

Competition - Portugal

Council of Ministers approves draft proposal for new Competition Act

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Introduction

On November 4 2011 the Council of Ministers approved a draft proposal for a new Competition Act. The proposal is part of the commitments that Portugal has made to the European Union, the European Central Bank and the International Monetary Fund under the agreement on Portugal's international financial assistance programme.

The government has stated that the new act's main objectives are to:

- simplify the law by distinguishing clearly between competition enforcement rules and penal rules;
- rationalise the methods of investigation, allowing the Competition Authority to decide on the significance of the complaints submitted and to select sectors for further investigation - a move which would remove the authority's legal obligation to investigate all complaints that are submitted to it;
- align procedural mechanisms more closely with EU merger control rules;
- ensure further clarity and legal certainty when applying administrative procedural law to the merger control process; and
- ensure due process in investigating restrictive practices.

The government believes that the new legislation will foster a more competitive economy and boost confidence among economic operators.

The draft legislation proposes several significant amendments to key points of the national competition regime, but leaves unaltered many other aspects which were expected to be modernised. This update briefly summarises some of the main features of the draft proposal.

Restrictive practices

The proposal includes some specific structural changes. A general rule on the procedures regarding restrictive practices will reduce to five working days the time limit for requesting acts or diligence before the authority. The same time limit will apply when seeking a ruling on nullity or in connection with procedural issues. The time limit for providing the authority with information and documents pursuant to a formal request has been shortened to 15 working days.

A further change refers to the investigatory powers conferred on the authority. These now expressly include actions on which there had previously been no consensus between lawyers, companies or even the courts. The new powers include the right to:

- seize opened or unopened correspondence (in electronic format or hard copy) and any other records of communications;
- conduct searches of private residences; and
- seal the premises of a company in a dawn raid (including the electronic materials found therein).

These investigatory measures must be supervised by a pre-trial judge, who may decide to exclude documents or information where the right to privacy is liable to be breached.

The draft legislation also allows undertakings under investigation to negotiate

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settlement agreements with the authority, which will then close the investigation. Once the intention to negotiate a settlement agreement with the authority has been confirmed in writing, the authority must inform the undertaking of the facts under investigation, the evidence available at the time and the applicable penalties. If the undertaking accepts and confirms the settlement agreement, the decision becomes final and cannot be appealed to the courts.

Investigations and enquiries may also be closed following commitments imposed on - not negotiated with - the undertaking. However, the draft proposal does not specify the type of commitment that may be imposed; thus, it is assumed that behavioural and structural commitments are allowed.

A further change concerns the effect of appeals to the courts against the authority's administrative decisions on restrictive practices. According to the draft proposal, appeals do not suspend the execution of the decision. Consequently, undertakings condemned for restrictive practices by the authority must fulfil the terms of the penalties imposed (whether financial, structural or behavioural) without prejudice to their right of appeal.

In the context of appeals, the draft proposal allows an appellate court to modify the authority's decision so as to impose a more severe penalty on the appellant.

Merger control rules

The draft proposal amends merger control in both its procedural and substantive aspects.

There are no time limits for notifying a concentration to the authority, as concentrations cannot in any case be implemented until after a clearance decision.

The legal criteria for notifying a concentration have been changed. In addition to the volume and market share criteria under the Competition Act, which remain in effect, the proposal will introduce an exemption where:

- the individual turnover of at least two companies taking part in the concentration does not exceed €5 million; and
- the concentration does not create or reinforce a market share of more than 50% of the national market for particular goods or services (or for a substantial part of such a market).

The draft proposal also determines that two or more concentrations, involving the same participants, which take place within two years and which would not be subject to prior notification if considered individually, will be treated as a single concentration subject to prior notification if the notification criteria are met. This obligation must be fulfilled after the final transaction is implemented, with the transaction being suspended until the clearance decision is issued.

The draft legislation further clarifies the issue of third-party participation in merger control procedures, determining the stage at which such parties must provide the authority with information regarding their position in respect of the concentration and the arguments that support such a position. As a result, interested third parties shall be heard before the authority issues a decision, in both first-phase and second-phase procedures.

Commitments to overcome possible competition constraints resulting from a concentration are dealt with specifically in the draft legislation, which provides that the presentation of commitments by the notifying party suspends the merger control procedure for 20 working days, during which time the authority may request additional information from the notifying party or any other entity. The authority may reject a notifying party's commitments if they are insufficient to address the restrictions on competition or because it is unclear how the commitments would be implemented in practice.

At the substantive level, the draft proposal modifies the test for ascertaining the impact of a concentration on competition. It states that a concentration which may result in a significant impediment to effective competition in the Portuguese market, or a substantial part thereof, and which results in the creation or strengthening of a dominant position may not be cleared.

Comment

The draft proposal is under public discussion until December 5 2011. Contributions from academics, practitioners, corporate bodies, associations and other regulators will play a vital part in shaping the future legislation.

Following the consultation, the draft proposal will be submitted for approval by the Council of Secretaries of State before passing to the Council of Ministers, where

changes may be made in light of the consultation feedback. The proposal will then be submitted to Parliament, where it may be further amended before its final approval.

The draft proposal clearly indicates the government's stance in regard to the authority's powers and the level of intervention in the market - and the economy at large - that is expected from the authority. The government has frequently invoked the rationalisation of investigatory methods, closer alignment with EU statute and jurisprudence and the importance of competition in the markets to endorse amendments to the competition regime. Such changes should clearly facilitate the authority's work, but cannot be used to limit rights conferred by the Constitution and international conventions or treaties.

With this in mind, it is strongly arguable that some of the key proposals require improvement or more comprehensive change in order to safeguard the balance between the increased reach and powers of the authority and the protection of due process and defendants' rights. If such changes are not made, the objectives that the government is pursuing may be at risk and arguments on issues of constitutionality may leave the door to appeals wide open.

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