Competition - Portugal

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Competition Authority serves first settlement

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Introduction

In July 2013 the Competition Authority issued its first decision under the settlement procedure endorsed in mid-2012. Broadly speaking, settlement procedures for antitrust breaches in Portugal closely follow the outline of similar plea bargaining arrangements at EU level. However, unlike the European Commission – which sets a 10% potential reduction in fines applicable to parties that are rewarded for settlement – the authority does not quantify beforehand the benefit to be gained from engaging in settlement discussions. This could serve as a deterrent for both companies and individuals to consider entering into such discussions with the authority. However, a recent case suggests that there may be some scope for settlement arrangements at the national level, especially if the parties are willing to acknowledge their involvement in an infringement and are unlikely to benefit from full immunity from fines under the leniency programme.

Case

This was the first case in which the authority used the settlement proceedings made available in 2012. The investigation in this case was initiated before the enactment of the present Competition Act, which entered into force in July 2012. The proceedings concerned an alleged cartel between the three main players in the national market for polyurethane foam, which is used as a raw material in several sectors of the so-called 'comfort' industry (eg, furniture, household textiles, automotive, footwear and childcare). Between 2000 and 2010, the three competitors (FLEX 2000, FLEXIPOL and EUROSPUMA) – which account for approximately 90% of the relevant market – implemented a price-fixing agreement and a scheme for the ongoing exchange of sensitive commercial information.

The proceedings were triggered by a leniency application submitted by FLEX 2000, which received full immunity. The remaining two cartelists were fined a total of €993,000 – FLEXIPOL received a fine of €498,000, resulting from a 50% fine reduction for leniency and an additional reduction (surprisingly, not disclosed by the authority) for settlement; while EUROSPUMA received a €495,000 fine, which included a non-quantified reduction as a result of the settlement arrangement. Five members and former members of the boards of the undertakings concerned were also fined a total of €7,000 (these individuals were also entitled to immunity and fine reductions on the same terms as their respective companies).

Comment

Neither the Competition Act nor the 2013 guidelines set out by the authority in respect of antitrust proceedings clarify the amount of reduction expected to be applied in settled cases, which has been widely criticised by practitioners. Ultimately, this means that resorting to settlement proceedings in Portugal requires a complex trade-off between opposing interests.

On the one hand, these types of arrangement allow for a swift decision and (uncertain) fine reduction, which can be combined with further reductions under the leniency programme. Authors of settlement proposals are also protected to a certain extent from private enforcement follow-on actions, given that, as a rule, third parties are not allowed to access settlement submissions contained in the file and other undertakings concerned in the case are allowed to see only documents necessary for the preparation of their defence (although no copies of these can be made without the settlement author's authorisation).

On the other hand, the facts to which a party in a settlement procedure has confessed cannot be challenged in court.

At first glance, it might be difficult to envisage the clear advantages of settlement arrangements, since a party does not know at the outset what potential savings it may get from them. Furthermore, even the assistance provided to the authority outside the scope of settlement is considered a general mitigating circumstance when setting the amount of the fine, without implying a need for the party concerned to waive the privilege of judicial appeal.

Nevertheless, the authority's decision in the foam cartel case illustrates that companies and individuals may still find it beneficial to agree to a settlement – bearing in mind the pros and cons mentioned above – particularly in situations where they are prepared to confess their wrongdoings and are unlikely to benefit from full immunity under the leniency programme (eg, because they are not first-in whistleblowers).

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