Competition & Antitrust - Portugal

Farminveste/Glintt sequel – more to it than meets the eye

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Introduction

In an August 2014 press release the Portuguese Competition Authority announced its first settlement in the context of a fining procedure relating to merger control, with significant fine reductions for the offenders. At stake was Farminveste's breach of the obligation not to implement a concentration (the acquisition of sole control over Glintt) without the necessary preliminary clearance from the authority.

Even though the facts reported in the press release focused solely on the use of a settlement in a context other than cartels (as permitted by the Competition Act), and the associated benefits for all parties involved, the relevance of the case extends beyond this.

Case behind the case

The case involved a previous fining decision from 2012, in which the authority had condemned the Portuguese National Pharmacies Association Group (ANF) and two subsidiaries – Farminveste and Farminveste 3 – for having acquired sole control over Glintt without the necessary preliminary authorisation (for further details please see "Unusual fine imposed on non-authorised concentration").

However, on appeal, the Competition Regulation and Supervision Court decided that a violation of the rights of defence had occurred during the investigation and annulled the fining decision.

In the fining decision, the authority had introduced new facts supporting its conclusions on the existence of sole control – facts which had not been mentioned or considered in the statement of objections addressed to the parties – which the parties had no chance to contest. These facts consisted of the allegation that there was *de facto* sole control over the target, as evidenced by the minutes from Glintt shareholders' meetings in recent years which showed that – in light of the meetings' attendees and decisions adopted – the ANF Group was the only shareholder able to influence Glintt's commercial strategic decisions (despite its minority shareholding in the company).

The problem was that the allegation of *de facto* sole control (and the authority's assessment drawn from the analysis of the minutes in support thereof) was not communicated to the investigated parties before the final decision. What is more peculiar is that the investigated parties had anticipated the matter. They suggested (in their response to the statement of objections) that an analysis of the minutes of Glintt's social bodies would be essential for a substantiated conclusion on control, and that if the authority undertook such an analysis, the results would have to be communicated to the parties so that they could exercise their right of defence.

The authority acted on the parties' suggestion, but did not share its conclusions with the parties because it considered that the facts were neither new nor unknown to them.

However, the court did not agree with the authority. It found that there were indeed new facts, and considered that the authority's purpose when analysing the minutes had been to show *de facto* control by a minority shareholder and that the authority's conclusions were included as proven facts in its final decision. The court held that, even if the minutes were documents known to the investigated parties, it could not deprive them of their right to be informed of the documents and the opportunity to contest the documents or the authority's interpretation or valuation of them.

The case was remanded for adequate processing. However, on this occasion the investigated parties availed of the possibility introduced by the Competition Act (in force since July 2012) to close the case in the context of a settlement procedure. Therefore, the companies confessed the breach and assumed the underlying responsibility in exchange for a reduction in the fine that would otherwise apply.

The fines imposed were of €6.879,14 for ANF and €111.958,24 for Farminveste. Farminveste 3 was not fined due to an absence of turnover in 2013. On account of the settlement, each fine was reduced by one-third.

Comment

Farminveste/Glintt presented an excellent opportunity for the court to reaffirm the limits faced by administrative authorities when imposing penalties. Even though the Competition Act gives the authority important tools to build up its case without the strict procedural fetters of traditional criminal procedure, certain limits relating to the right of defence and due process cannot be crossed. The decision has clarified that the purpose of an expedited administrative procedure cannot go as far as to deprive the investigated parties of their right to be heard, in respect of both relevant facts referred to in a final decision but omitted in the statement of objections and the outcome of evidentiary measures undertaken by the authority.

Under Portuguese competition law, the settlement mechanism is not limited to cartel investigations, but is potentially applicable to any administrative offence investigation for breach of substantive provisions of competition law, including in the context of merger control, as in this case.

There is no pre-established threshold in legislation or in the authority's guidelines concerning the amount by which fines will be reduced. The authority has stated publicly that it favours a case-by-case approach that will enable it to take into account the particulars of the case, including the type of breach at stake and the gains of settlement in terms of procedural efficiency. The 10% threshold applied by the European Commission will serve as guidance, but not as a limit. In this settlement decision the reductions granted were one-third of each fine. The previous settlement reached in the polyurethane foam cartel case in 2013 saw fine reductions of between 38% and 40%.

Even if each case is assessed on its merits, experience thus far sends out a positive message to companies willing to consider a settlement as an option for closing their own cases.

Considering that the importance of the case relates not only to settlement and administrative efficiency, but also to fundamental issues of a balanced and fair administrative procedure in respect of the rights of defence of companies, it is unfortunate to see that this last aspect was ommitted from the authority's communication. Neither the press release nor any other previous public communication by the authority contained information on the annulment of the initial case and its grounds or the substance of the court's judgment.

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