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Competition - Portugal

Assessing Market Share: Divergent Data Leaves Drinks Companies Over the Limit

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Merging companies in Portugal are required to notify their transaction to the Competition Authority before implementation. They must also observe a standstill obligation (ie, refrain from continuing the merger process until they receive approval). However, these obligations apply only to mergers in which the undertakings' aggregate turnover reaches a certain threshold or when the transaction would create or reinforce a market share of over 30%. The second condition has been criticized by academics and practitioners. Portugal is one of the few EU member states that still uses the market share criterion to determine whether notification is required. The main argument against this approach lies in its scope for uncertainty, since market definition is not an exact science and the problem is aggravated by the short time in which parties must file their notification. A notification submitted earlier in 2009 revealed another aspect of the problem, illustrating the difficulties involved in accurately assessing market share, especially when different research and data management companies provide contradictory data.

Schweppes/SCC Assets⁽¹⁾ involved Schweppes International Ltd's acquisition of a number of soft drinks brands owned by Sociedade Central de Cervejas e Bebidas, SA (SCC). Since the companies' combined turnover did not reach the threshold and their combined market share was under 30% in all of the relevant markets, the parties decided to proceed with the transaction, believing that they were not obliged to notify it.

However, in November 2008 the parties were unpleasantly surprised when the authority, in dealing with a concentration between their competitors in the same market,⁽²⁾ assessed Schweppes and SCC as holding market shares that, if combined, would represent over 30% of the market for non-carbonated fruit-flavoured soft drinks in the hotels, restaurants and catering channel. This meant that Schweppes and SCC were liable for a fine for failing to notify and suspend their transaction.

It transpired that the parties and the authority had used different market research companies - Canadean Ltd and Nielsen, respectively. Both companies are well-known global providers of market research information and both are frequently used by the European Commission when it assesses mergers. However, the undertakings and the authority ended up with different data on a crucial issue that could have had serious consequences.

Although Schweppes believed that it was under no legal duty, it decided to play safe: it suspended the transaction and notified the authority. Schweppes believed that Canadean's evaluation was a better reflection of the market. Among other things, it indicated that Canadean's estimates were all based on information gathered from producers and representatives in all of the sectors related to the beverage industry. Moreover, Canadean had sought to take account of total beverage consumption, since its data also assessed the drinks sold in the grocery channel (ie, for home consumption). Schweppes observed that the commission had previously made extensive use of Canadean data when assessing mergers in the beverage sector.

Nonetheless, the authority preferred Nielsen's estimates. It argued that information provided to Canadean by beverage producers relates only to total sales made in the national territory - Canadean then estimates how much of the total quantity sold is distributed through a given sales channel on the basis of a number of enquiries to producers. The authority concluded that although Canadean's statistics on total sales volume were accurate, its assessment of sales by distribution channel was less reliable.

The authority observed that Nielsen's estimates of total sales volume and the division of sales by distribution channel were based on sample market enquiries that represented the vast majority of points of sale. Therefore, Nielsen's estimates were more likely to reflect the actual state of the market.

In considering the fact that the commission regularly uses Canadean data, the authority observed that most

of the mergers for which Canadean's market information has been used have taken place in the beer market or have been cases in which the distinction between sales channels was irrelevant.⁽³⁾ In support of its view, it referred to the *Coca-Cola Company/Carlsberg A/S* merger, in which the commission recognized that "the Canadean price data [represents] selected retail prices which do not cover all distribution channels and packages".⁽⁴⁾

Therefore, the authority decided to use the data provided by Nielsen. It concluded that the merging parties enjoyed a market share of over 30% and that they were required to notify the merger. The notification was subsequently filed and the merger was unconditionally approved.

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Endnotes

(1) Case 3/2009.

(2) *Sumolis/Compal*, Case 22/2008.

(3) The authority gave the examples of *The Coca-Cola Company/Kar-Tess Group* (COMP/M1683), *Interbrew/Beck's* (COMP/M2569), *Interbrew/Spaten-Franziskaner/Löwenbräu/Dinkelacker* (COMP/M3289) and *Heineken/Scottish and Newcastle Assets* (COMP/M4999).

(4) Case IV/M833, Paragraph 34.

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