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Competition - Portugal

Joint Venture in Travel Sector Prompts Clarifications on Merger Notifications

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Introduction

In a merger decision issued in September 2008 concerning a joint venture in the travel sector, the Competition Authority ruled on two jurisdictional points which are significant in assessing the scope of and responsibility for merger notifications: the issue of interrelated transactions and the issue of which undertakings should notify a concentration involving a change of controlling shareholders in an existing joint venture.

Although the authority has previously assessed interrelated transactions, the reasoning applied in this decision goes further than before in exploring the elements to be evaluated when determining whether two distinct transactions effectively result in the same concentration.

On the question of responsibility for notification, the authority expressly recognized that in the case of a change of joint controlling shareholders in an existing joint venture, special circumstances may apply in which not all of the joint controlling parent companies must act as notifying parties.

Facts

The concentration notified to the authority consisted of the establishment of a full-function joint venture between two independent groups: the Sonae Group (through its solely controlled subholding Sonae Distribuição) and the RAR Group. The joint venture encompassed each group's activities in the retail market for travel agencies (operated under the 'Star' and 'Geotur' brands) and in the wholesale market for tour operators.

Sonae Distribuição was active in the wholesale market for tour operators through Mundo VIP, a joint venture with third-party competitor Espírito Santo Viagens. Joint control over Mundo VIP had previously been recognized on the basis of a shareholders' agreement, as Sonae Distribuição held only a minority shareholding in the joint venture. The notified concentration involved not only the establishment of the Sonae-RAR joint venture and its acquisition of each party's (solely controlled) operations in the relevant markets, but also the transfer to the joint venture of Sonae's stakeholding in Mundo VIP. This transfer would entail a change in the joint controlling shareholders of Mundo VIP, with Sonae being replaced by its newly incorporated joint venture with RAR.

Assessment

The authority considered that the notified concentration comprised two transactions: (i) the creation of a joint venture, to be jointly controlled by Sonae and RAR, and this joint venture's acquisition of the share capital of certain companies previously under the sole control of each parent; and (ii) the potential acquisition by the Sonae-RAR joint venture of joint control over Mundo VIP through the acquisition of the stakeholding and voting rights held, directly or indirectly, by Sonae Distribuição.

Although the authority identified two distinct transactions, the legal and economic ties between them were found to be so close that they could be regarded as interrelated; therefore, they could be analyzed as a single concentration.

The authority began its assessment by addressing the issue of reciprocal conditionality between the two transactions. It found that the second transaction was conditional on the first, but not vice versa. While acknowledging that the absence of reciprocal conditionality might justify a separate analysis of the two transactions, the authority considered that other aspects of the operation should be considered in assessing the degree of interrelation. In particular, it focused on:

- the element of shared identity between the parties;
- the fact that both transactions were supported by the same agreement between the parties;
- the economic rationale of the deal; and
- the parties' intention as evidenced by the agreement, the reasons underpinning its execution and the terms of the notification form.

These factors demonstrated that the parties wished to place all of their activities in the travel agency and tour operator markets under their common joint control through the Sonae-RAR joint venture. This, in turn, justified the decision to assess the competitive effects of the transactions together, especially as the analysis would be no different if the two transactions were considered separately.

Moreover, Espírito Santo Viagens was not required to intervene in order for the Sonae-RAR joint venture to replace Sonae Distribuição as the joint controlling shareholder in Mundo VIP - the existing shareholders' agreement remained in force and Espírito Santo Viagens and the new controlling shareholder were not required to reach a new understanding in this regard. The authority considered that this supported its interpretation.

The authority considered that the fact that no action was required from a remaining joint controlling shareholder was an exceptional circumstance which justified the waiver of the general rule that in an acquisition of joint control, all companies enjoying such control must be notifying parties. This rule normally applies not only to parties that were and remain joint controlling shareholders, but also to parties that acquire joint control as a result of the concentration.

This issue is relevant to the wider question of which undertakings must notify concentrations. Although the authority considered the issue in the context of assessing the interrelated nature of the two transactions, it also drew further conclusions. The decision that Espírito Santo Viagens was not required to intervene as a notifying party was based on circumstances that the authority described as 'exceptional' (ie, the fact that no intervention is required by a former controlling shareholder in a modification of joint control involving its joint controlling shareholder and a third party). However, such circumstances arise frequently in business transactions. Therefore, a ruling that a prior controlling shareholder is not required to intervene in merger control proceedings is particularly welcome.

Comment

The authority's assessment of interrelated transactions places significant weight on the economic reality underlying the transaction, as well as its economic purpose. Its approach appears to be broadly consistent with the European Commission's general guidance in the Jurisdictional Notice on the Control of Concentrations and with European Court of First Instance guidance. However, it places less importance on the issue of legal or *de facto* mutual conditionality, at least when other elements are present.

The express recognition that in certain circumstances a joint controlling shareholder may not have to intervene as a notifying party in a concentration involving a change in joint control seems to be consistent with the commission's approach. Paragraph 144 of the notice indicates that existing and new shareholders should, in principle, notify changes in a joint control scenario; this wording implicitly allows for exceptions to the rule.

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