ACQUISITIONS (CEMENT): THE CIMPOR CEMENTOS CASE

Subject: Acaquisitions

Industry: Cement
(Implications for other industries)

Parties: Cimpor Cementos de Portugal SGPS
Secil Companhia Geral de Cal e Cimentos SA
Holderbank
The Portuguese Government

Source: Commission Statement IP/00/1338, dated 22 November 2000

(Note. This case, which escaped attention when first made public, is interesting in the way in which it illustrates the determination of the Commission to assert its jurisdiction in merger cases. Member States' powers to take action are limited to "the protection of legitimate interests", which are defined as public security, plurality of the media and prudential rules: see the second paragraph of the report below.)

The Commission has decided that the measures taken by the Portuguese authorities against the proposed takeover bid by Secil Companhia Geral de Cal e Cimentos SA and Holderbank for Portuguese company Cimpor Cimentos de Portugal SGPS were incompatible with the European Community's competition law. The decisions taken by the Minister of Finance in July and August 2000 opposing the bid were found not to protect any legitimate interest recognised under Article 21 of the European Merger Regulation. The Commission intends to protect its exclusive right to review mergers with a Community dimension and will challenge any other similar infringements.

The decision is based on Article 21 of the Merger Regulation, which grants the Commission exclusive legal power to assess concentrations above certain turn-over thresholds. The same article allows Member States to take appropriate measures to protect legitimate interests, which are defined as public security, plurality of the media and prudential rules. Any other public interests must be communicated to the Commission by the Member State and be recognised by the Commission after an assessment before the measure is taken by the Member State, according to Article 21.

The Commission's decision finds that in blocking the proposed acquisition, the Portuguese Government has breached its obligations under Article 21 of the Merger Regulation. The prohibition could not be intended to protect the interests foreseen in Article 21, nor did Portugal communicate to the Commission any other public interests they wished to safeguard.

The Portuguese Government's decisions, which were based on the application of national legislation, refer, *inter alia*, to "the need to protect the development of the shareholding structures in companies undergoing privatisation with a view to reinforcing the corporate capacity and the efficiency of the national production apparatus in a way that is consistent with the national economic policy guidelines". The Commission does not consider this as a public interest that can be reconciled in this particular case with the general principles of merger control law.

In the light of the decision, the Portuguese Government is under an obligation to take the necessary measures to comply with Community law and withdraw the decisions it took in relation to the proposed concentration.

The Portuguese company Cimpor Cimentos de Portugal SGPS was established as a 100% state-owned company in 1976. In 1991, it became a public company and was subsequently partly privatised in 1994. The company is listed on the Lisbon Stock Exchange. The Portuguese state has progressively sold its shareholding in Cimpor and currently holds approximately 12% of the shares including 10% golden shares. Article 22 of Cimpor's by-laws grants the Government the right to veto strategic decisions and any amendment to the by-laws of Cimpor.

On 15 June 2000, Holderbel, a fully-owned Belgian subsidiary of the Holderbank group of Switzerland and Secil Companhia Geral de Cal e Cimentos SA of Portugal announced a public bid for the shares of Cimpor through Secilpar, a special purpose vehicle jointly controlled by the parties. The operation, which has a Community dimension within the meaning of the Merger Regulation[1] was notified to the Commission on 4 July 2000.

On 16 June 2000, the notifying parties applied for prior authorisation from the Portuguese Minister of Finance to acquire through a public offer a minimum of 67%, of the share capital of Cimpor. Pursuant to Decree Law No 380/93 of 15 November the acquisition of more than 10% of the share capital with voting rights in companies, which have not yet entirely been privatised, requires an authorisation of the Minister of Finance. On 6 July 2000, the Portuguese Minister of Finance adopted a decision opposing the notified operation. Following a modification to the bid, the parties applied on 7 July 2000 again for authorisation at the Minister of Finance. On 11 August 2000, the Minister of Finance issued a decision to the effect that the renewed application for an authorisation by the notifying parties was declined. The decision reformed the motivation of the decision of 6 July 2000 but confirmed its conclusion. Since then, the Portuguese government has announced its intention to privatise Cimpor and to renounce its golden share in the company.

In 1997 the Commission challenged in the European Court of Justice the Portuguese legislation on which the two vetoes were based as breaching the right of establishment and the free movement of capital, two of the key principles of the European Single Market. Similar legislation has been challenged by the Commission also in Spain, the United Kingdom, France and Belgium among other countries. The Court's judgment in these cases is still awaited. ■