



EUROPEAN COMMISSION
DG Competition

***Case M.11264 - AUCHAN PORTUGAL / DIA /
DIA PORTUGAL SUPERMERCADOS***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 4(4)
Date: 17/1/2024



EUROPEAN COMMISSION

Brussels, 17.1.2024
C(2024) 424 final

PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

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Portugal

Autoridade da Concorrência -
Portuguese Competition Authority
Avenida de Berna, 19
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Portugal

Subject: **Case M.11264 - AUCHAN PORTUGAL / DIA / DIA PORTUGAL SUPERMERCADOS**
Commission decision following a reasoned submission pursuant to Article 4(4) of Regulation No 139/2004¹ for referral of the case to Portugal and Article 57 of the Agreement on the European Economic Area².

Date of filing: 15.12.2023

Legal deadline for response of Member States: 16.1.2024

Legal deadline for the Commission decision under Article 4(4): 30.1.2024

¹ OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

Dear Sir or Madam,

1. INTRODUCTION

- (1) On 15.12.2023, the Commission received by means of a reasoned submission a referral request pursuant to Article 4(4) of the Merger Regulation with respect to the transaction cited above. The parties request the operation to be examined in its entirety by the competent authorities of Portugal.
- (2) According to Article 4(4) of the Merger Regulation, before a formal notification has been made to the Commission, the parties to a transaction with a Union dimension may request that their transaction be referred in whole or in part from the Commission to a Member State where the concentration may significantly affect competition in a market within that Member State, and which present all the characteristics of a distinct market.
- (3) A copy of this reasoned submission was transmitted to all Member States on 15.12.2023.
- (4) By email of 04.01.2024, the Portuguese Competition Authority (*Autoridade da Concorrência*; 'PCA'), as the competent authority of Portugal, informed the Commission that Portugal agrees with the proposed referral.

2. THE PARTIES

- (5) **Auchan Portugal, S.A.** ('Auchan'), headquartered in Portugal, is primarily active in procurement and the retail sale of daily consumer goods through modern distribution channels in Portugal. Auchan operates 76 own retail stores and provides franchising services to 17 retail stores operated by franchisees in Portugal. Auchan is ultimately solely controlled by ELO S.A., the holding company of the ELO Group, a French-based international group primarily active in the procurement and the retail sale of daily consumer goods across the EEA. The ELO Group is also active internationally (outside the EEA) in other sectors.
- (6) **DIA Portugal Supermercados S.A.** (the 'Target'), headquartered in Portugal, is active in procurement and the retail sale of daily consumer goods through modern distribution channels in Portugal. The Target operates [...] own retail stores and provides franchising services to [...] retail stores operated by franchisees in Portugal.
- (7) Auchan and the Target together will hereinafter be referred to as the 'Parties'.

3. THE OPERATION AND CONCENTRATION

- (8) On 15.12.2023, Auchan notified to the Commission its intention to acquire sole control over the Target and requested the Commission to refer the case to Portugal pursuant to Article 4(4) of the Merger Regulation.
- (9) On 03.08.2023, Auchan, Distribuidora Internacional de Alimentación, S.A. and Luxembourg Investment Company 322 S.à r.l. (the latter two as sellers) entered into the Shares Sales and Purchase Agreement, pursuant to which Auchan will

acquire (i) 100% of the shares in the Target; as well as (ii) the Target's franchise business (the 'Proposed Transaction').³

- (10) The Proposed Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

4. EU DIMENSION

- (11) The Proposed Transaction has an EU dimension within the meaning of Article 1(2) of the Merger Regulation. The Parties have a combined aggregate turnover of more than EUR 5 000 million (ELO Group: EUR 33 485 million; and the Target: EUR [...] million). Each of the Parties achieved Union-wide turnover in excess of EUR [...] million (ELO Group: EUR [...] million; and the Target: EUR [...] million). ELO Group does not achieve more than two thirds of its EU-wide turnover within one Member State.

5. ASSESSMENT

- (12) The Proposed Transaction results in horizontally affected markets in relation to the retail sale of daily consumer goods through modern distribution channels in Portugal.⁴ The Proposed Transaction does not give rise to affected markets outside of Portugal.

5.1. Relevant product markets

- (13) In previous decisions, the Commission considered that the sale of daily consumer goods carried out by retail outlets such as hypermarkets, supermarkets and discount chains ('modern distribution channels') constitutes a distinct market, different from the sale of consumer goods carried out by other types of retailers such as specialised outlets (butchers or bakers, for instance) and service stations.⁵ These modern distribution channels offer consumers a basket of fresh and dry foodstuffs and non-food household consumables sold in a supermarket environment.⁶

³ The Commission notes that the question of whether the Target controls its franchise business can be left open for the purposes of the referral since the Proposed Transaction has EU dimension and gives rise to affected markets regardless of whether the Target's franchise business is taken into account or not.

⁴ For completeness: the Proposed Transaction gives rise to horizontal overlaps but no affected markets in relation to procurement of daily consumer goods in (or outside) Portugal.

⁵ Commission decision in Case M.10631 – *ITM/Mestdagh*, (2022), paragraph 15; Commission decision in Case M.8374 – *UAB Rimi Lietuva/UAB Palink*, (2017), paragraph 13; Commission decision in Case M.7933 – *Carrefour/Billa Romania and Billa Invest Construct*, (2016), paragraph 14; Commission decision in Case M.7920 – *Netto/J Sainsbury/Dansk Supermarked/New Edlington/Hedon/Roundhay Road*, (2016), paragraph 15; Commission decision in Case M.7224 – *Koninklijke Ahold/Spar CZ*, (2014), paragraph 9; Commission decision in Case M.5112 – *Rewe/Plus Discount*, (2008), paragraph 15; and Commission decision in Case M.5047, *REWE/Adeg*, (2011), paragraph 24; Commission decision in Case M.4590 – *Rewe/Delvita*, (2007), paragraphs 9-14; Commission decision in Case M.4686 – *Louis Delhaize/Magyar Hipermarket Kft.*, (2007), paragraph 8; Commission decision in Case M.2604 – *ICA Ahold/Dansk Supermarked*, (2001), paragraphs 10 and 11; and Commission decision in Case M.3905 – *TESCO/Carrefour*, (2005), paragraph 10.

⁶ Commission decision in Case M.10631 – *ITM/Mestdagh*, (2022), paragraph 15; Commission decision in Case M.8374 – *UAB Rimi Lietuva/UAB Palink*, (2017) paragraph 13; Commission decision in Case M.7933 – *Carrefour/Billa Romania and Billa Invest Construct*, (2016), paragraph 14; Commission decision in Case M.7920 – *Netto/J Sainsbury/Dansk Supermarked/New Edlington/Hedon/Roundhay*

Supermarkets, hypermarkets and discount chains compete with respect to their food and non-food product range, marketing strategy and customer approach, and each offers consumers the possibility to purchase all their daily groceries in one shop.⁷

- (14) The Commission has generally left open the question of whether a further distinction should be made according to the total surface of the stores.⁸ However, it has considered possible segmentations between: (i) hypermarkets (larger than 2 500 square meters), (ii) supermarkets (between 400 and 2 500 square meters), (iii) convenience stores and neighbourhood stores (less than 400 square meters), and (iv) maxi-discount stores.⁹
- (15) The Parties consider that in line with the Commission's decisional practice the market should be defined as retail sale of daily consumer goods through modern distribution channels, comprising supermarkets, hypermarkets, and discount chains. The PCA's practice is broadly in line with the Commission's decisional practice.¹⁰
- (16) In any event, for the purposes of the Commission's assessment under Article 4(4) of the Merger Regulation, the precise scope of the product market can be left open as the Proposed Transaction significantly affects competition under any plausible product market definition.

5.2. Relevant geographic market

- (17) In previous decisions, the Commission has considered that the geographic market for the retail sale of daily consumer goods through modern distribution channels is local in nature, the exact geographical scope corresponding to a catchment area around each store, based on travel distance to the store. In previous decisions, the Commission has considered a zone of 10, 20, or 30 minutes of travel time by car to the store: in general, hypermarkets, defined as stores with a surface of more than 2 500 square meters, have a larger catchment area (20 to 30 minutes) than smaller stores such as supermarkets (catchment areas of 10 to 20 minutes).¹¹ The PCA's practice is broadly in line with the Commission's decisional practice.¹²
- (18) The Parties consider that the geographic scope of the market for the retail sale of daily consumer goods through modern distribution channels should be national

Road, (2016), paragraph 15; Commission decision in Case M.5677 – *Schuitema/Super de Boer Assets*, (2010), paragraph 18; Commission decision in Case M.6847 – *Triton/Suomen Lähikauppa*, (2013), paragraph 11; and Commission decision in Case M.784 – *Kesko/Tuko*, (1997), paragraphs 18-20.

⁷ Commission decision in Case M.10631 – *ITM/Mestdagh*, (2022), paragraph 15; and Commission decision in Case M.5677 – *Schuitema/Super de Boer Assets*, (2010), paragraph 18.

⁸ Commission decision in Case M.10631 – *ITM/Mestdagh*, (2022), paragraph 17; Commission decision in Case M.9847 – *Aldi/FPLPH Assets*, paragraph 15; Commission decision in Case M.7345 – *Carrefour/53 magasins de Billa en Italie*, paragraph 12.

⁹ M.7345 *Carrefour / 53 magasins de Billa en Italie*, paragraph 12.

¹⁰ Form RS, paragraphs 62 et seq.

¹¹ Commission decision in Case M.10631 – *ITM/Mestdagh*, (2022), paragraph 20; M.8468 – *Norgesgruppen/Axfood/Eurocash*, paragraph 24; M.8374 – *Uab Rimi Lietuva/Uab Palink*, paragraph 15; M.7702 – *Koninklijke Ahold/Delhaize Group*, paragraph 17; M.6506 – *Groupe Auchan/Magyar Hipermarket*, paragraph 13; M.6822 – *Groupe Auchan/Real/Real Hypermarket Romania*, paragraph 11; M.5790 – *Lidl/Plus Romania/Plus Bulgaria*, paragraph 14; M.5176 – *CVC/Schuitema*, paragraph 12; M.7920 – *Netto/J Sainsbury/Dansk Supermarked/New Edlington/Hedon/Roundhay*, paragraph 17.

¹² Form RS, paragraphs 78 et seq.

because the market conditions, commercial strategies/decisions, and main elements are homogenous at the national level.¹³

- (19) In any event, for the purposes of the Commission's assessment under Article 4(4) of the Merger Regulation, the precise scope of the geographic market can be left open as the Proposed Transaction significantly affects competition under any plausible geographic market definition.

5.3. Assessment of the referral request

5.3.1. Legal requirements

- (20) According to the Commission Notice on Case Referral in respect of concentrations (the 'Notice')¹⁴, in order for a referral to be made by the Commission to one or more Member States pursuant to Article 4(4), the following two legal requirements must be fulfilled:

- (a) there must be indications that the concentration may significantly affect competition in a market or markets,¹⁵ and
- (b) the market(s) in question must be within a Member State and present all the characteristics of a distinct market.¹⁶

5.3.1.1. The Proposed Transaction may significantly affect competition in a market or markets

- (21) According to paragraph 17 of the Notice, the existence of an affected market is generally considered sufficient to meet the requirement set forth in Article 4(4) of the Merger Regulation.

- (22) The Proposed Transaction results in several horizontally affected markets in Portugal.

- (23) On the market for the retail sale of daily consumer goods through modern distribution channels in Portugal, the Proposed Transaction would lead at least to the following affected markets in terms of sales area in 2022 when considering the Commission's decisional practice:¹⁷

- (a) two affected markets comprising hypermarkets, supermarkets, and convenience stores within a catchment area of 30 minutes by car;
- (b) six affected markets comprising hypermarkets, supermarkets, and convenience stores within a catchment area of 20 minutes by car;
- (c) 19 affected markets comprising hypermarkets, supermarkets, and convenience stores within a catchment area of 10 minutes by car;

¹³ Form RS, paragraphs 82 et seq.

¹⁴ Commission Notice on Case Referral in respect of concentrations, OJ C 56, 5.3.2005, p. 2–23.

¹⁵ Further developed in point 17 of the Notice.

¹⁶ Further developed in point 18 of the Notice.

¹⁷ Form RS, Annexes 4.2.2 and 4.2.3. For the sake of completeness, according to the Parties, the Proposed Transaction would give rise to affected markets even following the decisional practice of the PCA.

- (d) three affected markets comprising only supermarkets within a catchment area of 20 minutes by car;
 - (e) 32 affected markets comprising only convenience stores within a catchment area of 10 minutes by car.
- (24) Therefore, the first legal requirement set forth in Article 4(4) of the Merger Regulation appears to be met.

5.3.1.2. The market(s) in question must be within a Member State and present all the characteristics of a distinct market

- (25) According to paragraph 18 of the Notice, the second requirement set forth by Article 4(4) of the Merger Regulation is satisfied if the geographic scope of the markets where competition is affected is national or narrower than national.
- (26) As indicated above, the markets for retail sale of daily consumer goods through modern distribution channels are characterised by strong local elements and defined narrower than national in scope by the Commission and even the PCA.
- (27) Therefore, the second legal requirement set forth by Article 4(4) of the Merger Regulation also appears to be met.

5.3.2. *Additional factors*

- (28) In addition to the verification of the legal requirements, point 19 of the Notice provides that it should also be considered whether referral of the case is appropriate, and in particular “whether the competition authority or authorities to which they are contemplating requesting the referral of the case is the most appropriate authority for dealing with the case”.
- (29) In addition, point 23 of the Notice states that “[c]onsideration should also, to the extent possible, be given to whether the NCA(s) to which referral of the case is contemplated may possess specific expertise concerning local markets, or be examining, or about to examine, another transaction in the sector concerned”.
- (30) *First*, the PCA has specific expertise in the assessment of markets in the relevant sector at hand. In fact, the PCA has in the past reviewed concentrations in relation to the retail sale of daily consumer goods through modern distribution channels.¹⁸
- (31) *Second*, in light of the information submitted in the reasoned submission by Auchan, the Commission considers that the effects of the Proposed Transaction are confined to Portugal either at a national or sub-national level, in the form of catchment areas. Thus, the case may require investigative efforts at local level that the PCA seems better placed to conduct.
- (32) *Third*, a referral of the Proposed Transaction to the PCA satisfies the need to preserve the benefit of the ‘one-stop-shop’ as there are no affected markets outside

¹⁸ Ccent. n.º25/2006 - *Dia Portugal / 4 Estabelecimento Patrisuper*; Ccent. n.º13/2007 - *ITMI / Marrachinho*; Ccent. n.º51/2007 - *Sonae Distribuição / Carrefour*; Ccent. n.º1/2008 - *Pingo Doce / Plus*; Ccent. n.º44/2008 - *Companhia Portuguesa de Hipermercados / Activos Sonae Distribuição*, Ccent. n. 10/2013 - *MCH / Ativos Hiper Sá*; Ccent. n. 29/2015 - *Pingo Doce / Amol*.

of Portugal. The case would thus be referred in its entirety to a single competition authority (i.e. the PCA), which is an important factor of administrative efficiency.

- (33) *Fourth*, the Commission regularly refers cases concerning the retail sales of daily consumer goods to national competition authorities.¹⁹

5.3.3. *Conclusion on referral*

- (34) On the basis of the information provided by the Parties in the reasoned submission, the case meets the legal requirements set out in Article 4(4) of the Merger Regulation in that the concentration may significantly affect competition in a market(s) within a Member State which presents all the characteristics of a distinct market.

- (35) Moreover, the requested referral would be consistent with paragraphs 19-23 of the Notice, in particular because the PCA appears to be the most appropriate authority to examine the Proposed Transaction.

6. CONCLUSION

- (36) For the above reasons, and given that Portugal has expressed its agreement, the Commission has decided to refer the transaction in its entirety to be examined by the PCA. This decision is adopted in application of Article 4(4) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Olivier GUERSENT
Director-General

¹⁹ See for instance Commission's decisions in cases M.7336 - *Carrefour France/Dia France* (2014); M.11165 - *Carrefour/Romania Hypermarche* (2023); M.10201 - *Ahold Delhaize/Deen Assets* (2021); and M.10015 - *Carrefour/Supersol* (2020).