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Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

-- Contribution from Portugal --

4-5 April 2017, Managua, Nicaragua

The attached document from Portugal is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

15th Latin American and Caribbean Competition Forum
4-5 APRIL 2017, Managua, Nicaragua

Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

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-- CONTRIBUTION FROM PORTUGAL --

1. Merger review under the Portuguese Competition Act

1. The Portuguese Competition Act (Law No. 19/2012, of 8 May) establishes a mandatory pre-notification merger review system. The law also imposes a stand-still obligation to merging parties until the Portuguese Competition Authority (AdC) reaches a decision.

2. The AdC has also issued a series of guidelines on merger control to improve legal certainty and transparency, namely on economic analysis of horizontal mergers, the pre-notification procedure, and on the use of remedies in merger cases.

1.1 Notification thresholds

3. Mergers between undertakings are subject to prior notification when they fulfil one of the following criteria:

- The acquisition, creation or reinforcement of a market share equal to or greater than 50% of the domestic market in a specific product or service, or in a substantial part of it;

- The acquisition, creation or reinforcement of a market share equal to or greater than 30% but smaller than 50% of the domestic market in a specific product or service, or in a substantial part of it, in the case where the individual turnover in Portugal in the previous financial year, by at least two of the undertakings involved in the merger, is greater than 5 million euros, net of taxes directly related to such o turnover; and

- A turnover threshold in which the undertakings involved reach an aggregate turnover in Portugal in the previous financial year greater than 100 million euros, net of taxes directly related to such a

turnover, as long as the turnover in Portugal of at least two of these undertakings is above 5 million euros.

4. In 2012, the notification thresholds were reviewed, making them less strict and enabling the AdC to focus on more relevant cases, including those with high market shares that could potentially harm the country's small open economy[1].

1.2 Substantive test

5. Under the Portuguese Competition Act, mergers are reviewed in order to determine their effect on market structure taking into consideration the need to protect and promote effective competition in the market, for the benefit of intermediate and final consumers (Article 41 of the Portuguese Competition Act).

6. The AdC assesses mergers under the significant impediment of effective competition (SIEC) test, similar to the test applied by the European Commission and other jurisdictions of the European Union.

7. The substantive test is established in Article 41 of the Portuguese Competition Act as follows: "Concentrations which are likely to create significant impediments to effective competition in the domestic market or a substantial part of it, in particular if the impediments derive from the creation or reinforcement of a dominant position shall not be authorized".

8. The SIEC substantive test was introduced in the Portuguese Competition Act in 2012, replacing the dominance test established in the 2003 Portuguese Competition Act, under which the AdC would prohibit mergers creating or strengthening a dominant position that could result in significant barriers to effective competition in the Portuguese market or in a substantial part of it[2].

9. When carrying out merger review, the AdC is precluded from taking into account any considerations unrelated with competition, under the criteria laid down in the Portuguese Competition Act[3].

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1 In Portugal, merger notification thresholds include both a turnover threshold and a market share threshold. In 2012, legislative amendments on both notification thresholds were introduced to ensure a more targeted merger control by the AdC in terms of impact on competition, alleviating unnecessary administrative burdens on firms. At the same time, there was the concern to ensure that mergers that could raise competition concerns were kept under the AdC's scrutiny. During preparatory works for the legislative reform of 2012, an in-depth analysis of the PCA's merger control case record was carried out, leading to the conclusion that the market share threshold should be kept.

2 The dominance test was foreseen in Article 12 of the former Portuguese Competition Act, Law No. 18/2003, of 11 June.

3 Article 41 (2) of the Portuguese Competition Act states that, when reviewing mergers, the PCA shall take into account: *"a) The structure of the relevant markets and the existence or absence of competition from undertakings in these markets or in separate markets; b) The position of the undertakings concerned in the relevant markets and their economic and financial power, compared with those of their main competitors; c) The purchaser's market power and its ability to prevent the reinforcement of situations of economic dependence vis-à-vis the undertaking that results from the concentration, pursuant to article 12 of this law; d) Potential competition and the existence, in fact or in law, of barriers to entry into the market; e) The possibility of choice for suppliers, clients and users; f) The access of various undertakings to sources of supply and markets for their goods; g) The structure of existing distribution networks; h) Developments in the supply and demand of the products and services at issue; i) The existence of special or exclusive rights conferred by law or stemming from the nature of the products being traded or the services supplied; j) The control of essential facilities by the undertakings concerned and the possibility of access to these facilities provided for competing undertakings; k) Any technical and economic progress that does not constitute an*

1.3 Merger remedies

10. In the context of a merger review, the AdC may issue four different types of decisions: non-application (the operation does not fall within the scope of the merger control), non-opposition, non-opposition with remedies and prohibition. A prohibition decision may only be issued in phase II of proceedings.

11. Mergers may be subjected to remedies presented by the parties at any time of the proceeding (phase I or II).

12. The presentation of remedies to prevent competition concerns raised by the merger is entitled solely to the parties. When remedies are presented by the parties, the AdC focuses on the principles of (i) effectiveness (remedies are accepted when they eliminate the competition concerns identified, can be implemented and can be monitored); (ii) efficiency (remedies are the least burdensome solution to address the competitive concerns. Costs accounted for include market distortion (especially in behavioural remedies) and reduction of positive effects resulting from the merger and passed through to the customer); and (iii) proportionality, to assess if there is a balance between the costs of the remedies and the elimination of the competition concerns.

13. Structural remedies result in different risks than the ones derived from behavioural ones which are outlined in detail in the AdC's Guidelines. Structural remedies demand a careful assessment of whether the divestiture package will attract a suitable purchaser (composition risks), if there is a suitable buyer (purchaser risks), and the risks related to the potential deterioration of the proposed assets for divestiture (asset risks). For behavioural remedies, the main concerns relate to specification, circumvention and distortion risks, as well as monitoring and enforcement risks.

14. This structured approach of the AdC to remedies was consolidated in the Guidelines on Remedies published in 2011. These guidelines were based on the AdC's experience, as well as international best practice, with a strong influence from the UK remedies guidelines.

15. The publication of these guidelines not only structured how the AdC tackles the analysis of remedies, but also helped merging parties to improve the design of remedies, and to take those risks into consideration.

1.3.1 Merger clearance subject to remedies – Case EDP Renewables/Ativos ENEOP

16. As stated on its merger remedies' guidelines, the AdC has a preference for structural remedies and has accepted these type of remedies in the majority of cases. This option derives from both the type of competition concerns identified and the adequate way of addressing them. The AdC can also accept behavioural remedies if it finds them appropriate. Often, a combination of both has been adopted.

17. For instance, in a merger concerning the wind-power electricity generation market[4] in which EDP Renewables acquired the sole control over a number of wind-power parks, belonging to ENEOP, the AdC accepted behavioural remedies and also structural remedies. This merger raised concerns because of the potential impact in the complementary services market as a result of the merger.

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impediment to competition, provided there are efficiency gains that benefit consumers, stemming directly from the concentration".

4 Cfr. Ccent. 9/2015 – EDP Renewables/Ativos ENEOP. Clearance decision subject to remedies of 14 August 2015.

18. In fact, a rise of the levels of intermittence and unpredictability of wind-power electricity generation, in particular as a result of EDP Renewables' potential strategic behaviours in the management of both the power capacity and the effective electricity production by its own wind-power parks, would have resulted in an increase of the need to resort to complementary services markets (secondary and tertiary regulation) in order to adjust generation and consumption needs in real-time.

19. As the main beneficiary of the referred to increase to recourse to complementary services reserves - due to its overwhelming position in the complementary services market – the EDP Group would have the incentive to adopt strategic behaviours when managing its own wind-power parks with negative effects to consumers.

20. EDP Renewables offered behavioural remedies that were considered adequate and sufficient to eliminate the competition concerns. However, if competition concerns would still remain following the cessation of the behavioural remedies, a divestment remedy will be applied.

*1.3.2 Merger prohibition decision – Case Controlinveste*ZON*PT / Sport TV*PPTV*Sportinveste*

21. In the past five years the PCA has adopted only one prohibition decision[5] . This merger concerned the telecom sector. By the proposed transaction, PT[6] would enter into an already existing Joint Venture (Sport TV) between ZON Optimus and Controlinveste. Sport TV had been the sole supplier of Sports premium pay-tv subscription channels until Benfica TV (premium) started broadcasting in July 2013. Premerger, Sport TV was a 50/50 joint venture between ZON Optimus and Controlinveste. As a result of the merger, ZON Optimus and PT would each hold 25% of Sport TV' share capital and Controlinveste the remaining 50%.

22. The AdC's assessment resulted in major concerns in terms of vertical effects. Regarding customer foreclosure (i) the share of pay-tv subscribers enjoyed by non-integrated (with Sport TV) telecom operators would be reduced from around 50% to 10%; (ii) a reduction on PT's incentives to promote the entry/expansion of premium Sports channels would most likely occur; (iii) there would be an increase of ZON Optimus' incentives for customer foreclosure.

23. Also, important concerns were identified relating to input foreclosure: (i) how would the concentration increase Sport TV's market power; and (ii) how incentives to foreclose would increase as a result of the proposed concentration.

24. There were also competition concerns with coordinated effects in pay-tv and triple-play, as the merger would have (i) resulted in the creation of structural links between rival telecoms, (ii) increased the symmetry in terms of vertical integration, (iii) reduced the scope and incentives for differentiation via Sports Premium contents, (iv) harmonized the degree of information on competitors accessible by both ZON Optimus and PT, (v) harmonized cost structures, (vi) increased transparency creating fora for information exchange and (vii) strengthened barriers to entry as a result of the input and customer foreclosure effects.

25. The parties presented a package of behavioural remedies, which the AdC considered insufficient since it did not address some of the concerns (e.g. coordinated effects) and addressed ineffectively other competition concerns identified. Therefore, the AdC issued a prohibition decision.

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5 Cfr. Ccent. 4/2013 - Controlinveste*ZON Optimus*PT /Sport TV*Sportinveste*PPTV, prohibition decision of 31 July 2014.

6 At the time, PT was the largest Portuguese telecom holding company.

2. International Cooperation in Merger Control

26. Besides the formal cooperation mechanisms within the European Union[7], most of the AdC's international cooperation in the field of merger control takes place within the European Competition Network (ECN) Merger Working Group and the European Competition Authorities network (ECA).

27. At the European level, the need to foster increased consistency, convergence and cooperation among EU merger jurisdictions led to the creation of Best Practices on Cooperation between EU national competition authorities in merger review, published in 2011[8].

28. Within this informal system, each European competition authority informs its European counterparts of mergers notified to it which are also notifiable in other jurisdictions in Europe.

29. An informal system was put in place including a list of contact points and a template including basic public information on the transaction, such as which parties are involved, relevant economic sectors and geographic area, date of notification, relevant deadlines of the case and the case handling team.

30. This system allows for the establishment of a communication channel among authorities reviewing the same case in an early stage of the procedure and promotes the exchange of relevant public information. When there is a need for exchanging or discussing confidential information, the AdC requests a waiver to the merging parties in order to enable a deeper cooperation with other authorities.

31. The need to coordinate timetables is equally important for encouraging consisting outcomes. In fact, the importance of timing alignment was reflected in the legislative reform of the Portuguese competition law when an obstacle to timing alignment was eliminated. Under the previous law, merging parties had to notify the merger within 7 working days of signing an agreement. This is no longer the case as merging parties must now only notify the merger and obtain clearance before implementing the transaction. This allows for better alignment in review periods and cooperation.

32. Even if the merger is multijurisdictional, the competition concerns and the remedies to address them do not necessarily have an international dimension. In some cases differences in national or sub-national markets geographical markets may require different, specific remedies.

33. An interesting case that reflects this situation is the merger between JCDecaux and Cemusa, which was cleared without remedies in Spain, but raised serious doubts concerning possible significant impediments to effective competition in Portugal. The concerns raised related to the increase of the degree of market concentration (that was different from the Spanish case), competitive closeness between the undertakings participating in the transaction and the existing barriers to entry and to expansion, which could be increased with the merger. Although parties submitted remedies after the AdC opened an in-depth investigation, the agency considered they were not enough to solve the raised concerns. The parties ultimately decided to withdraw the notification.

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7 Cooperation mechanisms between the European Commission and EU national Competition authorities are established in Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation).

8 http://ec.europa.eu/competition/ecn/mergers.html

3. Concluding remarks

34. The evolution of the merger control regime in Portugal has consistently sought to enhance legal certainty and streamline procedural rules, building on international best practices, the AdC's experience and the interaction with relevant stakeholders.

35. The AdC's overall experience with the remedies procedure has been positive, as it has allowed the PCA to address competition concerns swiftly, in the benefit of consumers and businesses.

36. In multijurisdictional mergers, the extent of international cooperation depends on the case's specificities. Sharing basic information and defining contact points for international cooperation may be a first step towards deepening cooperation in mergers review.