

### The Portuguese Competition Authority holds that the non-timely execution of a divestiture commitment leads to an opposition decision (Powervia / Laso merger)

**Portugal, Mergers, Relevant market, Notification (mergers), Remedies (mergers), Market definition, Sole control, High market shares, Prohibition (mergers), Market power, Clearance Phase II (merger), Transport**

Portuguese Competition Authority (Autoridade da Concorrência), 12 January 2012, Case Ccent 16/2011, Phase II decision with commitments, Powervia, S.A. / Auto - Laso, S.A., Probilog - Transportes e Logística, Lda. and Laso - Abnormal Loads, S.A.

Portuguese Competition Authority (Autoridade da Concorrência), August 2012, Case Ccent 16/2011, Opposition decision due to the non-execution of the proposed and accepted commitments, Powervia, S.A. / Auto - Laso, S.A., Probilog - Transportes e Logística, Lda. and Laso - Abnormal Loads, S.A.

EU Competition Law Handbook n° PT M22

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## I. Introduction

On April 20, 2011, the Portuguese Competition Authority (PCA) was notified of a concentration under which *Powervia, S.A. (Powervia)*, an investment fund, notified the acquisition of sole control over the following companies: *Laso - Transportes, S.A., Auto - Laso, S.A.* and *Probilog Abnormal Loads, S.A.* (these three companies jointly referred as **Laso**). As a result of the transaction, *Powervia* aims to control these companies which are active in the provision of special road transport services in the Portuguese territory. In addition, *Powervia*, prior to the merger, is already active in the provision of special road transport services in Portugal through two companies: *Transportes Gonçalves, S.A.* and *FHM - Transportes Especiais, S.A.* Thus, this transaction had a horizontal nature.

## II. The negative market effects of the transaction

According to the authority, the transaction would lead to a combined market share of 80-90% in the national relevant market for the provision of special road transport services, as the notifying party held a market share between 30-40% and *Laso* a 50-60% market share. This relevant market comprises special transport by road of cargo with an abnormal dimension and tonnage, transport

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which is subject to specific public licenses by the Portuguese transport regulator and which also entails a significant price difference *vis-à-vis* the cost of a standard road transport service.

During the merger market investigation conducted in Phase II by the authority, a very significant number of respondents to requests for information – *maxime* competitors and clients of the parties to the transaction –, identified *Powervia* and the three target companies as the only entities active in this market or as the most prominent economic agents active in the provision of special road transport services.

Thus, the authority concluded that the negative competition effects of the transaction were substantial, as the parties post-concentration would hold a 80%-90% market share, leading also to a *HHI* and *delta* [em] of more than 2500 and 250, respectively, in the relevant market. The authority also concluded that the barriers to entry in this market were significant due to the considerable costs associated with the acquisition of the relevant road transportation equipments and the relevance of the developed engineering *know how* (for instance, in terms of best transportation routes, assessment of road infrastructures and cargo load, unload and transport). Thus, the parties to the transaction would have the ability to deteriorate the conditions applied to the entities which use this type of road transportation services, including also potential price increases – as the users would not hold in the post-merger scenario any negotiating power which could discipline the behaviours of the *Powervia* group of companies in terms of service and price conditions.

In a nutshell, the *company* arising from the merger would have the ability to act autonomously from its competitors and clients having consequently the capacity, as well as the incentive, to increase prices or to deteriorate other strategic variables of the special road transport services – including quality.

### **III. The Commitments package and the approval of the transaction**

*Powervia*, with the aim of keeping the market contestable, submitted to the authority a *first* commitment package of behavioural and structural remedies, including, first and foremost, the sale of one group company supplemented with additional assets directly related with the special road transport service market. This first package was considered insufficient by the authority and, on November 2 and 9, 2011, a second commitment package was submitted before the authority which entailed the additional obligation of *Powervia* not to execute the transaction before establishing a promissory agreement with an adequate acquirer – an up-front buyer solution – for the company to be divested (company reinforced and added with assets related to the special road transport service market). In terms of behavioural commitments, the notifying party would also inform and declare by letter, addressed to all the entities to which it had previously provided road transport services of any type in the preceding 5 years that they were not bound by any exclusivity clause. The authority executed a market test in relation to the second commitment package before a very significant number of operators active in the general road transport sector. Overall, the respondents considered the commitments insufficient or difficult to execute – *maxime*, the existence of an up-front buyer for the company to be divested in light of the felt and adverse financial-economic context.

The authority accepted a third final commitment package, provided by *Powervia* on November 29,

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2011, under which the economic viability of the assets to be divested, including a group company, was strengthened and cumulatively, a non-implementation condition of the transaction was included in the commitments package: prior to *Powervia* executing a promissory agreement with an up-front buyer - for the assets to be divested - the transaction could not overall be executed. A monitoring trustee was also part of the offered commitments.

The authority accepted this package, as it considered that (i) the divested assets would provide the acquirer with the necessary resources to act as a viable autonomous player in the relevant market; and (ii) the up-front buyer solution, safeguarded the authority's issues with the transaction, as the merger could not be implemented until the notifying party provided a buyer for the assets under a promissory agreement, being in any event a buyer subject to prior endorsement by the authority.

Thus, the concentration was approved by decision of January 12, 2012, subject to the fulfilment of the commitments by the notifying party.

## **IV. The non-timely execution of the core commitment led to a prohibition decision**

Following the approval of the transaction with commitments on January, 2012, *Powervia* had a four month period, until May 14, 2012 [[em](#)], to divest the assets. This deadline was subject to a time extension requested by the company, but the request was not accepted by the authority, which by its decision dated May 17, 2012, considered that there were no supervening circumstances which could justify the non-execution of the divestiture obligation in the original time schedule - as the market conditions and the economic-financial context used as justification by *Powervia* for the extension request, had been taken into account when granting the original four month divestiture period.

Consequently, the authority, by its decision dated August 12, 2012, due to the non-timely execution by *Powervia* of the core of the provided commitments, declared that the notified transaction could not be implemented.

## **V. Comment**

This case substantiates the hard lesson that the approval of a transaction with commitments by a competition authority is only half way on the pathway to success for the notifying party, as an incomplete or deficient timely execution of the provided commitments can entail a subsequent opposition decision, erasing all the relevant efforts made by the company (human and financial) with the aim of concluding successfully the transaction. In addition, a notifying party, when proposing and negotiating commitments, should carefully ponder, when applicable, if the envisaged timeframe for their execution is materially adequate and not underestimated.

[[em](#)] 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, except in very special circumstances, to identify horizontal competition concerns in a merger with a post-merger HHI

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between 1000 and 2000 and a delta below 250, or a merger with a post-merger HHI above 2000 and a delta below 150, conditions not met *in casu*.

[[em](#)] According to §§ 23 and 26 of the non-confidential version of the authority's decision in Case Ccent 16/2011, dated August 2, 2012.

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