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Competition & Antitrust - Portugal

Competition Authority's 2013 activity report: a year of transition

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Introduction

In 2013 the Portuguese Competition Authority celebrated its 10th anniversary.⁽¹⁾ This coincided with the appointment of a new board (which took office in September 2013) and marked the first complete year of enforcement of the new Competition Act, which entered into force in July 2012.

The authority recently published its 2013 activity report. Judging from the figures and apart from the aforementioned milestones, it seems that 2013 was essentially a period of transition for the former and new board members and department heads. The authority's statistics in antitrust, merger control and restrictive trade practices decisions were slightly lower than in 2012 (in both the number of cases and the amount of fines issued). However, important institutional and regulatory measures were put in place that are likely to produce results in the short to medium term.

Merger control activity

In 2013 the authority issued 44 decisions in merger control cases. During this period, 40 filings were made. This constitutes a 34.4% reduction in the number of notifications filed and a 25.4% drop in the decisions issued in comparison to 2012.

As the authority pointed out in its report, this decrease in activity may be a result of the downturn in the national economy, but may also have been prompted by the new jurisdictional thresholds of the Competition Act 2012, which exempts from review a number of transactions involving companies with low turnover (ie, less than €5 million) or market shares that do not appear to be problematic (ie, less than 50% or between 30% and 50% where the participating companies do not record turnovers in excess of €5 million).

Nevertheless, as Portugal is one of the few countries in Europe that retain merger control thresholds based on market share alone or a combination of market share and turnover, compulsory notification where such market share criteria are met still carries significant weight. For instance, in 2013 32% of filings were based on market share alone and 23% were subject to review for meeting the minimum market share threshold (between 30% and 50% where the companies at stake achieved turnovers exceeding €5 million).

In respect of pre-notification proceedings, the figures illustrate companies' increasing interest in seeking such informal and confidential contact with the authority at an early stage of their transactions - a trend similarly experienced and encouraged in other EU member states and at EU level. According to the report, in 2013 the authority received 12 requests for preliminary assessment, six of which ultimately led to merger filings. This contrasts sharply with the two requests for preliminary assessment received in 2012, only one of which resulted in a notification.

The increasing importance given by companies to the expedience of pre-notification poses an ongoing challenge for the authority, with its aim to continue to improve legal certainty, transparency and consistency in the enforcement of merger control rules.

Antitrust proceedings

In 2013 the authority issued three decisions imposing fines on companies for their involvement in antitrust conduct:

- a case of abuse of dominance for discriminatory behaviour in the market of premium sports pay television channels;⁽²⁾
- a cartel between the three main players in the market for polyurethane foam, which is used as a raw material in several sectors of the so-called 'comfort' industry;⁽³⁾ and
- a resale price maintenance conviction in the market of aquarium products sold online.

In the abuse of dominance case the undertakings challenged the authority's decision in court. However, in early 2014 the Competition, Regulation and Supervision Court confirmed the authority's findings, although it reduced the penalty from €3.7 million to €2.7 million. In the two remaining antitrust cases, the decisions were not appealed.

The total fines imposed in 2013 amounted to around €4.7 million, compared with the four antitrust decisions issued in 2012 that resulted in penalties of approximately €17.8 million. Nonetheless, the authority has continued its efforts to reduce the timeframe for decisions in antitrust matters, with particular focus on cases that are more than three years old.

A variation of antitrust law is embodied in the regime governing so-called 'individual commercial practices', which involve unfair trading behaviour between businesses and businesses and consumers.⁽⁴⁾ In late 2013 the legislation dealing with these practices was revised and one of the most important changes was the transfer of prosecution and penalising powers in this field from the Competition Authority to the Authority for Economic and Food Safety.

However, since the new law was published only in late December 2013, during the course of the year the Competition Authority issued 42 decisions fining companies for engaging in unfair commercial practices. Given that penalties were relatively minor under the previous statute – with a maximum fine of €15,000 – these 42 decisions (of which 25 were challenged in court) resulted in total fines of slightly less than €491,000.

Institutional and regulatory changes

A number of relevant modifications to the competition framework were put in place in 2013, at both institutional and regulatory levels.

From a regulatory standpoint, the first full year of applicability of the new Competition Act stands out as one of the most prominent events, because (among other things) it strikes a new balance between investigatory/penalising powers and defence rights.⁽⁵⁾ The amendments introduced by the new law will certainly strengthen the authority's ability to pursue and punish antitrust infringement, and one of the most immediate responses to this expansion of power was the recent creation of a dedicated unit within the authority to probe cartels.

In the institutional sphere, a new board was appointed and, as a result of the government's commitments to its international creditors under the financial assistance plan, a new framework law on independent regulatory authorities was approved. This statute strengthens the authority's administrative and financial autonomy, but also imposes greater demands on the authority to improve its management efficiency and prevent impediments and incompatibilities between board members and other officials. To this end, it is expected that the government will soon pass new bylaws for the authority.

Comment

As mentioned, it seems that 2013 was a transition year for the authority. Figures relating to merger control cases and antitrust proceedings suggest a slight decrease in activity from 2012, which may be partially explained by the economic downturn and the adjustment period following the introduction of institutional and organisational changes.

However, the authority now has reinforced legal and regulatory methods at its disposal – with the new Competition Act at the forefront – that underpin the enforcement of new and stricter competition rules, particularly in respect of antitrust investigations.

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Endnotes

⁽¹⁾ The Competition Authority was enacted by Decree-Law 10/2003 (January 18 2003).

- (2) For further details please see "Sale terms of pay television sport channel lead to fine".
- (3) For further details please see "Competition Authority serves first settlement".
- (4) For further details please see "New regime introduced for individual commercial practices".
- (5) For further details please see "New Competition Act deals hard blow to rights of undertakings".

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