

The Portuguese Competition Authority considers mere coordinated contacts between two companies can consubstantiate a merger (Zon/Ar Telecom concentration)

Portugal, Mergers, Relevant market, Undertaking (notion), Market definition, Merger (notion), Control (notion), Clearance Phase I (merger), Telecommunications, Services

Portuguese Competition Authority (Autoridade da Concorrência), 1 March 2012, Case Ccent 47/2011, Zon / AR Telecom

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I. Introduction

On December 9, 2011, the Portuguese Competition Authority (**PCA**) was notified of a concentration under which *Zon TV Cabo Portugal (Zon)* notified the acquisition of a group of assets, specifically the residential customers of *AR Telecom - Acesso e Redes de Telecomunicações (AR Telecom)*, subscribers of internet, fixed telephone and television services. The notification was made following an *ex officio* request by the Competition Authority to *ZON*, as the former determined that the transfer of the assets at stake involved a concentration for the purposes of the Competition Act subject to mandatory notification to the authority.

According to the decision these residential clients, prior to the termination of the provision of such services by *AR Telecom*, were transferred to *ZON* under a negotiated and coordinated process with *AR Telecom*.

II. Reasons that led the Competition Authority to consider that the mere non-binding transfer of AR Telecom client base constituted a concentration

ZON Telecom during the procedure sustained that the operation at stake, for the purposes of the Portuguese Competition Act [1], did not constitute a concentration. The Authority did not accept

ZON's arguments for the reasons detailed below.

The authority established that there was a draft agency agreement between *AR Telecom* and ZON which, although not concluded, led to the establishment of a significant number of contacts aimed at transferring *AR Telecom* clients to ZON. In addition, the monitoring of the transfer of clients was also performed by the two companies, adding their subscriptions to ZON's service platform. According to the authority, the operational aspects regarding the transfer of the clients in a period of two months were articulated between the companies and *de facto* there was an effective acquisition of clients of *AR Telecom* by ZON as a result of the agreed process.

Moreover, in the authority's legal perspective, ZON acquired a set of residential clients which were formerly *AR Telecom* clients, through the access to the latter's client database, within the coordinated contacts that were established between the parties aimed at transferring them to ZON. Referring to Article 8(1b) of the Competition Act, the authority states in the decision that the acquisition of control can arise from any act, which *in casu* is enshrined in a coordinated process aimed at transferring a client base to ZON, which has a decisive influence over these assets (the transferred client base). In this context, the Decision takes into account the European Commission Consolidated Notice on the control of concentrations [2] which provides in § 24: *The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e., a business with a market presence, to which a market turnover can be clearly attributed. The transfer of the client base of a business can fulfil these criteria if this is sufficient to transfer a business with a market turnover.*

Thus, the authority's assessment determines that the client base transferred to ZON has a clear attributed turnover and, consequently, ZON has a decisive influence over the client base, as it entered into agreements with the referred clients for the provision of communication services (including internet, fixed telephone and television services). The authority concludes that the concentration has a horizontal nature, as both companies were active in providing internet, fixed telephone and television services to residential clients.

III. The authority's reasoning for the non-acceptance of triple play as a relevant market

The authority considered in its decision that the provision of the three referred services in a package (fixed telephone, internet and television, the so-called *triple play*) to residential clients could not be qualified as an autonomous product market, notably by comparison with the individual offer of each service. The notifying party sustained, as reflected in the decision, that a growing number of users opted for the *triple play* in detriment of an individual offer for each service and that the *triple play* also encompasses the following features: (i) allows the subscriber to contract with a single operator, (ii) the consumer has access to a single invoice, (iii) the consumer is confronted with a single physical installation; (iv) the consumer equipment is compatible among itself; and (v) the multiple service provides options and functionalities which are not available outside integrated solutions. In terms of price it is also referred that the subscription of each of the three services individually (to a single or to different operators) is clearly more expensive than the acquisition of the *triple play* offer and additionally, under the *SSNIP test*, a 10% increase in the price of the *triple play* offer would not lead consumers to change to individual subscriptions of the three services, as this second option

would entail more costs to the consumer.

This existence of a *triple play* relevant market was substantiated by ZON with data from the Portuguese Telecommunications Authority (ICP-ANACOM); for instance, in the third quarter of 2011, 67,1% of subscribers had access to television under a package offer (*dual or triple play*) and *triple play* was the offer with more subscribers (51,5%).

These arguments were not, however, sufficient to convince the authority to conclude for the existence of an autonomous *triple play* product market.

With limited argumentation, the authority recognizes that there can be factors which may lead to the existence of such a market (*multiple play* market, including fixed telephone, internet and television), but in light of the specificities of the case, such assessment, by nature complex, was not deemed necessary (as the transferred assets corresponded to less than 10.000 clients from *AR Telecom* to ZON). The authority also stressed that the European Commission in its decisional practice did not recognize the existence of a *multiple play* or *triple play* market [3] and continues to assess each service individually.

In light of these legal and factual arguments the authority assessed and defined each of the three services (internet, fixed telephone and television) as autonomous relevant product markets. In relation to the relevant geographic market, the authority defined each as an infra-national market equivalent to the geographic areas where *AR Telecom* was active and the assets (client base) established, corresponding basically to the Metropolitan Area of Lisbon, the capital, and the Metropolitan Area of Oporto, located in the north of Portugal.

IV. The relevant markets and the related markets assessed in the decision

Based also on its decisional practice reasoning in preceding cases the authority took into account the following relevant markets: (i) market for narrow band access to the public telephone network in a fixed location for residential clients with a national dimension; (ii) market for local and/or national telephone services publicly available in a fixed location for residential clients with a national dimension; (iii) market for international telephone services publicly available in a fixed location for residential clients, with a national dimension; (iv) market for telephone services destined to non-geographic numbers publicly available provided in a fixed location, with a national dimension; (v) market for call origination on the public telephone network in a fixed location, with a national dimension; (vi) market for call termination on the public telephone network in a fixed location of each operator; (vii) market for broadband internet access for residential clients, with a national dimension; and (viii) retail market for pay-tv services with an infra-national dimension.

Furthermore, the authority also considered the following *related markets*: (i) market of television broadcasting rights of premium cinema content; (ii) market of television broadcasting rights of premium sport content; (iii) market of television channels with a premium cinema content; and (iv) market of television channels with premium sports content.

V. The substantive competition effects of the transaction

The market share of *AR Telecom* in any of the mentioned relevant markets was negligible, always significantly below the 5% mark - we recall that at stake was the transfer of 10.000 residential clients from *AR Telecom* to *ZON* - and, according to the decision, the *delta* [4] in any given relevant market was always below 150 which highlights the nonexistence of a material competition issue. The concentration was therefore cleared in phase I.

VI. Comments

This case underlines the margin of discretion that the Portuguese Competition Authority, as any EU Competition authority, can have when determining the existence of a concentration subject to notification.

Although apparently there were no formal agreements concluded among *ZON* and *AR Telecom* for the purpose of transferring roughly 10.000 residential clients of *AR Telecom* to *ZON*, the mere contacts and operational coordination established between the parties with the aim of transferring the residential client base to *ZON* was sufficient for the authority to sustain that such contacts implied a concentration according to the Portuguese Competition Act. The legal standpoint adopted by the authority appears to be overstretched as apparently there were no binding instruments that could guarantee the transfer of the client base. In a dry approach, one could consider that basically *AR Telecom* granted *ZON* access to its residential client base, as it wanted to terminate in a controlled environment its activity in the residential sector without causing potential hazards to its clients.

However, reality gives evidence that this was not the authority's approach which *ex officio* legally compelled *ZON* to notify the *concentration* under a somewhat discretionary and weak reasoning.

Almost on a side note, we acknowledge the significant regulatory cost of the notification for *ZON*. Just in terms of authority's fees, which is based on the turnover of the parties to the transaction, the notification led to a minimum cost of €2,5 per potentially transferred client (the client base was estimated at 10.000 clients) as the applicable notification fee due to the Portuguese Competition Authority amounts to €25.000,00 based on the turnover of the notifying party - *see* Competition Authority Regulation No. 1/E/2003, 25 July 2003, *on the fees payable for the appraisal of concentrations between undertakings*. If the authority applied the provision of the referred Regulation, which in case of an *ex officio* proceedings establishes that the applicable notification fee is equivalent to double the amount of the applicable base fee - in such a scenario, a €50.000,00 fee would have been paid by *ZON*, with a *regulatory* cost of €5,00 per potentially transferred client.

[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.

[2] Commission [Consolidated Jurisdictional Notice](#) under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, [OJ C 95, 16.4.2008, p. 1-48](#).

[3] The following Commission decisions and cases are identified by the authority: European

Commission, 6 September 2006, [Case COMP/M.4338](#), **Cinven/ Warburg Pincus/ Casema/ Multikabel**, §§18; 21 September 2007, [Case COMP/M.4809](#), **France Telecom/ MID Europa Partners I**, §§32 and 33; 29 June 2009, [Case M.5532](#), **Carphone Warehouse/ Tiscali UK**, §§11 and 76; 26 October 2009, [Case M.5584](#), **Belgacom/ BICS/ MTN**; 25 October 2010, [Case COMP/M.5734](#), **Liberty Global Europe/Unitymedia**, §§8 and 43 to 48 and 11 March 2010, [Case COMP/M.5748](#), **Prisa/ Telefónica/ Telecinco/Digital**, §§64 to 68.

[4] In order to measure concentration levels, the authority, in the same way as the European Commission, often applies the Herfindahl-Hirschman Index (HHI). While the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger, the change in the HHI (known as the ‘delta’) is a useful proxy for the change in concentration directly brought about by the merger. The authority, as the European Commission, is unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1 000 and 2 000 and a delta below 250, or a merger with a post-merger HHI above 2 000 and a delta below 150, except in very special circumstances.

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