

***Case No IV/M.1616 -
BSCH/
A. Champalimaud***

Only the Portuguese text is authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 21(3)
Date: 20/07/1999

This unofficial translation is made available for information purposes only and does not constitute an official publication.

PUBLIC VERSION

COMMISSION DECISION

of 20 July 1999

relating to a proceeding pursuant to Article 21 of Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings

(Case n° IV/M.1616 - BSCH/A. Champalimaud)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings, as amended.

Having regard to the complaints lodged by Banco Santander Central Hispano on 21 June 1999, complemented on 24 June 1999, and by Mr. António Champalimaud on 21 June 1999.

Having regard to the information submitted by the Portuguese authorities on 2 July 1999 and on 15 July 1999, in reply to letters addressed by Mr. Van Miert, Commissioner for Competition Policy and on 9 July 1999, in reply addressed to Mr. Mogg, Director General of DG XV – Internal Market and Financial Services.

Having given the Portuguese authorities the opportunity to make known their views on the preliminary position of the services of the Commission.

Whereas:

1. On 30 June 1999, Banco Santander Central Hispano (“BSCH”) and Mr. António Champalimaud (“AC”) notified to the Commission a concentration operation of community dimension. On 18 June 1999, the Portuguese Minister of Finance adopted a decision opposing such a concentration operation.
2. The present decision concerns the compatibility of such decision with Article 21 of Council Regulation N° 4064/89 of 21 December 1989 on the control of concentrations between undertakings (“Regulation N° 4064/89”).

This unofficial translation is made available for information purposes only and does not constitute an official publication.

The operation notified

3. The notified operation consists in an exchange of shares whereby BSCH acquires 40% of the share capital of the two holding companies of the AC Group (AC SGPS, SA and Munfinac, SGPS), and Mr. Champalimaud will acquire 1.6% of the capital of BSCH. The operation also includes the transfer of BSCH' shareholdings in its Portuguese subsidiaries.
4. The above mentioned holding companies, together with Mr. Champalimaud, own directly or indirectly, the majority of the capital of the insurance undertaking Mundial Confiança S.A.. Mundial Confiança S.A. owns, directly and indirectly, more than 50% of the shares in several Portuguese banks (Banco Pinto & Sotto Mayor; Banco Totta & Açores; Banco Chemical Finance; Crédito Predial Português).
5. In addition to the agreements relating to the exchange shares, Mr. Champalimaud and the BSCH notified a Shareholders Agreement ("Acordo Parassocial") that grants to BSCH rights to nominate some members to the Boards of Administration and to the Executive Commissions of the AC holding companies and their subsidiaries as well as to veto essential decisions adopted by these companies.
6. In particular, the Shareholders Agreement (Acordo Parassocial) includes the following:
 - a) Nomination of executive posts in the holding companies: AC will have the right to nominate the executive directors in charge of insurance and wholesale banking, in both cases with the agreement of BSCH. BSCH will have the right to nominate the executive director in charge of retail banking, with the agreement of AC. Top executives in charge of "áreas de meios" and "áreas de staff" (audit, General Secretary, Tax, relations with external auditors) for all the group, will be appointed by common agreement.
 - b) Nomination of the Members of the Board of the holding companies: The boards will have 7 members. AC will nominate 4 of them, including the President and the executive directors of the holdings in charge of insurance and wholesale banking and BSCH will nominate the remaining 3 members, including the Vice-President and the executive director of the holdings in charge of retail banking. Should the number of members change (boards can be expanded up to 11 members) the same proportion will be maintained.
 - c) Nomination of the Members of the Board of Mundial Confiança: The agreement indicates that the Board will have between 5 and 9 members. AC nominates the President, with the agreement of BSCH. The executive director of the holdings in charge of insurance (nominated by AC with the agreement of BSCH) will be Vice-President with executive functions. BSCH will nominate one of the members of the Board which will take part in the Executive Commission, with the agreement of AC. The agreement does not include any instruction in relation to the remaining members of the Board.
 - d) Nomination of the Members of the Board of Banco Pinto & Sotto Mayor: The board will have at least 7 members. AC will nominate 4 of them, including the President, with the agreement of BSCH, and the executive director of the holdings

This unofficial translation is made available for information purposes only and does not constitute an official publication.

in charge of wholesale banking. BSCH will nominate the remaining 3 members, including the Vice-President, with the agreement of AC, and the executive director of the holdings in charge of retail banking. Should the number of members change (7 members is the minimum) the same proportion will be maintained.

e) Nomination of the Members of the Boards of the Banco Totta & Açores, Crédito Predial Português and Banco Chemical Finance. The proportion of members of the Board will be similar to that of Banco Pinto & Sotto Mayor.

f) Nomination of the Members of the Board of Banco Santander Portugal: The Board will have a non even number of members. Both parties will nominate half of the members, less one. The President will be nominated by Banco Pinto & Sotto Mayor.

g) Nomination of the members of the Executive Commissions: the Shareholders Agreement establishes that a maximum amount of executive matters will be decided by executive commissions. These will have an equal number of members representing AC and BSCH and a President, chosen with the agreement of both parties.

h) Adoption of decisions by the Boards of the holding companies: A qualified majority of half + 2 (5 members in the present composition) is needed to adopt the “Aspectos Essenciais da Actividade”. These are listed in the agreement and include, among others, approval of: annual accounts; annual strategic and operative plans, strategic agreements, trade mark policies and sales of shares. As far as other companies of the group are concerned, the modification of the boards and the approval of risk policies also need a qualified majority by the board of the holding companies.

i) Adoption of decisions by the Boards of the remaining companies of the group (including Banco Santander Portugal): The “Aspectos Essenciais da Actividade” will need to be discussed beforehand by the holding companies and receive the approval of AC and BSCH, with the exception of deliberations in Mundial Confiança with regard to management decisions specific to the insurance activity (Clause 2.4.6).

Concentration operation

7. In view of the above, on the exclusive basis of ownership rights, the notified operation would not involve any change of control over the companies of the AC group (i.e. the holding companies, Mundial Confiança S.A. and its banking subsidiaries, such as Banco Pinto & Sotto Mayor, Banco Totta & Açores, Crédito Predial Português, and Banco Chemical Finance). Indeed, Mr. Champalimaud continues to hold, directly or indirectly, the majority of shares in each of them. The only change of control which will derive, at a latter date, from ownership rights is the foreseen acquisition of 100% of the capital of Banco Santander Negócios Portugal by Banco Chemical Finance.
8. Once the Shareholders Agreement enters into force, however, BSCH will obtain joint control over the AC group and Mr. AC will obtain joint control over Banco Santander Portugal. Indeed, the right to nominate members of the Boards and the right to adopt essential decisions, both in the holding companies and in their

This unofficial translation is made available for information purposes only and does not constitute an official publication.

subsidiaries, as well as in Banco Santander Portugal, give both parties a decisive influence in the strategic commercial behaviour of these companies. It must be noted that the clauses of this agreement granting joint control will not enter into force until the notified operation is approved by the European Commission in accordance with Regulation N° 4064/89.

9. The parties to the concentration claim that the BSCH will not have veto rights over the insurance activities of Mundial Confiança S.A. This is confirmed by clause 2.4.6 of the shareholders agreement, which excludes decisions in Mundial Confiança S.A. with regard to management decisions specific to the insurance activity from the obligation to be discussed before by the holding companies and receive the approval of AC and BSCH.

10. However, the position of the Commission is that such a clause does not prevent BSCH from exerting decisive influence over the insurance activities of Mundial Confiança S.A. because, in any case, the Members of the Board of Mundial Confiança that will adopt such decisions will have been jointly nominated by BSCH. Indeed:

- According to clauses 2.3.4 and 2.1 b (i) of the Shareholders Agreement, BSCH will have the right to agree on the nomination of the President and Vice president (which will be the executive director of the holding companies in charge of insurance) of the Board. It will also have the right to nominate another member of the Board, with the agreement of AC.

- According to clause 2.4.1 d) of the Shareholders Agreement, BSCH will have the right to agree on the nomination of the members representing the holding companies in the Board of Mundial Confiança S.A..

Even if the holding companies do not hold the majority of shares in Mundial Confiança (only 44,3 %), together with Mr Champalimaud, which holds 7,5% of the capital directly, they will be able to reach the majority necessary in the General Assembly to appoint the Board (it is appointed by simple majority) and, therefore, will have a direct influence over its composition. The possibility that Mr. Champalimaud would reach a majority in the General Assembly together with the remaining shareholders of Mutual Confiança S.A. is only theoretical (the remaining capital is very dispersed, and has never obtained a representative in the Board) and would be contrary to clause 2.3.4 of the Shareholders Agreement.

11. In addition to its decisive influence on the composition of the Board, the Shareholders Agreement grants to BSCH other means to influence the insurance activity of Mundial Confiança. In particular, according to clause 2.4.1, a qualified majority is necessary in the Boards of the holding companies to agree, among other issues, on the risk policy (credit and market risks) of the companies of the AC group as well as on trade marks related to the whole group. These policies will also affect the insurance activities of Mundial Confiança S.A.

12. In view of the above, it can be concluded that the BSCH, through the Shareholders Agreement, will acquire joint control over the two holding companies and the remaining companies of the AC group. Therefore, the notified operation constitutes a concentration within the meaning of article 3.1 b) of Regulation N° 4064/89.

This unofficial translation is made available for information purposes only and does not constitute an official publication.

Operation of a community dimension

13. BSCH and the AC Group have a combined aggregate world-wide turnover in excess of Euro 5.000 million (BSCH: 9.371 million Euros; AC Group: 2.607 million Euros). They both have Community turnover in excess of Euro 250 million (BSCH: 5.166 million Euros; AC Group: 2.484 million Euros). The undertakings concerned do not achieve more than two thirds of their aggregate Community-wide turnover within one Member State. The notified operation, therefore, has a Community dimension.

Measures adopted by the Portuguese Authorities in relation to the notified operation

14. On 18 June 1999, the Portuguese Minister of Finance adopted a decision of opposition to the notified operation. The same day, the Instituto do Seguros de Portugal (ISP) informed Mundial Confiança S.A. that the opposition of the Minister determines the suspension of the exercise of voting rights resulting from the qualified participation acquired. On 9 July 1999, the ISP informed Mundial Confiança S.A. that the voting rights resulting from the qualified participation, which are suspended, are those deriving by the participation in Mundial Confiança S.A. held by AC, SGPS S.A., Munfinac SGPS, S.A., Mundac SGPS, S.A. and Mr. António Champalimaud.

15. The decision of the Portuguese Minister of Finance was the object of an administrative appeal by the BSCH on 18 June 1999.

16. According to the reply submitted by the Portuguese Authorities on 9 July 1999, confirmed by a letter of 15 July, the motives behind the opposition decision of 18 June 1999 are expressed in point 7 of the decision which states that:

“It must be analysed, in concrete, in view of the legal objectives and the existing data, whether the specific conditions of the operation and the situation that it will create guarantee a sound and prudent management of the insurance undertaking Mundial Confiança S.A. and its appropriate supervision”.

17. It must be noted, however, that in addition to these motives, the body of the decision refers to, at least, two other main motives. First, point 6 refers to the infringement of rules of a procedural character and, in particular, to the fact that BSCH acquired a qualified participation in Mundial Confiança S.A. without previously notifying it to the Minister of Finance, as foreseen in Article 43 of Decreto-Lei 94-B/98 of 17 April. Moreover, the notification submitted would not satisfy the requirements established by Portaria n° 292/99, of 28 April.

18. Second, point 3 states that the operation interferes strictly with the national interest and with strategic sectors which are essential to the Portuguese economy and financial system.

19. The Portuguese Minister of Finance and the Portuguese Prime Minister have also explained the motives of such decision in statements addressed to the press. Some of these statements refer to the prudential motives alleged by the Portuguese authorities in their letter of 9 July 1999 (see 16 above). Other statements, however, refer to the remaining two motives included in the body of the decision.

This unofficial translation is made available for information purposes only and does not constitute an official publication.

20. First, in several statements, the Portuguese Minister of Finance refers to a breach of procedural rules:

- On 24.6.1999, he declared to “Visão” that “any important act performed by financial institutions should previously be object of contacts with the respective authorities. And in this case, it was not. The manner in which both parties behaved in this process makes me comment that who proceeds in this manner is not welcomed to the financial Portuguese system. The door is open, but not in this manner and with this behaviour.”

21. Second, in other statements, national interests have also been advanced as a justification for the decision. These are reproduced below:

- On 24.6.1999, Mr. Sousa Franco, the Portuguese Minister of Finances declared to “Visão” that “...a restructuring of the Portuguese banking system will be necessary and it appears to me of good sense that, in a first phase, like it is already happening in France, this is made among national groups. Foreign groups, including BSCH, will have to compete on their own and should not perturb such a restructuring. It would be totally false to arrange the system by suddenly transferring the control of large national institutions to foreign owners.”

- In the same interview for “Visão” he pointed out that “There are strategic sectors that we want to be kept in Portuguese hands, but we will never use illegal methods to achieve this. Several times the Government talked to financial institutions and expressed to all of them, including to the Champalimaud group, the wish that the decision power in large financial Portuguese institutions would remain in Portuguese hands. (...) The policy of this government is that strategic sectors should be kept in Portuguese hands”.

- In an interview to “Comércio do Porto”, Mr. António Guterres, the Prime Minister of Portugal, declared in relation to the notified operation that “The State will act in respect of legality, but will also act in a very firm defence of the national interests and of the dignity of the Portuguese State”.

Compatibility of the measures adopted by the Portuguese authorities with Article 21 of Regulation N° 4064/89.

22. Article 21 of Regulation N° 4064/89 states that, subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation. This means that the Commission has an exclusive competence to deal with operations covered by Regulation N° 4064/89.

23. The second paragraph of Article 21 of this Regulation states that no Member State shall apply its national legislation on competition to any concentration that has Community dimension.

24. Paragraph 3, however, indicates that Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the EC Merger Regulation and compatible with the general principles and other provisions of Community law. According to the same article, public security, plurality of the media and prudential rules shall be regarded as legitimate interests. Any other public interest, however, must be communicated to the Commission by the Member

This unofficial translation is made available for information purposes only and does not constitute an official publication.

State concerned and shall be recognized by the Commission before any measure to protect such interests is adopted by the Member State.

25. The Portuguese Authorities did not communicate to the Commission any public interest that they considered necessary to protect by means of a decision of opposition to the notified operation.

Strategic and national interests

26. The protection of national interests and strategic sectors for the national economy has been mentioned in the body of the decision and in statements to the press by members of the Portuguese Government as a motivation behind the decision.
27. This is not one of the interests considered as legitimate by Paragraph 3 of Article 21. Therefore, should the Portuguese authorities have wanted to protect this interest by means of a prohibition decision, they should have notified it previously to the European Commission. By not having submitted this notification to the Commission, they have failed to comply with their obligations under Article 21 of Regulation N° 4064/89.
28. Even if the Portuguese Authorities had notified it, however, the Commission could not have approved it. Indeed, such an interest is contrary to the principle of non discrimination by reason of nationality embodied in Article 12 of the Treaty. Moreover, measures protecting such interest would lead to a violation of the principles of freedom of establishment and free movement of capital inside the EU.

Procedural rules

29. The Portuguese Authorities claim that one of the motives of their opposition decision is that the BSCH has violated the rules providing for prior notification to them of any acquisition of a qualified holding in an insurance undertaking.
30. Avoiding a violation of procedural rules is not one of the interests explicitly included in Article 21.3. The interpretative “notes on Council Regulation 4064/89”, adopted by the Council, do not include the respect of formal or procedural rules as one of the examples of interests to be considered as prudential. They either do not include the respect of such rules as examples of the other two legitimate interests covered by Article 21.3: public security and plurality of media.
31. Therefore, should the Portuguese authorities would have wanted to protect this interest by means of a prohibition decision, they should have notified it previously to the European Commission. By not having submitted this notification to the Commission, they have failed to comply with their obligations under Article 21 of Regulation N° 4064/89. Had such notification been made, however, the Commission would not have considered that a lack of notification of a qualified holding is a legitimate motive within the meaning of Article 21.3 of Regulation N° 4064/89 that justifies an opposition decision to an operation of Community dimension.

This unofficial translation is made available for information purposes only and does not constitute an official publication.

32. In effect, in application of the general principle of proportionality, measures which may be taken by Member States must be limited to the minimum of action necessary to ensure protection of the legitimate interest in question. As stated in the “Notes on Council Regulation 4064/89”, Member States must choose, where alternatives exist, the measure which is objectively the least restrictive to achieve the end pursued.
33. A decision adopted by a Member State to oppose a concentration operation of Community dimension in order to ensure that this operation is notified to the national prudential authorities would clearly be in breach of this principle. Indeed, there are less restrictive types of measures that a Member State can adopt in order to force the parties to the concentration to notify (e.g. injunctions, suspension of voting rights,...) than an opposition decision.

Prudential interests

Prudential interests according to Community law.

34. Article 21.3 of Regulation N° 4064/89 states that prudential interests should be considered as legitimate and that, therefore, a Member State can adopt measures with regard to a concentration of community dimension in order to protect one of these interests without previously requesting approval to the Commission.
35. The term “prudential interests” included in Article 21.3 is, however, a term with a specific meaning in Community Law. Not every interest that a Member State would consider as being prudential should be considered as such by Community Law and, therefore, covered by Article 21.3.
36. In particular, the Council interpreted that prudential interests should be understood to cover measures addressed, for example, to ensure the good repute of individuals managing such undertakings, the honesty of transactions and the rules of solvency, as it is indicated in the “Notes on Council Regulation 4064/89”.
37. The same Notes make a reference to the on-going process of harmonisation of prudential rules at EC level. These harmonising provisions, therefore, should also be taken into account in order to determine the community notion of prudential interest, which should include those interests protected by the harmonisation directives. In the present case, the provisions in question are the Council Directive 92/49/EEC of 18 June 1992 on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and amending Directives 73/239/EEC and 88/357/EEC (third non life insurance directive) as well as Article 14 of Council Directive 92/96/EEC of 10 November 1992 on the co-ordination of laws, regulations and administrative provisions relating to direct life insurance insurance and amending Directives 79/267/EEC and 90/619/EEC (third life insurance directive) as well as the measures amending them.

Prudential interests invoked by the Portuguese Authorities

38. According to the letter from the Portuguese Authorities of 9 July 1999, the decision of 18 June 1999 is justified by the protection of interests of a prudential character. As explained, the Portuguese Authorities believe that the decision attempts to guarantee a sound and prudent management of the insurance undertaking Mundial

This unofficial translation is made available for information purposes only and does not constitute an official publication.

Confiança S.A. and to ensure an appropriate supervision by the prudential authorities (point 7 of the decision).

39. According to the decision, these two interests would be at risk by the notified operation. Indeed, in point 8 of the decision it is said that “the lack of clarity and transparency of the group resulting from the operation and the process of decision established, which derive from the agreements concluded between the parties, could have negative repercussions on the immediate and long term stability of the insurance undertaking in question and the financial group which depends from it, as well as on the possibility of the existence of an appropriate supervision”.
40. The decision, however, apart from advancing arguments on national interest, does not explain or justify the reasons why the structure and the decision process resulting from the notified operation would be detrimental to a sound and prudent management of Mundial Confiança S.A. and its subsidiaries and would prevent the Portuguese Authorities from supervising them appropriately.
41. In the letter of 9 July 1999 to Mr Mogg, Director General of DG XV – Internal Market and Financial Services, the Portuguese Authorities explain that the structure and content of the concentration agreements show a lack of transparency of the operation and of the structure of the business group (point 2.2.3.2.1). They give some examples of situations deriving from these agreements that, according to the Portuguese Authorities, would justify on their own the objections of the supervisory authorities as far as the verification of the conditions for a sound and prudent management are concerned.
42. First, according to the Joint Venture Agreement and to the Escrow Account Agreement, AC is obliged to ensure that Mundial Confiança will use some of the shares it holds to constitute an escrow guarantee of the potential debts of AC towards BSCH. According to the Portuguese Authorities, the concession of such a non rewarded guarantee is not part of the social object of Mundial Confiança S.A. and it could constitute an act of unsound management.
43. Second, the agreements notified involve a deep distortion of the functioning of the social organs of the companies of the group resulting from the merger, because some essential decisions concerning these companies will be taken by the organs of the holding companies of the group. This would, according to the Portuguese authorities, restrict the clarity and transparency of the structure of the group resulting from the notified operation.
44. Third, the structure of the group introduces difficulties in the adoption of urgent decisions which, according to the provisions included in the Shareholders Agreement, could require an Arbitrage solution and, therefore, create uncertainty for a too long period of time.
45. None of these concerns advanced by the Portuguese Authorities in their letter of 9 July 1999 have been notified yet to the parties to the operation.

Assessment of the prudential interests invoked by the Portuguese authorities

46. In view of the circumstances of the case and in light of the other reasons advanced by the Portuguese authorities in the opposition decision and in statements to the press,

This unofficial translation is made available for information purposes only and does not constitute an official publication.

it is far from clear that the three reasons mentioned by the Portuguese authorities in their letter of 9 July 1999 in fact constitute the real basis for the decision of 18 June 1999.

47. With regard to the first reason mentioned, it should be first stated that the notified agreements do not impose any obligation on Mundial Confiança S.A. to participate in the Escrow Account Agreement. They simply include an obligation on the parties to ensure that the companies that they control, such as Mundial Confiança S.A., would adhere to such an agreement. This is an obligation of means, not of result, and is not binding on the organs of Mundial Confiança S.A.. Indeed, these organs remain responsible for the adoption of such decision and, should they consider that the decision would be contrary to the interests of the company, they would be legally entitled not to accept it.
48. In any event, the escrow account mechanism, is a very widely used mechanism to ensure that all parties will comply with their obligations in case of acquisition of minority shareholdings in other companies. It is difficult to consider it as an example of unsound or non prudent management when, in fact, it contributes to guarantee that the agreements signed by the shareholders of the group are respected.
49. To ensure the respect of such agreements is clearly in the interests, not only of the parent companies, but also of the remaining companies of the group. Indeed, it is in the interests of all the companies of the group to ensure the stability of the group's shareholders base, and in particular to ensure the presence of a shareholder which can contribute substantially to the internationalisation and professionalisation of the activities of each of the companies of the group.
50. In order to avoid legal responsibilities for a breach of prudential rules, it is likely that the Board would not approve to deposit shares in the escrow account without first adopting any other measure to prevent such a breach, such as an increase of capital or any other appropriate financing methods. Moreover, this would not take place without an appropriate information to the relevant authorities. It must be kept in mind that Mundial Confiança S.A. is a company quoted in the stock exchange and that such a decision would constitute a relevant information to be communicated to the stock exchange regulators.
51. A confirmation that such act would not be adopted against the interests of Mundial Confiança S.A. is found in the Joint Venture Agreement (point 7), which states that, the Board of Administration of Mundial Confiança S.A. can, at any moment, decide that the shares which represent the technical reserves that Mundial Confiança S.A. is legally obliged to keep should not be deposited to the escrow account. This freedom of decision derives directly from the law. The fact that it is reproduced in the Joint Venture Agreement is clear evidence that the escrow agreement is not intended to be detrimental to the interests of any of the companies of the group and that the respect of prudential rules will be taken appropriately into account before any decision is adopted in relation to this issue.
52. As far as the second reason is concerned, the Portuguese Authorities seem to imply that the fact that, as a result of the notified operation, some essential decisions will be adopted by the boards of the holding companies, could be detrimental of the

This unofficial translation is made available for information purposes only and does not constitute an official publication.

- remaining companies concerned and could complicate unnecessarily the structure of the group.
53. As it has just been pointed out, according to company law, no private agreement can deprive the Board of any company of the right to adopt the decisions concerning this particular company. The fact that, as a result of the agreements notified, some of these decisions are discussed previously by the main shareholders in another forum does not prevent the boards from adopting or refusing to adopt the most appropriate decisions. In fact, these same boards would remain responsible for the decisions adopted against the interests of their own company.
 54. Moreover, such an agreement is common with many joint venture agreements. As explained above, the changes that will take place in the structure of the AC Group in Portugal are simply these which derive from the acquisition of joint control by BSCH. Indeed, BSCH will acquire a minority stake in the holdings owning 44,3% of the shares of Mundial Confiança S.A. and Banco Pinto Sotto Mayor and Banco Chemical, subsidiaries of Mundial Confiança S.A., will respectively acquire stakes into Banco Santander Portugal and Banco Santander Negócios Portugal, subsidiaries of BSCH. In addition to this, BSCH will be granted the rights, specified above, to nominate Members in the Boards of the companies of the AC group and, through the majorities required to adopt decisions in these boards, to have a significant influence in the essential decisions being adopted by them.
 55. Such a structure does not appear to raise any concern from a prudential point of view, in particular because it is not put into doubt that the persons that will acquire a qualifying holding in Mundial Confiança S.A. are of good repute and have the appropriate professional qualifications or experience. The Portuguese Authorities explicitly accept that this is the case. In point 7 of the decision of 18 June 1999 it is said that the decision does not put into cause the subjective general qualities of the candidate persons to acquire the qualifying holding.
 56. It is difficult to imagine that the Portuguese Authorities could reach the opposite conclusion. BSCH is a well known financial entity, which controls already two banking subsidiaries in Portugal, duly authorised by the Portuguese authorities, and which performs banking and insurance activities in Spain, being there also duly authorised by the Spanish authorities.
 57. It must be also noted that concentration operations in the financial sector with similar structures have been notified to the Commission in several occasions (e.g. M.254 – Fortis/La Caixa; M.192 – Banesto/Banco Totta-Açores). Member States, including the Portuguese Republic, have never blocked these operations on the basis of the protection of legitimate prudential interests.
 58. Moreover, the notified operation would have a positive impact on the clarity of the structure of the AC group in Portugal. Indeed, the notified agreements foresee the integration of the two existing holding companies of the group into a single company, which will simplify the ownership structure of Mundial Confiança S.A.. Moreover, the Shareholders Agreement (point 9) also foresees that such holding company will be quoted in the stock exchange as soon as possible, with all the consequences that this involves in relation to transparency of the operations and information to shareholders.

This unofficial translation is made available for information purposes only and does not constitute an official publication.

59. Finally, the third reason advanced by the Portuguese Authorities is that the Shareholders Agreement establishes a method to resolve controversies between the main shareholders that could delay unnecessarily the adoption of agreements in the companies of the AC group.
60. The method to resolve controversies included in the Shareholders Agreement is intended, precisely, to limit the time spent in resolving the disputes that could occur between the main shareholders. In its absence, disagreements could lead to a dead-lock situation and substantially delay the adoption of a final decision.
61. Indeed, in order to avoid differences of opinion between the main shareholders that would threaten the adoption of important decisions in the AC group companies, the parties have adopted a fast-track mechanism of resolution of differences. This mechanism obliges them to reach an agreement within 20 days. If, at the end of this period, this agreement is not reached, an arbitration procedure could be launched. The delays foreseen for this procedure are also very short. The parties should explain their position within 10 days and a final decision should be adopted within the following 10 days.
62. The deadlines established by these procedures are such as to allow that any decision would be adopted in the time frame necessary to implement any decision of a prudential authority and to avoid any long impasse that could put in danger the stability of the companies concerned. Through this system, it will probably be easier to reach decisions in the AC group, with only two controlling shareholders, than in many other financial groups, with a much more dispersed shareholding basis.
63. Accordingly, it is hard, at this stage, to see any substance in the three prudential reasons advanced by the Portuguese authorities in order to justify the decision of 18 June 1999. There are, therefore, strong doubts whether the decision was in reality based on those grounds or on other grounds such as those referred to above.
64. This appears to be confirmed by the fact that by letter of 9 June 1999, the parties informed the Portuguese Authorities of the signed agreements, indicating that the clauses of the Acordo Parassocial granting joint control to the BSCH are suspended until the non-opposition to the operation by the competent supervisory authorities. Should the prudential authorities disagree with any of the aspects of the operation, therefore, they could have communicated this to the parties in view that these modify the signed agreements. The Portuguese authorities, however, did not follow this possibility and, instead, adopted an opposition decision 9 days latter.
65. The Portuguese Authorities, confronted with a situation which raises such substantial doubts as to the consideration of the interests protected as legitimate interests, should have communicated to the Commission the interests they attempted to protect, pursuant to Article 21 (3) of Regulation 4064/89, before adopting the measures included in this decision.
66. The second paragraph of Article 21 (3) is an exception to the general principle established by the first paragraph of the same article. In case of strong doubts as to whether a measure is in fact based on prudential rules, not notifying it to the Commission before any measure is adopted would be contrary to the principle of exclusive jurisdiction laid down by the Merger Regulation.

This unofficial translation is made available for information purposes only and does not constitute an official publication.

67. In the absence of notification, Article 21(3) would be deprived of all its effect. Member States could easily avoid the scrutiny of the Commission as to whether a measure adopted by a Member State is justified by one of the interests considered as legitimate by Article 21(3) or whether it is compatible with the general principles of Community law.

Conclusion

68. It should be concluded, therefore, insofar as there is considerable doubt whether the decision of 18 June 1999 is based on prudential rules, that the Portuguese Authorities, pursuant to Article 21(3) of Regulation 4064/89, were obliged to communicate to the Commission the interests that they attempted to protect by their decision of 18 June 1999, before the decision was adopted, and they failed to do so, contrary to their obligations under Article 21 of Regulation 4064/89. The information supplied by the Portuguese Authorities on 9 July 1999, confirmed by letter of 15 July 1999, did not resolve the above mentioned doubts.

69. In order to enable the Commission to determine whether the decision of 18 June 1999 is in fact based on prudential rules and, if not, whether it is intended to protect legitimate interests which can be recognised by the Commission, it is necessary to suspend the application of the decision pending its examination by the Commission, as well as the measures of suspension of voting rights deriving from this decision.

70. This position is without prejudice to the possibility that the decision adopted could also constitute an infringement of the articles of the EC Treaty concerning freedom of establishment, free movement of capitals or of the correct implementation of EC insurance directives. It is also without prejudice of the application of the relevant measures of the EC Directives concerning the notification of an acquisition of a qualifying holding in an insurance undertaking and the possible suspension effects deriving from these provisions.

HAS ADOPTED THIS DECISION:

Article 1

The Republic of Portugal is hereby required to suspend with immediate effect the measures adopted in relation to the notified operation, and in particular the decision of the Portuguese Minister of Finance dated 18 June 1999. It shall notify to the Commission the measures it has taken to that end within one week of the notification of this decision.

Article 2

This decision is addressed to the Republic of Portugal.

Done at Brussels,

This unofficial translation is made available for information purposes only and does not constitute an official publication.

For the Commission,