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– Contribution from Portugal -

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The attached document from Portugal is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 27-28 September 2022 to be held in Rio de Janeiro, Brazil.

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Session III: Media Mergers

– Contribution from Portugal –

1. Introduction

1. There have been major changes in the distribution and consumption of media recently, and these developments are changing the way in which firms compete in this sector.

2. As the main sources of income for firms operating in the media sector tend to be subscription fees and advertising, the assessment of a media merger is not usually limited to a price-effect analysis but also to its impact on output, quality, choice, and innovation.

3. Media mergers can be of horizontal (for example, a merger between two TV channels) or vertical nature (for example, a merger between a content supplier and an operator of a platform that bundles and delivers content to consumers). This contribution focuses exclusively on vertical media mergers by discussing the Altice / Media Capital merger which was assessed by the Portuguese Competition Authority (Autoridade da Concorrência, 'AdC') in 2017-18[1].

4. The remainder of this contribution is organized as follows. Section II describes how the AdC analyses vertical mergers. Section III makes a brief description of the Altice / Media Capital merger. Section IV concludes.

2. Overview: vertical merger assessment in Portugal

5. In Portugal, mergers are notified whenever certain turnover and/or market share thresholds are met[2] and, in this regard, no differentiation is made between horizontal or vertical mergers.

6. For the purpose of assessing vertical mergers, the AdC will typically refer to the European Commission's non-horizontal merger guidelines.[3]

7. In general, the AdC considers vertical mergers less likely to result in a significant lessening of competition than horizontal mergers. However, there is a variety of ways in which a vertical merger can raise competition concerns, such as input and/or customer

[1] Ccent no. 35/2017 – Altice/ Media Capital. More information is available (in Portuguese) at: https://extranet.concorrencia.pt/PesquisAdC/CCENT_Page.aspx?Ref=Ccent_2017_35. See press release (in English) at: https://www.concorrencia.pt/en/articles/adc-opens-depth-investigation-alticemedia-capital-merger. The merger was abandoned by the Parties before a second phase decision was issued.

[2] According to Article 37(1) of the Portuguese Competition Act, notification is required when: (i) a market share equal to or greater than 50% of the domestic market is acquired, created or reinforced (market share criterion); (ii) the undertakings involved have reached an aggregate turnover in Portugal greater than € 100 million and the turnover in Portugal of at least two of these undertakings is above € 5 million (turnover criterion); and (iii) a market share equal to or greater than 30% but smaller than 50% in the domestic market is acquired, created or reinforced, and individual turnover in Portugal, by at least two of the undertakings involved, is greater than € 5 million (mixed criterion).

[3] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008.

foreclosure, higher barriers to entry and other non-horizontal effects such as access to confidential information. Additionally, coordinated effects might arise from vertical mergers.

8. The AdC usually follows an "ability/incentives/effects" analysis, but the analytical framework is flexible and chosen on a case-by-case basis to accommodate all plausible theories of harm (e.g., coordinated effects).

9. Efficiency arguments are considered in the analysis, but the burden of proof lies on the notifying Parties and should follow the general and cumulative principles set out by the European Commission in its guidelines.

10. As a general rule, the AdC is open to accept remedies to address potential competitive concerns in vertical mergers. However, there is a strong preference towards structural remedies in detriment to behavioral remedies.[4] The AdC tends to accept short term behavioral remedies only under a rather narrow scope of conditions, since this type of remedies does not act on the causes of the competitive concerns (i.e., market structure and/or contestability) and is limited to restraining the adverse effects resulting from the merger (i.e., it addresses the symptoms of the problems, not the causes).

3. Input foreclosure in the Media Sector: the Altice/ Media Capital merger

11. In August 2017, a wholly owned subsidiary of Altice Europe N.V. ('Altice'), a media and telecoms group, announced it would acquire total control of Grupo Media Capital, SGPS, S.A. ('MC'), the main media and contents producer operating in Portugal.

12. This merger was notified to the AdC and led to an in-depth investigation on the potential negative impact of the merger on competition in the telecom and media markets in Portugal. Altice submitted a set of behavioral remedies which did not adequately address the competitive concerns identified by the AdC.

13. Although Altice decided to withdraw the notification, the AdC was able to conclude, in its competitive assessment, that the transaction would ultimately lead to serious impediments to effective competition in the telecom and media markets, with negative impacts on consumers.

3.1. Background

14. Altice (through the telecom and pay-TV operator MEO) is the former state-owned telecoms company active in all segments of electronic communications services, including the management of the Digital Terrestrial Television network. MEO supplies telecom services (voice, video, data, and internet) supported on both mobile and fixed networks and is active in the retail supply of pay-TV channels through its pay-TV platform and multiple-play services (i.e., bundled services for voice, TV and internet). In 2016, MEO had 39 percent of all pay-TV subscribers and represented 43 percent of multiple-play services revenues in Portugal.

15. At the time, the target, MC, controlled, *inter alia*, the television studio and content producer Plural, Portuguese-speaking TV channels under the TVI brand (TVI, TVI24, TVI Ficção, and TVI Reality), as well as a number of media outlets (radio stations, an internet portal and an online content platform).

[4] See AdC's Guidelines on merger remedies, available (in Portuguese) at https://www.concorrencia.pt/sites/default/files/Comunicado201109_DOC_2-Linhas_de_Orientacao.pdf.

16. TVI channels represented, in 2016, one quarter of average daily share view of all TV channels distributed in Portugal. Moreover, TVI programs (mostly produced by Plural) were, at the time, consistently in the TOP 10 most viewed programs (first 6 out of 10 most-viewed programs in 2016, excluding football matches). Advertising in TVI channels represented 40-50 percent of all TV advertising revenues in Portugal in 2016.

17. Altice and MC supply few services that directly compete with one another. Their main relationship is that MC provides TVI channels to Altice that are subsequently distributed to consumers. Therefore, this was primarily a vertical merger, between one of the main players in the telecoms sector, retail distribution of pay-TV services and multiple-play services, on the one hand, and the market leader for the wholesale distribution of audio-visual content and Portuguese-speaking TV channels, including the top-viewing channel (measured in terms of share of audience and advertising revenues), TVI, on the other.

3.2. Assessment

18. The transaction related to all the levels of the TV value chain and raised competitive concerns in several different vertically related markets, the most relevant of which concerned the possibility of foreclosing MC's TVI channels to Altice's rivals in the provision of pay-TV services (input foreclosure).[5]

19. In this context, the AdC assessed the possibility that Altice would either prevent rival pay-TV operators from obtaining access to TVI channels or would increase the carriage fees for those channels in such a way that would result in significant impediments to competition in the provision of pay-TV services, whether or not integrated in multiple-play offers.

20. This type of anti-competitive effect has been previously identified, for example, by the FCC in the Comcast/NBCU merger and by the European Commission, in the Liberty Global/Corelio/W&W/De Vijver Media transactions.

3.2.1. Exclusion of Rivals (total input foreclosure)

21. First, the AdC assessed whether the transaction would increase MC's ability and incentive to deny the provision of TVI channels[6] to Altice's retail competitors, causing them to become less effective competitors.

22. The AdC concluded that TVI's main channel and/or TVI24 are important to Altice's competitors and that there are no good substitutes from other sources that would allow Altice's rivals to implement effective and timely counterstrategies. Furthermore, the AdC concluded that such a strategy would be profitable for the vertically integrated firm.

23. Foreclosing TVI channels to Altice's rivals would entail (i) losing carriage fees from the foreclosed rival pay-TV operators; (ii) losing advertising revenues from reduced viewer reach of these channels; and (iii) losing customer interaction revenues,[7] also from reduced viewer reach of these channels.

[5] Besides input foreclosure concerning TV channels, the AdC assessed the possibility of input foreclosure relating to other products (e.g. advertising), customer foreclosure, as well as the impact resulting from the access to commercially sensitive information.

[6] Namely, the main and generalist channel TVI and TVI24, a 24h news channel.

[7] Customer interaction revenues are generated from calls made by the viewers in the course of a particular show or TV contest. These revenues are significant for the main Portuguese channels such as TVI, SIC, and RTP.

24. In the analysis, it was assumed that advertising and customer interaction revenues were directly proportional to the subscriber share of each pay-TV platform prior to foreclosure. Thus, input foreclosure strategy would result in a revenue loss corresponding to the pre-transaction advertising revenues of each rival platform reduced by the proportion of subscribers on these platforms that would switch to Altice or other non-foreclosed platforms in order to be able to continue watching TVI channels.

25. Moreover, it was assumed that a reduction in advertising and customer interaction revenues would result in an equal reduction in MC's profits, given that costs would not change.

26. The gains from total input foreclosure would equate to the additional profits earned by Altice resulting from new subscribers that would switch to Altice's platform in response to the loss of TVI's channels in the foreclosed platforms.

27. In order to estimate subscriber switching rates, the AdC had to the determine both the fraction of customers that would decide to leave Altice's rivals (the departure rate) and the fraction of these departing customers that would switch to Altice (diversion rate).

28. For the diversion rates, historical data collected by pay-TV operators was used. For the departure rate, the AdC conducted a consumer survey with 1,550 interviews where households were asked to qualify (on a scale of 0 to 10, where 10 is "I would switch for sure") the probability of switching in case their current pay-TV service provider would not offer TVI main channel, TVI24 or both in its channels *bouquet*.

29. The results of the consumer survey showed that a majority of Altice's rivals' subscribers would not switch from their current providers if TVI main channel, TVI24 or both were withdrawn from the channels bouquet. However, a significant number of respondents showed a very high willingness to switch (considering only level 10 of the survey scale): around 15 percent of respondents in the case of the withdrawal of TVI main channel, 7 percent for TVI24 news channel and 18 percent for both. From this survey, it was thus possible to estimate the actual number of subscribers switching to Altice as a result of a total foreclosure strategy.

30. In order to estimate the incremental profit of each subscriber switching to Altice, the AdC used data provided by the notifying party where the latter estimated incremental profits *per* type of service.[8] The AdC assumed that subscribers switching to Altice would generate a margin equal to Altice's average contribution margin *per* subscriber *per* service on the rival's existing customer base.[9]

31. The AdC then assessed the incentives for Altice to engage in a number of input foreclosure scenarios involving the permanent withholding of TVI channels from its rivals. It concluded that Altice would have the ability and incentive to: (i) foreclose TVI main channel to the largest of its rivals; (ii) foreclose TVI24 to each one of its rivals; (iii) foreclose both TVI and TVI24 to the largest of its rivals; and (iv) foreclose TVI main channel and/or TVI24 simultaneously to all of its rivals.

[8] From 2-play to quintuple play bundles that included pay-TV.

[9] For example, if a rival's subscriber base is composed of 40 percent triple-play customers and 60 percent quadruple-play customers, then the AdC assumed that the average subscriber switching from that rival to Altice would contribute to Altice's profits taking into account 40 percent of Altice's incremental profit in triple-play services and 60 percent in quadruple-play services (incremental profit of a subscriber switching from the rival = (0.4 x Altice incremental profit in triple-play services) + (0.6 x Altice incremental profit in quadruple play)).

32. In these situations, estimated gains in profits in pay-TV provision more than compensated losses in revenues from advertising and customer interaction services and carriage fees.

3.2.2. Raising Rivals' Costs (Partial Input Foreclosure)

33. Even though some total input foreclosure strategies would have been profitable, the AdC also assessed the possibility that the vertically integrated firm would be willing to supply TVI channels to Altice's rivals although at significantly higher prices compared to the pre-transaction scenario, raising rivals' costs and hampering their ability to compete in the provision of pay-TV services.

34. Given that distribution contracts for TVI channels are negotiated bilaterally between MC and pay-TV operators, the AdC assessed if the transaction would significantly strengthen MC's bargaining position *vis-à-vis* Altice's rivals.

35. In this situation, TVI channels would continue to be widely distributed across most or all rival pay-TV platforms, increasing, on the one hand, revenues from carriage fees and, on the other hand, holding audience levels constant and, consequently, revenues from advertising and customer interaction services.

36. For this assessment, the AdC used a Nash bargaining framework, such as the one used by the European Commission in its assessment of the *Liberty Global/Corelio/W&W/De Vijver Media* transaction[10] and by the FCC in its investigation of the *Comcast/NBCU* merger.[11]

37. The AdC concluded that this transaction would substantially increase MC's bargaining position in negotiations with Altice's rivals over carriage fees for TVI channels in comparison to the pre-merger situation. This was true for all scenarios taken into consideration (partial foreclosure of TVI main channel, TVI24 or both to each of Altice's rivals), regardless of whether or not total foreclosure was a profitable strategy.

38. In fact, the bargaining model showed that post-merger, MC and Altice's rivals would always have an incentive to reach an agreement (i.e., total surplus from reaching an agreement was strictly positive in all situations). The vertically integrated firm would be able to obtain an increase in carriage fees at least as high as the increase in profits from total foreclosure. As for Altice's rivals, their losses from higher carriage fees would be lower than the ones resulting from lost subscriber revenues.

39. Even when total foreclosure was not a profitable strategy, MC would still be able to extract significantly higher carriage fees because failure to reach an agreement with Altice's rivals post-transaction would harm MC less than absent the transaction, as post-transaction MC would internalize Altice's profits.

40. The Nash equilibria post-transaction predicted several-fold increases in carriage fees that amounted to substantial increases in total content acquisition costs for Altice's rivals.

[10] *See* case M.7194 - Liberty Global / Corelio / W&W / De Vijver Media (decision available at http://ec.europa.eu/competition/mergers/cases/decisions/m7194_20150224_20600_4264271_EN.pdf.

[11] *See* Baker, Jonathan B., Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis (February 5, 2011). Antitrust, Vol. 25, No. 2. Spring 2011; Rogerson, William (2012): Vertical mergers in the video programming and distribution industry: The case of Comcast-NBCU, CSIO Working Paper, No. 0116, Center for the Study of Industrial Organization at Northwestern Univ., Evanston, Ill.

41. The AdC, therefore, concluded not only that post-transaction the new entity would have an improved bargaining position in negotiations of carriage fees with Altice's rivals, but also that partial foreclosure would be the most likely result from this transaction, given that it would result in higher profits for the vertically integrated firm.

3.2.3. Effects

42. The AdC concluded that the merged firm would have the ability and incentive to implement total and partial foreclosure strategies attaching a higher probability to a partial foreclosure outcome.

43. Higher carriage fees for TVI channels would result in significant overall increases in content acquisition costs to Altice's rivals, which would have to increase subscriber fees. Furthermore, Altice's rivals' ability to acquire competitive content would also be negatively affected.

44. In both cases, Altice's rivals would become less effective competitors, thus increasing the ability of the merged entity to increase prices to final consumers and/or decreasing pressure for high-quality content acquisition and production.

45. Furthermore, the AdC concluded that the transaction would raise barriers to entry, with particular emphasis to potential alternative low-cost online providers, as these providers either would not have access to TVI channels or would have access at less favorable terms than absent the merger.

3.2.4. Remedies

46. The notifying party proposed to adopt a set of remedies. However, since Altice decided to withdraw its notification during the course of the in-depth investigation, the AdC did not adopt a decision including a detailed assessment of the merger and, for this reason, it is not possible to discuss the remedies in further detail.

47. Nonetheless, it can be said that these were purely behavioral remedies (including, but not limited to, must-carry and must-deliver obligations). The AdC considered that, in general, they did not adequately and structurally address the competitive concerns identified in the assessment.

4. Concluding remarks

48. The AdC's experience with vertical mergers in general indicates that, while these mergers may be less prone to lead to anticompetitive effects than purely horizontal mergers, they can still give rise to a variety of competition concerns.

49. In the vertical media merger discussed above, the AdC analyzed several theories of harm and concluded that partial input foreclosure, through higher carriage fees, would be the most likely result of the transaction. This would have caused a significant increase in content acquisition costs, hampering Altice's rivals' ability to be effective competitors in the provision of pay-TV services, ultimately leading to higher consumer prices and/or decreased service quality.

50. This case shows that in vertical media mergers it is crucial to investigate the existence of highly relevant inputs, i.e., inputs that confer a strong competitive advantage. In this merger, through a consumer survey, the AdC found that TVI channels were perceived by a considerable portion of consumers as an essential input, giving the merging entity the capacity to raise costs to its downstream rivals.

51. Additionally, in this case, the behavioral remedies proposed by the Parties were deemed insufficient as they did not adequately address the multiple competitive concerns raised. The proposed remedies raised very significant risks of specification, circumvention, and monitoring. Even without such risks, these remedies would have no impact on the root causes of the competitive concerns (e.g., market structure and/or contestability).

References

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