

The Portuguese Competition Authority requests the examination of a merger by the European Commission (Associated British Foods)

Portugal, Mergers, Effect on interstate trade, Notification (mergers), Sole control, Change of control, Clearance Phase II (merger), Agriculture/Food products

Portuguese Competition Authority (Autoridade da Concorrência), 18 December 2007, referral to the European Commission, Case Ccent 69/2007, Associated British Foods plc / Companies and assets of the GBI Holding B.V. group, including GBI Unipessoal, Lda.

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I. Introduction

On October 11, 2007, the Portuguese Competition Authority (PCA) was notified of a concentration under which *Associated British Foods, Plc (ABF)* notified the acquisition of sole control over several assets and companies of *GBI Holding, B.V.*, including in Portugal *GBI, Unipessoal, Lda (GBI business)*. As a result of the transaction, *ABF* aims to control companies and assets of the *GBI business* operating in Belgium, The Netherlands, France, Spain, Portugal and Italy.

ABF is active in the yeast production and distribution business through its companies operating within its *AB Mauri Division*. The *GBI business* is also primarily active in the production and distribution of yeast products, including in the territory of Portugal.

II. The referral to the European Commission

The transaction was notified by *ABF* to the national competition authorities of four European Union Members States: Portugal, Spain, France and the Netherlands.

The Spanish Competition Authority ("*Comisión Nacional de Competencia*"), based on Article 22(1) of the EU Merger Regulation [1] requested, on November 7, 2007, the European Commission to examine the case as it deemed that the transaction affected trade between Member States and threatened to significantly affect competition within its territory. This first request was subject to subsequent join requests by the competition authorities of Portugal and France. In the specific case

of Portugal, the Competition Authority adhered to the Spanish request in a letter dated November 28, 2007, maintaining that the transaction would have adverse effects in the compressed yeast market in Portugal, where the operation would reduce the number of effective suppliers from three to two [2]. The French Competition Authority referral request was made on November 29, 2007.

III. Consequences of the referral request to the European Commission at the national level

The Board of the Portuguese Competition Authority, in a decision dated December 18, 2007, declared the national procedure terminated, due to the acceptance of the referral request by the European Commission and the concomitant legal impossibility of the Portuguese authority applying the Portuguese Competition Act [3] to the transaction, as the case under Article 22(3) [4] of EU Merger Regulation was reviewed by the European Commission.

Thus, due to the appraisal by the European Commission, the national case was closed by the authority under the rule of Article 122 of the Portuguese Administrative Procedure Code (“*Código do Procedimento Administrativo*”) which provides that the *procedure is extinct when the competent body to adopt the decision verifies that the sought aim or the object of the decision has become impossible or useless*.

IV. Commission’s decision

The European Commission cleared under the EU Merger Regulation the proposed acquisition of certain assets of *GBI* by *ABF* [5], subject to conditions as both companies produced dry, compressed and liquid baker’s yeast. The Commission’s in-depth market investigation opened in April 2008 had indicated that the concentration, as originally notified, would have raised competition concerns in the markets for compressed baker’s yeast in Spain and Portugal.

To remedy the Commission’s concerns during the in-depth investigation (Phase II), the notifying party offered commitments, which removed any serious doubts as to the compatibility of the notified operation with the common market. Specifically, *ABF* offered to divest the *GBI* businesses in Spain and Portugal, whilst ensuring that these businesses were linked to a sufficient production capacity. In light of these commitments, the European Commission concluded that the proposed transaction would not significantly impede effective competition in the European Economic Area or any substantial part of it.

V. Comment

This case gives evidence of the sound articulation that can exist between EU national competition authorities and the European Commission in the review of a merger transaction which affects trade between Member States and threatens to significantly affect competition within the territory of several Member States - *in casu*, in Portugal and Spain. The joint work of the national competition authorities with the Commission led to the acceptance by the notifying party of a multijurisdictional remedy package which removed the significant impediment to effective competition identified in the yeast markets in Portugal and Spain.

Regarding this case, see also : [Andrea Amelio, Pablo Asbo, Ruben Maximiano, Viktor Porubsky, Miguel de la Mano, *The European Commission conditionally approves merger in the baking industry after analysis of possible coordinated effects \(ABF,GBI\), 23 September 2008, e-Competitions, n° 35092*](#)

[1] Council [Regulation \(EC\) n° 139/2004](#), of 20 January 2004, on the control of concentrations between undertakings (ECMR), [OJEU L 24, 29 January 2004, p. 1-22 ECMR](#).

[2] See European Commission press release [IP/08/591](#), dated 7/04/2008.

[3] 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.

[4] Article 22(3) of the Regulation provides: “3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine, the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request. The Commission shall inform all Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4. The Member State or States having made the request shall no longer apply their national legislation on competition to the concentration.”

[5] See Europa press release [IP/08/1392](#), 23/09/2008. European Commission, 23 September 2008, [Case No. COMP/M.4980, ABF/ GBI Business](#).

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