE (BRISA)-AUTO-ESTRADAS DO OESTE/AUTO-ESTRADAS DO ATLÂNTICO.

quality and safety of the carriageways (e.g. road surface, franchised services along the routes, duration of road works) and in the long-term improvement of the infra-structure, in particular as regards to road maintenance and widening[45].

According to the PCA, it was not proved that the intended efficiency gains could not be achieved without the notified concentration.

The PCA finally remarked that this case was considered an exceptional case insofar as there were two similar and parallel routes that would be connecting the country's two main urban centres.

Hence, by decision of 7 April 2005, the PCA decided to oppose to the notified concentration insofar as it was susceptible to create or reinforce a dominant position from which significant impediments to competition would result thereof in the markets for the exploitation of motorways in the stretches Lisbon/Leiria and Lisbon/Porto.

Faced with an opposition decision to the notified concentration, the acquiring undertakings Brisa and Auto-Estradas do Oeste appealed to the Minister for Economical Affairs, under the aforesaid legal procedure.

The Minister decided to approve the concentration, subject to five complementary conditions[46], to the extent that said operation corresponded to fundamental interests to the national economy (and this supersedes the eventual competitive consequences resulting from the operation[47]), not only due to the development of the sector in question (seen as a national strategic sector) but also due to the re-dimensioning of the undertakings in question, that will afford them an increased ability to innovate and a higher international competitiveness, that would inevitably benefit the national economy.

This was so far the only case that an appeal of this type has been filed since in the other three cases, two of the acquiring undertakings filed no appeals and in the other case, the acquiring undertaking filed directly a judicial appeal before the competent court, which, to the best of our knowledge, is still pending.

---

[45] The PCA also mentioned that international consultants studies' showed that for 30% of the total traffic using the aforesaid roads, the two franchise holders were in direct competition, which constituted an indication of the existence of a high degree of substitutability between them.

[46] In order to decrease the disadvantages or potential inconvenient for competition resulting from the recognition of the duly grounded prevalence of the fundamental interests of the national economy, as stated in the Minister's decision, since the latter interests need to be balanced with the former disadvantages in order for an option to be made on the prevailing interests. Said judgment and an approval decision cannot however result in an absolute sacrifice of the applicable competition rules, the Minister's decision also said, at least from a theoretical point of view.

[47] Defined by the Minister as a judgment to be made on the basis of the relevance of the operation and of the undertakings involved to the overall of the Portuguese economy, which should be centred first and foremost in the analysis of the contribution of the undertaking acquiring control to the overall of the Portuguese economy and its perspectives of future evolution. The Minister's decision therefore encompasses firstly an analysis of Brisa's innovation capacity, internationalization (also on the basis of what is foreseen in Article 12(1)(l) of the Competition Act), scale as critical competitiveness factor in the sector and market shares, followed by an analysis of the main characteristics of the sector.

Q 42. Have these decisions been appealed to courts? What was the outcome of these appeals?

Although in the Brisa case, the PCA made known that it was considering filing a judicial appeal to the Lisbon Commercial Court of the Minister's merger approval decision, it finally decided not to do so. Hence, and to the best of our knowledge, there is yet no case-law on this subject.

It is however difficult to imagine how a court of law would be able to scrutinize the Minister's decision which is based on such undetermined and political criteria as benefits to fundamental national economic interests, as this would seem to entail that the court would be able to render its own judgment (or at least to set aside the Minister's political judgment) on such criteria and on how it would be best served.

State aid

Q 43. Does your Member State have national rules on the granting of state aid? Are there any procedural rules on the granting of state aid?

In what concerns the granting of State Aid in Portugal, the most relevant specific legislation is Law No 112/97, of 16 September 1997, which enacted the legal regime for the granting of State personal guarantees or by other legal persons of public law.

The granting of said type of guarantees assumes an exceptional nature and is based in a manifest interest to the national economy. It is to be made with respect by the principle of equality, national and EC competition law rules and according to the provisions of Law No 112/97 (Article 1(2) of Law No 112/97).

The Parliament shall set, within the Budget Law or by special law, the maximum amount to be granted, each year, by way of State personal guarantees or other legal persons of public law (Article 5 of Law No 112/97). Said type of guarantees has as its objective the insurance of credit or other financial operations, national or international, which benefit public entities, national companies or other companies that legally benefit from equality of treatment and are to be granted to projects of manifest interest to the national economy (Articles 6 and 8 of Law No 112/97).

The cumulative conditions for the granting of said type of guarantees[48] are: (i) the existence of a concrete project of investment or specific study of the operation, as well as a rigorous financing programme; (ii) the State shall hold a share of the beneficiary company, or participate in the underlying project or operation; (iii) the beneficiary

[48] At least one of the following objectives should be inherent to the operation: investments of reduced profitability (due to e.g. risks involved) as long as integrated in projects of economic and social interest; investments of adequate profitability but in which the beneficiary, although economically viable, has a transitory deficit financial situation; maintenance of the beneficiary in operation while a given entity appointed by the Government studies and proposes measures for ensuring that the beneficiary is viable (all other cases of reinforcement of liquidity or financing of normal spending are to be rejected); and granting of extraordinary financial aid (Articles 9(2) and (3) of Law No 112/97).

shall present economic, financial and organisational characteristics that offer sufficient security that it will comply with the inherent responsibilities resulting from the liabilities that it intends to assume; and (iv) the granting of the guarantee is indispensable to the implementation of the credit or financial operation, e.g., due to the inexistence or insufficiency of other guarantees (Article 9 of Law No 112/97).

The credits to be guarantee shall have a 5 year maximum time-limit and should be totally reimbursed within a maximum of 20 years, as of the date of the respective underlying concession agreements (Article 12 of Law No 112/97).

The request for the aforesaid guarantee is to be directed at the Minister for Financial Affairs by the beneficiary[49], along with the following elements: identification of the operation in question; appraisal of the economic and financial situation of the beneficiary and perspectives of evolution; demonstration of the fulfilling of the criteria set in Law No 112/97; guarantees to be eventually provided to the State; draft of the loan or financial operation agreement, plan for the using of the financing and scheme for reimbursement, as well as a demonstration of its compatibility with the foreseeable financial ability of the company (having regard, e.g., to the programmed economic and financial measures for the period in question – Articles 13(1) and (2) of Law No 112/97)[50].

The request is then submitted for an Opinion to the Minister(s) responsible for the sector(s) of activity(ies) of the beneficiary, to be issued within 15 days, as regards, e.g., the inclusion of the operation within the framework of the economical policy of the Government and the role of the company in the overall sector or region in which it is active (Articles 14(1) and (2) of Law No 112/97).

The grating of the guarantee is always to be authorised by order of the Minister for Financial Affairs, which shall be reasoned, in fact and in law (in particular as regards the concept of "interest for the national economy") and which shall be published in the Official Journal (Article 15 of Law No 112/97)[51]. The draft of the inherent loan agreement or financial operation should always be annexed to said authorisation, including the reimbursement and payment of interests plan, as well as the information from the relevant services of the ministerial services of the Ministry for Financial Affairs and the Ministerial Opinions (Article 16 of Law No 112/97).

Beneficiaries are bound to send to the Directorate-General for the Treasury, within 5 days of the relevant facts, e.g., documentation to prove payment of capital and interests, and to notify said entity, with 30 days prior notice, if perchance they will unable to timely comply with said payments (Articles 19(1) and (2) of Law No 112/97)[52]. Should said beneficiaries fail to comply with said payment obligations the

[49] If the operation consists of a banking credit, the drafting of the request should be made jointly by the beneficiary and the bank (Article 13(3) of Law No 112/97).
[50] Other elements considered necessary for the evaluation of the risk of the guarantee to be granted may be requested by the Ministry for Financial Affairs – Article 13(4) of Law No 112/97.
[51] The effective granting of guarantees is to be made by the Director-General for the Treasury or its legal substitute, which has the powers to sign the underlying agreements, issue declarations of guarantee or sign the titles representing the guaranteed operations (Article 17 of law No 112/97).
[52] Other documentation (e.g., reports and accounts and budgets) should be also sent on a regular basis in order to allow detection of difficulties in compliance (Article 20(1) of Law 112/97).

State can only executed the guarantee upon creditor notification (Article 19(3) of Law No 112/97). The granting of a State guarantee confers the right of the Government to supervise the activities of the beneficiary, from the financial, economical, technical and administrative points of view (Article 20(2) of Law No 112/97).

Faced with the financial crisis, Portugal also enacted Law No 60-A/2008, of 20 October 2008, that established the possibility of extraordinary granting of personal State guarantees to the financial system[53] and Law No 63-A/2008, of 24 November 2008, establishing reinforcement measures of the financial solidity of credit institutions for the reinforcement of financial stability and availability of liquid in the financial markets[54].

Also, Article 13 of the Portuguese Competition Act states that the aid granted to undertakings by the State or any other public body must not significantly restrict or affect competition in the whole or in part of the market. Further to this general statement, the Portuguese Competition Authority, at the request of any interested party, may scrutinize any aid or aid project and formulate such recommendations for the Government as it deems necessary to eliminate the negative effects on competition of such aid. Pursuant to Article 13(3) of the Competition Act, compensatory payments made by the state in return for the provision of a public service, whatever the form of such payments, shall not be considered as aid.

Since the PCA may only formulate recommendations aiming at the elimination of negative aspects of the granting of state aids, state aids "national control" in Portugal has little practical relevance.

Q 44. Has the application of the guidelines for state aid to the financial sector mentioned above been successful in addressing the distortions of competition resulting from the massive aid operations and the accompanying measures?

Please refer to our answer to questions 45 to 47.

Q 45. Discuss the main Commission decisions concerning your member state so far. As these decisions all contain a revision clause that the effects of the aid have to be assessed after six months it is appropriate to describe/analyse the follow up measures. Such analysis should be focused on the main theme of this questionnaire, as set out above.

On 15 October 2008, the Portuguese Authorities notified to the Commission a guarantee scheme aimed at facilitating credit institutions' access to financing in the context of the financial crisis[55].

---

[53] Implemented by Ministerial Order (Portaria) No 1219-A/2008 of 23 October 2008.

[54] Both said Laws were appraised by the EC Commission, under the EC state aids' regime and are discussed further in answer to question 45 infra.

[55] State Aid Case NN 60/2008 – Portuguese Guarantee scheme for credit institutions in Portugal. The scheme was enacted by Law No 60-A/2008, of 20 October 2008, that established the possibility of

The scheme provided state guarantees for financing agreements and the emission of non-subordinated short and medium term debt of solvent credit institutions incorporated in Portugal. The total budget of the scheme was €20 billion. Guarantees were available for instruments with a maximum maturity of three years, or exceptionally five years only when duly justified by the Portuguese Central Bank.

The scheme provided for non-discriminatory access, as it would be open to all solvent banks incorporated in Portugal (including subsidiaries of foreign banks with registered office in Portugal), and for a market oriented remuneration of the guarantee, in line with the recommendations of the European Central Bank. The duration of the scheme was limited until 31 December 2009.

The Commission considered the measure as state aid but contained several provisions aimed at ensuring its adequacy and proportionality under the EU state aid rules, in accordance with its guidelines.

According to the Commission, the proportionality of the measure was ensured by various safeguards aimed at minimising distortions of competition. In particular, the beneficiary who has called on a guarantee had to reimburse the state in full, either by paying back the loan or by exchanging it for preferential shares. In addition, the Portuguese authorities committed to notify a viability plan for these beneficiaries to the Commission. The decision also included safeguards to prevent abusive expansion. This helped, in the Commission's view, to ensure that support was limited to what was necessary for restoring the normal functioning of the markets.

In light of the strict conditions framing the use of the guarantee, the Commission concluded that the scheme was an appropriate and proportionate means to restore confidence in the Portuguese financial markets. The Commission therefore concluded that the package was an adequate means to remedy a serious disturbance of the Portuguese economy and as such in line with Article 87(3)(b) EC[56].

Under this scheme, state guarantees were granted, e.g., to Banco Invest, for the emission of bonds up to €25 million and for signing a loan agreement with Caixa Geral de Depósitos up also to the aforesaid amount[57].

The Commission also authorized on 19 January 2009, under the state aid rules of the EC Treaty, the first in a series of aid measures for businesses planned by Portugal to deal with the current economic crisis[58].

---

extraordinary granting of personal State guarantees to the financial system and Ministerial Order (Portaria) No 1219-A/2008 of 23 October 2008.

[56] OJ C9, of 14.1.2009 and OJ C25, of 31.1.2009. See also the Commission's letter of 17.12.2008, State Aid NN 60/2008 – Portuguese Guarantee scheme for credit institutions in Portugal, available in English at the following internet address: http://ec.europa.eu/competition/state_aid/register/ii/doc/NN-60-08-WLWL-en-17.12.2008.pdf

[57] Orders of the Treasury and Financial Affairs Secretary of State Nos 4296/2009 and 4297/2009 of 23 January 2009, Portuguese OJ II, of 4 February 2009.

[58] State aid N 13/2009 – Portugal C(2009) 252, OJ C37, of 14.2.2009.

According to the Commission, the scheme met the conditions imposed by the Commission's "Temporary framework for State Aid measures to support access to finance in the current financial and economic crisis" adopted on 17 December 2008. In particular, the maximum amount of aid does not exceed €500,000 per undertaking and the scheme applies only SMEs and large firms (an estimate of 3,000 beneficiaries was estimated) which were not in difficulty on 1 July 2008. Aid under the scheme can be granted in 2009 and 2010 and all sectoral exclusions laid down in sections 4.2.2.(d), (e) and (h) of the "Temporary Framework" were respected. It was therefore declared compatible with Article 87(3)(b) of the EC Treaty, which permits aid intended to remedy a serious disturbance in the economy of a Member State.

On 5 November 2008 the Portuguese authorities had also notified to the Commission a recapitalisation scheme for credit institutions registered in Portugal. The measure, whose legal basis was Law No 63-A/2008, of 24 November 2008, made available new capital to eligible credit institutions, whether financially sound or not, in exchange for instruments eligible as tier 1 capital (ordinary or preference shares). The measure was intended to enable credit institutions to strengthen their capital base against potential losses, in line with the recommendations of the Portuguese central bank to establish a tier 1 ratio not lower than 8%.

According to the Commission, the size of the scheme was limited both as regards the overall amount (capped at €4 billion) and in respect of individual beneficiaries (maximum 2% of the credit institution's risk-weighted assets). The latter ceiling did not apply to credit institutions that were not fundamentally sound but they must submit a restructuring plan. Furthermore, they must comply with additional safeguards regarding in particular the level of price and an obligation not to distribute dividends. In any event, the recapitalised tier 1 ratio should not exceed 8% on the day the recapitalisation is implemented.

Under the scheme, the Portuguese authorities may also take part in recapitalisations provided that at least 30% of the capital is contributed by private investors and that the state capital is on equal terms with the private capital.

The measure was limited in time and scope, with entry windows of maximum six months. It requires beneficiaries to pay a market-oriented remuneration, aligned on the recommendations of the European Central Bank.

The distortive effect of the recapitalisation was, in the Commission's view, minimised by various conditions, including fixed step-up clauses over time and increases in remuneration linked to dividend payments. In order to give credit institutions an incentive to redeem the state participation once the crisis is over and to allow a return to normal market functioning, a redemption price increasing over time is foreseen as from the third year. In addition, behavioural commitments such as on dividend policy or management remuneration were part of the requirements for access to the recapitalisation scheme.

The Commission therefore concluded that the scheme was an appropriate means to restore confidence in the creditworthiness of Portuguese credit institutions and to stimulate lending to the real economy, thereby being an adequate means to remedy a

serious disturbance of the Portuguese economy and as such was declared compatible with Article 87(3)(b) EC[59].

The only individual state aid case in the financial sector was the loan contract signed by Banco Privado Português ("BPP"), assisted by a State guarantee, for €450 million with six major Portuguese banks[60].

Banco Privado Português is a financial institution providing private banking, corporate advisor and private equity services. In response to acute difficulties threatening its survival, on 5 December 2008 Portugal granted said state guarantee and notified it to the Commission in that very same day.

The loan had a duration of six months and could only be used by Banco Privado Português to face its liabilities as registered in the balance sheet on 24 November 2008. The loan was only to be used to reimburse depositors and other creditors and not to cover liabilities of other entities of the group.

The Commission found the temporary rescue measure to be in line with its Guidance Communication on state aid to overcome the financial crisis. In particular, the measure was found by the Commission to be necessary to remedy the severe liquidity problems of BPP and to preserve confidence in the financial markets, and is limited to the minimum required to achieve this objective. The Commission therefore concluded, on 13 March 2009, that the measure could be authorised because it was an adequate means to remedy a serious disturbance of the Portuguese economy and as such was in line with Article 87(3)(b) EC.

The Commission's decision required Portugal to submit a restructuring or liquidation plan for BPP as a condition for accepting a guarantee fee below the level that would have applied pursuant to the Banking Communication. The Commission also noted that a prolongation of the guarantee beyond the initial period of six months would need to be notified to it for approval.

The latest news point out to the fact that the Portuguese State has indeed prolonged said guarantee on June 2009 for further six months but has not notified the Commission of such an extension.

Therefore, the Commission has reported the opening, on 10 November 2009 and under EC Treaty state aid rules, of an in-depth investigation to said state guarantee[61]. The Commission has also expressed, at the time, its doubts as to the fact that said state

---

[59] OJ C 152, of 4 July 2009. See the Commission's letter of 20.5.2009, State aid N 556/2008 – Portugal, Recapitalisation scheme of credit institutions in Portugal, available in English at the following internet address: http://ec.europa.eu/competition/state_aid/register/ii/doc/N-556-2008-WLWL-en-20.05.2009.pdf. This state guarantee was granted outside the Portuguese guarantee scheme above described and approved by the Commission (Case NN 60/2008) insofar as said scheme was reserved to solvent banks and was therefore an inappropriate framework, given the increasing financial deterioration of BPP and the specific risks linked to this transaction.

[60] See the Commission's letter of 13.3.2009, State aid NN 71/2008 – Portugal, State aid to Banco Privado Português – BPP, available in English at the following internet address: http://ec.europa.eu/competition/state_aid/register/ii/doc/NN-71-2008-WLWL-en-13.03.2009.pdf

[61] Case C-33/2009 (ex NN57/2009).

guarantee was still in line with its Guidance Communication on state aid to overcome the financial crisis in relation to both the duration and the pricing of the measure[62]. Moreover, the commitment by the Portuguese authorities to submit to the Commission a restructuring plan within six months of granting the original state aid measure, outlining the future of the bank without state aid, has not been made[63].

There has been some public and political controversy as regards the aids to BPP, especially due to the difference in treatment as regards BPN (which was promptly nationalised) and due to the fact that most of its clients are still deprived from their deposited monies (the Portuguese Central Bank as for several times extended its initial decision in said regard), as well as to the practices of BPP as regards client information and financial investments *versus* deposits' accounts, within the context of the types of monies covered by the legislation of guaranteed bank accounts by the State's funds.

More recently, the Portuguese Court of Auditors concluded that the Government could not legally have granted a State guarantee to the aforesaid €450 million loan to BPP insofar as there were no certainties as to the payback of said loan by BPP.

Indeed, the Court of Auditors said that at the time of the granting of the State guarantee or afterwards, no measures to change BPP's financial situation were foreseen that could insure that BPP could repay the loan granted. And if the time of the granting of the State guarantee there was already a high probability that said guarantee would have to be executed (since the very reason for BPP to ask for the loan was its inability to abide with its financial commitments), the Court of Auditors considered that it would be impossible to argue that BPP could repay the loan. Hence, the legal obligation that provides for the existence of a sufficient degree of security that the obligation at stake will be fulfilled by the guarantor did not exist. If said security did not exist, as per the BPP's case, said State guarantee could have not legally been granted, the Court of Auditors concluded.

Moreover, the Court of Auditors considered that the State made a superficial evaluation of the guarantees offered by BPP, raising doubts as to the value of the assets handed by BPP to the State – financial assets, real estate and works of art. Indeed, according to the Opinion of the Court of Auditors, given the swiftness of the entire process, the value of said assets was provided by BPP itself (€672 million) and accepted by the State as such. However, the Court of Auditors added, in the very first analysis made by the Portuguese Central Bank, the value of said assets was reduced to €439 million (and was later on increased to €512 million). Moreover, the Court of Auditors said, the largest portion of said assets is made out of living credit rights and by overdrafts in current accounts which have not yet been properly scrutinised by the Portuguese Central Bank.

The Opinion of the Court of Auditors also alerted to the significant increase of the State's effective responsibilities arising from State guarantees granted (almost 1,800 million), in particular given the fact that some of the beneficiary entities (like BPN

---

[62] See the Commission's press release of 10.11.2009, IP/09/1691.

[63] See paragraph 44 of the EC Commission's letter of 13.3.2009 (C(2009) 1892) on case NN 71/2008 and the Commission's press release of 10.11.2009, IP/09/1691.

and BPP) are in a very difficult financial situation which seriously raises the possibility for the State to have to disburse, in a near future, very significant payments in the execution of said guarantees.

III.D. Miscellaneous

Q 46. If you are of the opinion that financial regulation and supervision has an effect on the cleavage between public and private capital in your Member State please provide your views.

The extraordinary measures and the rules adopted in the context of the recent crisis aimed at enhancing the regulatory environment of the sector and increasing investors' protection. Such initiatives envisage promoting financial stability and restoring investors' confidence in the financial markets.

In line with these goals, such rules are not expected to have an effect on the cleavage between public and private capital, rather those are intended to, on the one hand, mitigating the detrimental effects of the liquidity crisis and, on the other hand, establishing more demanding requirements for market players deemed as pivotal to ensure a sound financial environment.

Q 47. Is there a risk that the measures taken to address the financial crisis including the nationalization of some banks, will lead to less stringent financial supervision?

The exceptional measures taken to address the financial crisis (including the nationalization of one bank) are not expected to lead to less stringent financial supervision.

Q 48 Are there any other areas of the law that are designed to secure a level playing field between public and private capital?

Not applicable.