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Competition - Portugal

Minister Reverses Merger Prohibition

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Acquisition

On March 24 2005 two Portuguese companies active in the highways market - Auto-Estradas do Oeste Concessões Rodoviárias de Portugal SA (AEO) and Brisa Autoestradas de Portugal SA, the latter acting through its wholly owned subsidiary Via Oeste SGPS SA - gave notice of a concentration to the Competition Authority as part of a bid to acquire joint control over Auto-Estradas do Atlântico Concessões Rodoviárias de Portugal SA (AEA).⁽¹⁾ The target was already solely controlled by AEO and was responsible for the planning, construction, financing, running and maintenance of the A8 highway linking Lisbon and Leiria. Brisa operates the only other route in Portugal's main road network linking the two cities, the A1 Lisbon to Porto highway.

Prohibition of Brisa's Concentration

After an in-depth, second-phase investigation the authority concluded that the merger could lead to the creation or strengthening of a dominant position, which would result in significant barriers to effective competition in: (i) the Lisbon to Leiria highway market, which would become a monopoly; and (ii) highways on the Lisbon to Porto route, as for 75% of the route the number of operators would be reduced from three to two. On April 7 2006 the two parent companies were given notice of the authority's decision to block the concentration. This was only the third prohibition of a concentration since the creation of the authority in 2003.⁽²⁾

Appeal Mechanisms

Parties to a concentration which has been blocked have two alternative means of appeal. They may file either (i) a jurisdictional appeal before the Lisbon Commercial Court under Article 54 of the Competition Act, or (ii) an extraordinary appeal on the grounds of prevailing national interest before the minister of trade within 30 days of notification under Article 34 of the authority's statutes.⁽³⁾ The parties opted for the latter mechanism in an effort to overturn the authority's verdict - the first time the right of extraordinary appeal has been exercised since the act came into force.

An extraordinary appeal is based on a ministerial assessment which seeks to identify a fundamental national economic interest which is served by the operation and offsets its potential adverse effects on competition by its benefits to the Portuguese economy.

A ministerial assessment must reach one of two conclusions: (i) the decision on the basis of strict competition criteria is upheld and the appeal is rejected; or (ii) the minister recognizes that the national interest outweighs the restriction of competition, allows the appeal and authorizes the concentration.

Appeal Decision

The minister of trade's decision began with a description of Brisa's importance to the Portuguese economy, stating that the merger would enhance the company's ability to innovate and develop its activities internationally and domestically.

However, the decision underlined the fact that Brisa is much smaller than its main competitors at EU level, comparing its market share with that of domestic operators in other southern European countries and benchmarking its charges to users. The minister also found it significant that Brisa's activity is regulated and carried out under a concession agreement with the state.

Therefore, the minister decided to authorize the operation because the concentration created benefits in the essential national economic interest which compensated for the restriction in competition.

Remedies

Nevertheless, in accordance with Article 34(2) of Decree-Law 10/2003, the decision was rendered conditional on five obligations concerning:

- rules relating to the simultaneous closure of both highways, as this would leave no alternative route on the main road network;
- prohibitions on repairing, maintaining or expanding both highways simultaneously;
- the need for explicit consent from the state before arranging the early repayment of loans or other financial arrangements entered into by AEA;
- the right of consumers to differentiated tariffs and prices; and
- compliance with national and EU rules regarding the award of construction contracts and the provision of services.

Comment

Merger control laws have existed in Portugal since the 1980s. However, no concentrations were blocked until the creation of the authority in 2003.

Widespread criticism in Portugal of the ineffectiveness of competition law enforcement and a realization of the need to adapt to new economic and political realities in Europe and worldwide led to the creation of the authority and the passing of a new Competition Act (for further details please see "[New Competition Authority Commences Operations](#)").

The latest decision has started a debate on government interference in merger control procedures and the consequent fragility of the authority (for further details please see "[From Birth to Childhood: The Growth of the Competition Authority](#)"), particularly as the decision not only takes into account political and economic arguments, but also demonstrates judgement of competition issues which is not necessarily compatible or coherent with the authority's approach in blocking the transaction.

Among other remarks related to competition, it stated that the management of the A1 and A8 highways was subject to a concession regime in which the essential factors of the activity, such as the price and quality of service, were regulated by the concession contract and were already subject to the control of a specific entity, *Estradas de Portugal*; furthermore, it stated that such regulatory control is expected to be reinforced by the forthcoming creation of a new regulatory body, the *Instituto das Infra-estruturas Rodoviárias*.

In addition, the clearance decision seems to rely on the absence of formal objections to the merger from competitors. However, lack of opposition by competitors to a proposed concentration does not necessarily mean that a transaction is pro-competitive and not liable to create or strengthen a dominant position - their silence might be explained by the possibility of wider benefits to the

industry at the expense of consumers.

The decision highlighted the merging parties' growth in the Portuguese market as a result of the concentration, enhancing their ability to expand internationally, innovate and access funding, as a factor which was considered to contribute to the "national economy's fundamental interests". However, these factors are fairly common to most concentrations and the decision failed to establish a sound causal link between the proposed transaction - the acquisition of joint control of a small competitor, but one controlling the only alternative to part of Brisa's most profitable route - and an enhanced capacity to innovate, compete abroad or reduce financing costs.

Surprisingly, the minister's clearance decision was issued without giving the authority an opportunity to reply to the merging parties' arguments in the appeal.

As this was the first government decision reversing a veto by the authority, it is still too early to determine whether it should be construed as a sign that the government intends to use this legal mechanism to support 'national champions' capable of competing in the international arena, even to the detriment of consumer welfare. However, there is always a risk that an appeal of this type may prove to be a setback for the establishment of a solid competition culture, as it may cast doubt on the future effectiveness and development of competition policy in Portugal. This risk should be thoroughly considered, but not overestimated: it is reasonable to expect that the exceptional appeal mechanism, which is available only in the event of a negative decision, will be used very rarely - and even more rarely with success. Therefore, it seems unlikely that the mechanism will endanger the intended balance between the authority's competence and the minister's powers.

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Endnotes

- (1) *BRISA/AEO/AEA* (Case 22/2005).
- (2) See the decisions in *Barraqueiro/Arriva (ATMS)* (Case 37/2004) and *Petrogal/Esso* (Case 45/2004), issued on November 25 2005 and December 14 2005 respectively.
- (3) A similar solution exists in the competition legislation of other jurisdictions, such as the *Ministererlaubnis* in Section 42 of the German Competition Act.

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