

The Portuguese Competition Authority approves the acquisition of an outlet centre holding a fragmented definition of the relevant market (Freeport's outlet centre/Carlyle group)

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Portuguese Competition Authority (Autoridade da Concorrência), 11 May 2007, Carlyle Group / Freeport

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Carlos Botelho Moniz, Eduardo Maia Cadete, e-Competitions | N° 21389, www.concurrences.com

I. Introduction

On March 28, 2007, the Portuguese Competition Authority (**PCA**) was notified of a concentration under which *Carlyle Europe Real Estate Partners* (**Carlyle**) notified the acquisition of sole control over *Freeport Leisure Plc* (**Freeport**), through a takeover bid of the share capital of the latter on the London Stock Exchange.

Freeport holds in Portugal the *Freeport Designer Outlet*, the largest outlet centre in Europe with 75,000 square meters of space. The outlet is located in Alcochete, a short distance from the centre of Lisbon, near the Vasco da Gama bridge on the south side of the river Tejo.

Carlyle is not active in Portugal in the outlet centre business and consequently, in this merger review, there is no horizontal overlap between the activities of the parties in the Portuguese territory.

II. reasons that led to notification to the Competition Authority

Notwithstanding the fact that the merging parties did not meet the applicable notification criteria based on turnover in the Portuguese territory - *idus est*, the parties to the transaction did not jointly hold a turnover above 150 million euros in Portugal -, the PCA established that the market share notification criterion, provided in Article 9(1b) of the Competition Act [1], was met: creation or

strengthening of a market share equal to or greater than 30% in any given relevant market to the transaction.

III. The authority's narrow definition of the relevant market

The authority considered in its decision that the renting of spaces for commercial purposes is an autonomous market from the renting of spaces for housing purposes, as from a demand side perspective they satisfy different needs.

The following step in the authority's legal reasoning is to state that an additional segmentation must be made between the renting of space for commercial purposes in integrated spaces, as shopping centres, and the renting of space for commercial purposes on traditional shopping streets, without prejudice to the fact that in specific circumstances certain street shopping spaces have a capacity to attract clients and promote sales similar to the stores located in shopping centres.

In this context, it is stated in the decision that commercial establishments in shopping centres have less flexible (i) opening hours and (ii) physical exterior presentation. At the same time, the Authority considers that the stores located in shopping centres can benefit from the synergies of concentration and from a diversified commercial offer, including services and infrastructures (car parks,) and are capable of attracting customers during daytime but also during the evening and on weekends.

Taking *inter alia* these facts into account the authority considered as two autonomous markets (i) the renting of spaces for commercial purposes in integrated spaces, notably in shopping centres, and (ii) the renting of spaces for commercial purposes on traditional shopping streets.

But the authority's reasoning in the definition of the relevant markets went even further, as it established that an additional division should be executed between (i) traditional shopping centres and (ii) specialized shopping centres; as in the former the rents are supposedly higher for the retailers and have a different attending public. In relation to specialized shopping centres the authority additionally stated that it is also possible to differentiate at least between three specialized formats: (i) *Retail Parks*, (ii) *Factory Outlet Centres* and (iii) *Leisure Centres*.

In this context the Decision takes into account the following characteristics of each specialized format: (i) a *retail park* is a format which includes specialized retail stores, generally called *big boxes* or *power stores* with direct access to the car park or to pedestrian areas; (ii) a *factory outlet* centre is the format which includes retail stores of small and medium dimensions, where producers and retailers sell products with significant price reductions, whose origin are excess stocks; (iii) lastly, a *leisure centre* is a format which includes retail units specialized in a specific retail category and may be based on leisure components.

The authority includes the *Freeport Designer Outlet* in the factory outlet centres market which is further characterized as designed to attract retail stores which want to sell products, mainly clothes and footwear that cannot be sold through traditional retail channels, selling excessive production and off season products with significant discounts. In addition, the Authority states that the average physical space per retailer store is between 100 to 200 square meters in outlet centres whilst in retail parks, the stores have an average area between 1000 and 2500 square meters with a lower rent in comparison with outlet centres.

Furthermore, taking into account that from the demand side perspective retailers may choose to establish themselves in any given part of the Portuguese territory, the geographic market of renting commercial spaces in outlet centres is defined in the Decision as having a national dimension.

As a result of the foregoing, according to the decision, in the national outlet centre market, *Freeport*, with one outlet centre in the Portuguese territory, holds a 40% to 50% market share in terms of gross rental space in outlet centres.

Notwithstanding, as there is no horizontal overlap between the activities of the parties in the national territory, the authority concludes that the mere transfer of the provided market share from *Freeport* to *Carlyle* does not alter the market competition structure and it does not create or strengthen a dominant position leading to a significant impediment to effective competition in the relevant market.

IV. Comments

This case gives notice to the degree of detail that the Portuguese Competition Authority can implement in a substantive merger review of an apparent innocuous transaction. *In casu*, the market share attributed to the *Freeport* outlet centre - in the 40% to 50% market share range - appeared artificially inflated due to the fragmented manner in which the relevant market was defined - exclusively limited to outlet centres -, which led, in our perspective, to an overestimation of *Freeport*'s market share - notably through the separation, in the definition of the relevant product market, of outlet centres from retail parks and leisure centres, as well as from traditional shopping centres when there is non-negligible demand-side and supply-side substitution between these spaces for commercial renting purposes.

[1] At the time it was in force the Competition Act enshrined in Law no. 18/2003, June 11, as amended. A new Portuguese Competition Act, Law 19/2012 was published on 8 May 2012, which replaces the Competition Act of 2003.

Carlos Botelho Moniz Morais Leitão, Galvão Teles, Soares da Silva & Associados (Lisbon) cmoniz@mlgts.pt Eduardo Maia Cadete Morais Leitão, Galvão Teles, Soares da Silva & Associados (Lisbon) maiacadete@mlgts.pt
