ACQUISITIONS (BANKING): THE BSCH / CHAMPALIMAUD CASE

Subject: Acquisitions
Procedure
Jurisdiction

Industry: Banking
(Some implications for other industries)

Parties: Banco Santando Central Hispano (BSCH)
Mr Antonio Champalimaud (AC)
The Republic of Portugal

Source: Commission Decision dated 20 July, 1999 (published 20 October, 1999);
Commission Statement IP/99/774, dated 20 October, 1999
Commission Statement IP/99/818, dated 3 November, 1999

(Note. In the report on this case, the text of the Commission Decision is set out almost in its entirety, while the consequences of the Decision are referred to in the two Statements issued by the Commission after the Decision had been published. Although the Decision goes into the merits of the case, it is mainly concerned with the question of jurisdiction: that is, whether the Portuguese authorities were entitled to prohibit the acquisition in question before the Commission had had a chance to examine it. Given that the acquisition had "a Community dimension", within the meaning of the Regulation, jurisdiction undoubtedly rested with the Commission, rather than with the Portuguese authorities. There are exceptions to this principle, based on the Member State's "prudential interest"; but the Commission takes the view that the Portuguese government's reasons for blocking the acquisition did not satisfy the prudential criteria. As the Portuguese government had not responded to the Commission's Decision within the time-limit, the Commission referred the case to the Court of Justice.)

Origin of case (text of Commission Decision)

1 On 30 June 1999, Banco Santander Central Hispano and Mr. Antonio Champalimaud notified to the Commission a concentration having a Community dimension. On 18 June 1999, the Portuguese Minister of Finance had adopted a decision opposing the concentration.

2 The present decision concerns the compatibility of the Portuguese Minister's decision with Article 21 of Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Regulation 4064/89).

The notified operation

3 The notified operation consists of 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's 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 Confianca SA, which owns, directly and indirectly, more than 50% of the shares in several Portuguese banks (Banco Pinto & Sotto Mayor; Banco Totta & Acores; Banco Chemical Finance; Credito Predial Portugues).

5 In addition to the agreements relating to the exchange shares, Mr. Champalimaud and the BSCH notified a Shareholders Agreement 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.

[Paragraph 6 refers to the Shareholders Agreement; sub-paragraphs (a) to (i) give details of the arrangements for control .]

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 (that is, the holding companies, Mundial Confianca SA and its banking subsidiaries, such as Banco Pinto & Sotto Mayor, Banco Totta & Acores, Credito Predial Portugues, 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 later date, from ownership rights is the expected acquisition of 100% of the capital of Banco Santander Negocios Portugal by Banco Chemical Finance.

8 Once the Shareholders Agreement comes 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 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 come into force until the notified operation is approved by the Commission in accordance with Regulation 4064/89.

9 The parties to the concentration claim that the BSCH will not have veto rights over the insurance activities of Mundial Confianca SA. This is confirmed by clause 2.4.6 of the shareholders agreement, which excludes decisions in Mundial Confianca SA 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 Confianca SA because, in any case, the Members of the Board of Mundial Confianca who 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 Confianca SA.

Even if the holding companies do not hold the majority of shares in Mundial Confianca (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 Confianca SA 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 Confianca. 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 Confianca SA.

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 4064/89.

Operation having a community dimension

13 BSCH and the AC Group have a combined aggregate world-wide

turnover of more than € 5,000m (BSCH: € 9,371m; AC Group: € 2,607m). They both have a Community turnover of more than € 250m (BSCH: € 5,166m; AC Group: € 2,484m) . 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

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

15 The decision of the Portuguese Minister of Finance was the subject 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 reasons for the decision of 18 June 1999 are set out in point 7 of the decision which states that: "There must be a concrete analysis, in view of the legal objectives and the existing data, of 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 Confianca SA and appropriate supervision of it".

17 It must be noted, however, that in addition to these reasons, the body of the decision refers to at least two other main reasons. 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 Confianca SA without previously notifying it to the Minister of Finance, as required under Article 43 of Decreto-Lei 94-B/98 of 17 April. Moreover, the notification submitted would not satisfy the requirements established by Portaria 292/99, of 28 April.

18 Second, point 3 states that the operation interferes 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 reasons for the decision in statements addressed to the press. Some of these statements refer to the prudential reasons alleged by the Portuguese authorities in their letter of 9 July 1999 (see 16 above). Other statements, however, refer to the remaining two reasons included in the body of the decision.

20 First, in several statements, the Portuguese Minister of Finance refers to a breach of procedural rules. On 24.6.1999, he told the journal *Visao* that "any important act performed by financial institutions should previously have been the subject 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 whoever proceeds in this manner is not welcome in the Portuguese financial 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. On 24.6.1999, Mr. Sousa Franco, the Portuguese Minister of Finances told *Visao* that "... a restructuring of the Portuguese banking system will be necessary and it appears to me of good sense that, in a first phase, as 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 interfere with 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 with *Visao* he pointed out that "There are strategic sectors that we want to keep in Portuguese hands, but we will never use illegal methods to achieve this. Several times the Government talked to financial institutions telling all of them, including the Champalimaud group, of our wish that the decision-making power in large financial Portuguese institutions should remain in Portuguese hands... The policy of this government is that strategic sectors should be kept in Portuguese hands". In an interview with *Comercio do Porto*, Mr. Antonio Guterres, the Prime Minister of Portugal, stated in respect of the notified operation that "The State will respect legality, but will also act in a very firm defence of the national interests and of the dignity of the Portuguese State".

The Portuguese decision and Article 21 of Regulation 4064/89

22 Article 21 of Regulation 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 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 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 reason for the decision.

27 This is not one of the interests considered as legitimate by Paragraph 3 of Article 21. Therefore, if the Portuguese authorities had wanted to protect this interest by means of a prohibition decision, they should have notified it previously to the Commission. By not having submitted this notification to the Commission, they have failed to comply with their obligations under Article 21 of Regulation 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 an interest would lead to a violation of the principles of freedom of establishment and free movement of capital inside the European Union.

Procedural rules

29 The Portuguese authorities claim that one of the reasons for their 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. Nor do they 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, if the Portuguese authorities had wanted to protect this interest by means of a prohibition decision, they should have notified it previously to the Commission. By not having submitted this notification to the Commission, they have failed to comply with their obligations under Article 21 of Regulation 4064/89. Had such a notification been made, however, the Commission would not have considered that a lack of notification of a qualified holding was a legitimate reason within the meaning of Article 21(3) of

Regulation 4064/89 justifying a decision to oppose an operation with a Community dimension.

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 with a 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 (such as injunctions, suspension of voting rights, and so on) than a decision opposing it altogether.

Prudential interests according to Community law

34 Article 21(3) of Regulation 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 with a community dimension in order to protect one of these interests without previously requesting the approval of 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 prudential interests as covering measures addressed, for example, to ensure the good repute of individuals managing such undertakings, the honesty of transactions and the rules of solvency, as 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 European Community 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 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 and amending Directives 79/267/EEC and 90/619/EEC (third life insurance

directive) as well as the measures amending them.

Prudential interests referred to 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 Confianca SA 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 from 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-making which it established, deriving 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 on it, as well as on the possibility of the existence of appropriate supervision".

40 The decision, however, apart from advancing arguments on national interest, does not explain or justify why the structure and the decision-making process resulting from the notified operation would be detrimental to a sound and prudent management of Mundial Confianca SA 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 which, 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 the Escrow Account Agreement, AC is obliged to ensure that Mundial Confianca 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 within the powers of Mundial Confianca SA and could constitute an act of unsound management.

43 Second, the agreements notified involve a deep distorsion 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 too long a period of time.

45 None of these concerns advanced by the Portuguese Authorities in their letter of 9 July 1999 has been notified yet to the parties to the operation.

Assessment of Portuguese prudential interests

46 In view of the circumstances of the case and in the light of the other reasons advanced by the Portuguese authorities in their decision and in statements to the press, 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 Confianca SA to participate in the Escrow Account Agreement. They simply include an obligation on the parties to ensure that the companies they control, such as Mundial Confianca SA, would adhere to such an agreement. This is an obligation of means, not of result, and is not binding on the organs of Mundial Confianca SA. Indeed, these organs remain responsible for the adoption of such a decision and, if they considered 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 an example of unsound or imprudent management when, in fact, it contributes towards guaranteeing that the agreements signed by the shareholders of the group are respected.

49 To ensure respect for 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 shareholder base, and in particular to ensure the presence of a shareholder which can contribute substantially to the internationalisation and professional-isation of the activities of each of the companies of the group.

50 To avoid legal responsibility for a breach of prudential rules, it is likely that the Board would not approve the deposit of 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 Confianca SA is a company quoted in the stock exchange and that such a decision would constitute

relevant information to be communicated to the stock exchange regulators.

51 Confirmation that such an act would not be adopted against the interests of Mundial Confianca SA is found in the Joint Venture Agreement (point 7), which states that the Board of Administration of Mundial Confianca SA can, at any moment, decide that the shares which represent the technical reserves that Mundial Confianca SA 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 respect for 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 to the remaining companies concerned and could complicate unnecessarily the structure of the group.

53 As 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 notified agreements, 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 those 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 Confianca SA and Banco Pinto Sotto Mayor and Banco Chemical, subsidiaries of Mundial Confianca SA, will respectively acquire stakes into Banco Santander Portugal and Banco Santander Negocios 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 there is no doubt that the persons who will acquire a qualifying holding in Mundial Confianca SA 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 question the general qualities of

the persons concerned 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 performs banking and insurance activities in Spain, where it is 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 on several occasions (such as M.254 - Fortis/La Caixa; M.192 - Banesto/Banco Totta-Acores). 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 Confianca SA. Moreover, the Shareholders Agreement (point 9) also foresees that the 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.

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 of resolving 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 deadlock situation and substantially delay the adoption of a final decision.

61 Indeed, 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 for resolving 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 arbitrage procedure could be launched. The time-limits envisaged under this procedure are also very short. The parties have to explain their position within 10 days and a final decision has to be adopted within the following 10 days.

62. The deadlines established by these procedures are such as to allow for any decision to be adopted in the time frame necessary to implement any decision of a prudential authority and to avoid any long impasse that could endanger 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 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 noted above.

64 This appears to be confirmed by the fact that, in their letter of 9 June 1999, the parties informed the Portuguese authorities of the signed agreements, indicating that the clauses of the agreement granting joint control to the BSCH were suspended until the non-opposition to the operation by the competent supervisory authorities. If the prudential authorities disagreed with any of the aspects of the operation, therefore, they could have communicated this to the parties with a view to their modifying the signed agreements. The Portuguese authorities, however, did not pursue this possibility and, instead, adopted a decision 9 days latter opposing the concentration.

65 The Portuguese authorities, confronted with a situation which raised such substantial doubts about treating the protected interests 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, 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.

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 was justified by one of the interests considered legitimate by Article 21(3) or whether it was 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 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 to 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.

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.

[Following the foregoing Decision, the Commission issued a statement (IP/99/774, dated 20 October 1999) outlining the arguments set out in full above and reminding those interested of the course of proceedings. The relevant dates of these proceedings are as follows.]

18 June: Portuguese veto (without prior notification to the Commission)
30 June: Commission notified by the firms concerned
20 July: 1st infringement procedure Internal market
Phase 1: letter of formal notice
Initial analysis of veto
Order to desist (deadline: 1 week)
3 August: Operation approved by the Commission

8 September: 2nd infringement procedure for failure to desist
Phase 1: letter of formal notice (deadline: 2 weeks)
13 October: Phase 2: reasoned opinion (deadline: 1 week)
20 October: Phase 2: reasoned opinion
Final analysis of veto (deadline: 1 month)

Conclusion: incompatible with Community law
(Article 21, Merger Regulation)

Now: Probable outcome: Court of Justice (request for interim measures)
Final decision

[In a further Statement below (IP/99/818, dated 3 November 1999), the Commission confirmed that it was referring the case to the Court of Justice.]

The Commission has decided to refer the BSCH / Champalimaud case to the Court of Justice. The case stems from Portugal's failure to comply with the decision which the Commission adopted on 20 July 1999 under the Merger Regulation. The referral to the Court is accompanied by a request for interim measures. The decision adopted on 20 July provisionally suspended the decision taken by the Portuguese Minister for Finance on 18 June 1999 to oppose the BSCH / Champalimaud merger, on the grounds that the measure infringed Article 21 of the Merger Regulation (which grants the Commission exclusive powers to assess mergers with a Community dimension). The Portuguese authorities did not notify their measures in advance, and the nation& and prudential interests invoked were not deemed legitimate by the Commission.

On 8 September 1999, the Commission decided to initiate accelerated proceedings against Portugal for failure to comply with the decision of 20 July 1999. On 13 October, the Commission decided to send a reasoned opinion, giving Portugal one week to reply. On 20 October, the one-week deadline expired without any reply from the Portuguese authorities having been received. The referral to the Court of Justice with an application for interim measures is necessary because the Portuguese authorities have still not suspended their decision of 18 June. The merger approved by the Commission on 3 August has consequently still not been implemented. Furthermore, Portugal's decision to oppose the merger entails the suspension of the voting rights of BSCH and Champalimaud. Unless the suspension is withdrawn immediately, the way will be open for a hostile bid for Champalimaud by Banco Comercial Portuguesas, which would definitively prevent the merger approved by the Commission. Under the interim measures requested, the Court would order the suspension of Portugal's decision of 18 June and of the measures resulting from it, and in particular the reinstatement of voting rights for BSCH and Mr Champalimaud. □

Commission Statements often need correction of their English. Decisions are kept as far as possible in their original terms. The BSCH case is a "provisional" text and has been widely corrected, but in language only.