Competition - Portugal

Competitive Effects: Are Venture Capital Companies Standalone Undertakings?

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Some of the Competition Authority's decisions over the past two years have sent contradictory messages about the way the authority assesses the competitive effect of concentrations in which a venture capital company or an investment fund is the acquirer.

When assessing a venture capital company's turnover thresholds, the authority has always considered the turnover of the economic group that controls the company. However, for the purpose of assessing competitive effects, it is unclear whether the authority takes account of the activities performed by the entire group or merely those of the venture capital company or investment fund involved in the acquisition.

Decree-Law 375/2007 allows venture capital companies to invest venture capital, either directly or through venture capital funds, and to manage such investments. However, venture capital funds are autonomous assets without a legal personality; they belong to their shareholders and are managed by venture capital companies exclusively on behalf of and pursuant to the interests of their investors.

In *Inter-Risco/Serlima Gest/Serlima Services*(1) the authority initially adopted an approach whereby in the assessment of the competitive effects of the concentration, it would consider the acquisition to be made by the venture capital company, not by the company's group or by any participants in the fund. The issue is particularly relevant in light of the potentially wide range of activities of the economic groups to which venture capital companies belong and the role of investment funds in general in mergers and acquisitions. The authority justified its position by arguing that venture capital companies enjoy autonomy of administration and decision-making independence; thus, neither the group that controls them nor the investors in the capital fund can exercise determinant influence over their management.

This seems to indicate that only activities carried out by an acquiring venture capital company are taken into account for the purposes of assessing the substantial effects of a concentration in the market. However, in two subsequent decisions involving the same venture capital company, the authority's references to the activities of the entities controlling the company cast doubt on the way in which this entity conducts its substantial competitive assessment.

In *Newcoffee (Inter-Risco)/Sanzala/611*(2) the authority expressly stated that no company connected to the economic groups in question was present in a relevant market. In *Inter-Risco/Frissul*(3) the authority considered the entire group's activities to be relevant and took into account that the venture capital company, its controlling shareholder and all group companies were absent from the relevant markets.

Unfortunately, the authority has not provided guidance in other decisions involving investment vehicles, such as private equity funds. In *Barclays Private Equity France SAS/NV de Smet SA Technologies and Services,*(4) which involved an acquisition by a private equity fund ultimately controlled by Barclays Bank plc, the authority appeared to take account of only the private equity fund's activities when investigating possible market overlaps between the acquirer and the target.

The authority's decisional practice demonstrates that the turnover of venture capital companies or investment funds is calculated according to the general rule in Article 10(1) of the Competition Law (18/2003) - similar to Article 5(4) of EU Regulation 139/2004 - and that the turnover of the entire economic group is paramount. However, on a case-by-case analysis it is not entirely clear whether the substantial competitive analysis should take account of the activities of the entire group involved or merely those of the relevant company. This is particularly the case since the decision in *Inter-Risco/Serlima Gest/Serlima Services*, which seems to contradict the authority's previous approach.

The conceptual discrepancy between the calculation of turnover and substantial appraisal is not new. In

ITMI/Marrachinho,(5) which involved franchised companies, the authority applied what seems to be the opposite reasoning to that in *Inter-Risco/Serlima Gest/Serlima Services*. When calculating the notifying party's turnover thresholds, the authority did not take into account the franchisees' network (ITMI-Intermarché) - an approach consistent with the European Commission's practice(6) and guidelines.(7) However, when examining local overlapping with the target and estimating aggregate market shares for the purpose of the competitive assessment, the authority decided to take into account the buyer's entire franchise network, based on common resources shared by the network and a consumer perception that the network constituted a single brand.

It appears that the authority has not followed a consistent line in deciding whether to consider the turnover and market activities of an entire group or merely those of the notifying party. Greater guidance in upcoming decisions would prevent uncertainty in the competitive assessment of mergers involving venture capital companies, other investment funds or private equity acquisition vehicles.

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Endnotes

(1) 46/2006, November 23 2006.

(2) 58/2007, September 19 2007.

(3) 12/2008, March 13 2008.

(4) 64/2006, January 19 2007.

(5) 12/2007, April 9 2007.

(6) See *UBS/Mister Minit*, IV/M 940, July 9 1997.

(7) See Commission Consolidated Notice under Council Regulation (EC) No 139/2004, on the control of concentrations between undertakings, Sections 19 to 21.

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