

Delivering expert knowledge to global counsel



Competition - Portugal

Competition Authority's first decision on negative sole control

Contributed by **Morais Leitão, Galvão Teles, Soares da Silva & Associados**

May 06 2010

On October 30 2009 the Competition Authority decided not to oppose a merger on the grounds that it was not liable to create or reinforce a dominant position that could result in significant barriers to effective competition in the national market for the production and distribution of roasted coffee. The merger operation consisted of the acquisition by Unicer - Bebidas de Portugal of negative sole control of NewCoffee II, a company whose corporate purpose was based on the management of shareholdings in other companies, particular companies operating in the coffee sector (ie, in the production and marketing of coffees and associated products).

The concentration involved the acquisition of a minority shareholding of between 30% and 40% in NewCoffee II. In this case the notifying company also had a right of veto on certain issues, such as special voting rights in decisions taken in the shareholders' meeting and the appointment of the board of directors, which went beyond the right of veto normally accorded to minority shareholders.

Accordingly, the company would benefit from a degree of influence similar to that enjoyed by an individual shareholder which jointly controls an undertaking (ie, the power to veto the adoption of strategic decisions). However, unlike in a jointly controlled company, none of the other shareholders enjoyed the same level of influence and the notifying party did not necessarily have to cooperate with other shareholders in order to determine the strategic behaviour of NewCoffee II.

The authority also considered that since the acquirer could provoke a deadlock situation, the shareholder would acquire 'decisive influence' within the meaning of Articles 8(1) and (3) of the Competition Act (18/2003). Finally, the authority concluded that the notifying party was the only shareholder with power to block strategic decisions in the target by virtue of veto rights enshrined in the shareholders' agreement. These rights were considered sufficient to bring this situation within the definition of 'negative sole control'.

The decision carries considerable weight, as it is the first merger case in which the authority has considered the concept of 'negative sole control'. The decision is at least theoretically significant for companies in a similar position as the notifying party. In the event that such a company decides to reinforce its shareholding position in the target, becomes the sole controlling undertaking and enjoys the power to determine the target's strategic commercial decisions (eg, by acquiring a majority of voting rights), there will be no change of control and a notification to the authority will not be required. The change from negative to positive sole control does not imply a modification of control for the purpose of merger control proceedings.

The authority's reasoning is also consistent with the European Commission's Consolidated Jurisdictional Notice on the Control of Concentrations between Undertakings, as in both cases - negative and positive - control is exclusive.

For further information on this topic please contact [Joaquim Vieira Peres](#) or [Alberto Saavedra](#) at [Morais Leitão Galvão Teles Soares da Silva & Associados](#) by telephone (+351 21 381 7400), fax (+351 21 381 7499) or email (vieira.peres@mlgts.pt or asaavedra@mlgts.pt).

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Authors

JJ Vieira Peres



Alberto Saavedra



Official Online Media Partner to the International Bar Association
An International Online Media Partner to the Association of Corporate Counsel
European Online Media Partner to the European Company Lawyers Association

© Copyright 1997-2010 Globe Business Publishing Ltd