Competition - Portugal

Decentralizing Competition Regulation

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Introduction

EU Regulation 1/2003 on the implementation of the competition rules laid down in Articles 81 and 82 of the EC Treaty came into force on May 1 2004. It initiated a revolution in the enforcement of competition law in the European Union by creating a system of parallel competences in which the European Commission and the national competition authorities are fully empowered to apply Articles 81 and 82 of the EC Treaty. For the past two years the national competition authorities and the commission have been cooperating closely within the European Competition Network, an informal body which will nevertheless be of growing importance for European companies in the future.

The Portuguese Competition Authority, created in 2003, has shown itself to be very active in its cooperation with the commission and other national competition authorities since the entry into force of the regulation. For example, in 2004 the European Competition Network allocated a case to the authority as it was considered best placed to review the case. The authority also initiated an investigation based on information supplied by another national authority on practices originating in Portugal and shared information on the eight cases it was then investigating under Articles 81 and 82.

Despite this close cooperation, and although Article 4 of the Portuguese Competition Act(1) closely follows the wording of Article 81, the first two authority decisions to apply both Article 81 of the treaty and Article 4 of the act were not issued until 2005. These decisions are briefly analyzed below.

The implementation of Regulation 1/2003 has also triggered a discussion on amendments to the existing national rules, in particular concerning notifications for exemption, leniency programmes and investigation procedures, even though the act already takes into account the main principles of the regulation. This update also discusses the legislative amendments already introduced, namely the authority's new regulation on prior notification for individual exemptions, as well as other amendments proposed by the authority.

First Applications of Article 81

The *Portuguese Veterinarian Association Case*(2) was the first in which the authority condemned an

agreement under both Article 4 and Article 81. The ethical code, which had been approved by the association, provided that veterinarians should follow the tables of recommended fees set by the association for each region. Practitioners could be punished with disciplinary action for charging fees which were "manifestly inferior" to those recommended in the tables, which was considered to be "unfair competition". The authority condemned both the provisions of the code and the tables, and imposed a fine of almost €76,000 on the association.

The authority considered that the price-fixing practice affected trade between EU member states, since all veterinarians practicing in Portugal, whether of Portuguese nationality or from other member states, were obliged to comply with the price restrictions. The authority therefore concluded that Article 81 was applicable.

Shortly afterwards, a similar decision was issued in the *Portuguese Dentists Association Case*.(3) The authority established that the association fixed minimum and maximum fees to be charged by dentists for each kind of operation. The violation of these restrictions constituted a disciplinary offence under the association's ethical code. As in the previous case, the authority considered that the practice had the effect of eliminating uncertainty regarding the fees charged by dentists, as well as raising further barriers to entry into the profession by preventing young dentists from charging lower prices when entering the market, which ultimately harmed consumers. The association was fined over €160,000.

However, in three other complex horizontal agreements cases decided in late 2004 and in 2005, the authority did not apply Article 81 and condemned the companies involved only for breaching Portuguese competition rules.

In the *Diabetes Products I Case*,(4) five pharmaceutical companies received a €3.2 million fine for rigging prices in a public bid launched by a hospital for products to be used for the diagnosis of diabetes. The authority did not apply Article 81, presumably because the offending conduct took place before to the adoption of the new Competition Act and EU Regulation 1/2003. Although it condemned the practice under Article 4 of the new act, the authority calculated the fine according to the more favourable provisions of the earlier legislation(5) which was in force at the time of the conduct.

In two other decisions issued in 2005, the authority also chose to apply only Portuguese competition law. In the *Diabetes Products II Case*,(6) which was prompted by information provided to the authority by one of the defendants, the authority condemned concerted practices by the same pharmaceutical companies in 36 other hospital public bids, imposing fines totalling €16 million. In the *Milling Companies Case*,(7) which concerned a concerted price-fixing practice in the milling industry, the authority fined the companies involved a total of €9 million. Since all three decisions were appealed to the Lisbon Commercial Court, it is likely that there will be interesting developments concerning these cases in 2006.

To date the authority has not announced any decision condemning an abuse of dominant position, although there are reports in the press that several complex investigations are pending.

Application of the New Individual Exemption Regulation

The new Regulation 9/2005 was enacted by the authority expressly to bring the individual exemption regime into line with Regulation 1/2003 (for further details please see "Impact of Prior Notification Procedure on Restrictive Practices").

The authority may, however, have gone beyond the requirements of Regulation 1/2003. Under Article 1(2) of Regulation 9/2005 it is not possible to apply to the authority for an exemption in respect of an agreement if Article 81 also applies. Given the wide interpretation given by European courts and the European Commission to the concept of the effect on trade between member states, the regulation will probably have no useful application, as no agreements other than those between small local companies will be notified. Significantly, no notifications were lodged under

Regulation 9/2005 during 2005.

Although it follows the abolition of the notification procedure at EU level, the abolition of the individual exemption procedure in Portuguese law may not prove to be as positive a step as one might expect. Portuguese competition law is still far from being fully developed and companies are only gradually becoming aware of the existence and scope of competition rules. The notification system established by EU Regulation 17/62, which was in force for more than 40 years, made a key contribution to the development of European competition law. An effective national exemption regime would represent a welcome contribution to the development of the less mature Portuguese competition law and culture.

Such a regime would need to comply with EU Regulation 1/2003 and could not have the effect of introducing an exemption at European level, as this would effectively replace the mechanism which was abolished by the regulation. However, a decision introducing an exemption under Portuguese law for an agreement affecting trade between member states might not necessarily be incompatible with the regulation. Such a decision would have effect only in Portugal, and Article 5(2) of the regulation allows national competition authorities to decide that there are no grounds for action on their part if the conditions for prohibition under Article 81 are not met. It could be argued that the authority could therefore exempt an agreement under national competition rules and not take any further action under European law because the agreement did not fall under Article 81.

The authority appears to be fully aware of the consequences of the wording of Regulation 9/2005 of the Council of the Competition Authority. In the *BCP/Eureko/F&C Case*,(8) which concerned the notification of an agreement for the provision of asset management services, the authority considered that it had no jurisdiction to review the case because the agreement fell within the scope of Article 81, even though Regulation 9/2005 did not apply, since the request was lodged under the previous exemption regime, under which the authority was empowered - and obliged - to decide the case.

Legislative Reforms for the Implementation of EU Regulation 1/2003

The authority is conscious of the many procedural concerns raised by the decentralization of the enforcement of Articles 81 and 82 by the national competition authorities. To this effect, and although the Competition Act 2003 already takes into account the main principles of the regulation, the authority recently stated that it had sent two legislative projects to the Portuguese government: one for the creation of a leniency programme, the other for the adoption of new national procedures for a more effective application of the regulation. The proposals have not yet been made available to the public.

Despite the rules introduced by the regulation on the protection of information provided by leniency applicants, the European Commission and leading commentators have stressed the necessity of instituting leniency programmes in all member states in order to ensure adequate protection for companies seeking leniency.

The authority has expressed a substantial interest in the creation of a leniency programme. Although it does not officially pursue a leniency policy, the authority seems to have adopted a similar rationale in the *Diabetes Products II Case,* in which the company that provided the information that triggered the investigation benefited from a substantial reduction in its fine compared with the other companies involved.

The adequacy of the procedure followed by the authority in the course of its investigations has also been the subject of controversy. The rules of Portuguese criminal procedure are subsidiarily applicable to investigations carried out by the authority and are in some cases more protective of companies' rights than equivalent European rules.

The recent *Portugal Telecom Case*(9) demonstrated this issue. The authority conducted a dawn raid on the premises of the telecommunications incumbent and seized several documents, in

particular a number of email messages. On appeal, the Lisbon Commercial Court agreed with Portugal Telecom that the authority had exceeded the powers of the warrant granted by the public prosecutor's office, which limited the investigation to the fixed telephony market, and ordered the authority to return all documents not related to that market.

The court also ordered the authority to return all emails seized during the dawn raid to Portugal Telecom. It declared that the emails could not be used as evidence, as they were considered to be correspondence, which is covered by very protective rules under Portugal's Code of Criminal Procedure. Under the terms of the code, correspondence may be seized only on the authority of a judge, who must in principle be the first person to consider its content in order to assess its relevance for the case. In the case in question, the warrant had been issued by the public prosecutor's office. Protection of email correspondence is therefore one of the areas of difference between European and Portuguese law, and one which may cause concerns regarding the application of Article 81 by the authority in the future; it is essential that the authority fully respects companies' rights of defence under Portuguese law.

Comment

The decentralization initiated by EU Regulation 1/2003 is clearly underway in Portugal. Interesting developments are expected in the decisional practice of the authority in 2006, in particular as they relate to pending investigations on abuses of dominant position and the judgments of the Lisbon Commercial Court on the decisions of the authority which are under appeal. Legislative reforms will bring about considerable modifications to the enforcement of competition rules.

Overall, the last two years have shown that a greater involvement of national authorities - and, especially in the future, of national courts - in the application of European competition law has led to a substantial increase in the efficiency of the enforcement policy.

However, the entry into force of EU legislation has also introduced a tendency to harmonize Portuguese competition law with European rules. Although in most cases this may be necessary and even welcome, national competition rules still have an important role to play, as there are - and probably always will be - differences in the competition cultures of the member states. Such differences give rise to specific circumstances which must be addressed by specific national rules. National individual exemption regimes in comparatively undeveloped competition law systems, such as that of Portugal, are perhaps a good example of an element of diversity that should be preserved.

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Endnotes

(1) Law 18/2003, published in the *Official Gazette* on June 11 2003.

(2) Press Release 7/2005, July 12 2005.

(3) Press Release 8/2005, August 29 2005.

(4) Press Release 1/2005, January 11 2005.

(5) Decree Law 371/1993, published in the *Official Gazette* on October 29 1993.

(6) Press Release 10/2005, October 13 2005.

(7) Press Release 11/2005, October 20 2005.

(8) Case 2/2004, Decision of November 7 2004.

(9) Order of Lisbon Commercial Court, January 31 2005, Case 412/04.