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The first five years of scrutiny of merger control by the Portuguese Competition Authority

Five years have now elapsed since the current Portuguese Competition Act was adopted¹ and the new Competition Authority started working². It is fair to say that much has changed in the area of competition law in Portugal since 2003 and that now it is timely to undertake a reflection on those changes. Regarding merger control procedures in particular – by far the ones that have attracted more attention and have developed in a major fashion – we take this opportunity to highlight some of the relevant aspects of the Authority's framework and practice during this period and to evaluate the necessity for further adjustments.

Brief overview of the Authority's current framework and practice

In 2003, the legislature aimed primarily at establishing a prestigious and independent competition agency that would not only be able to ensure respect for competition law, but also create a true competition culture. Once the Authority was enacted and the Competition Act saw the light of day it became clear that there would be relevant changes in the competition law framework that concerned not only the substance and the proceedings, but also the approach towards competition law.

Having a modern framework as the background and holding the necessary competences to conduct the required merger control analysis and impose substantial fines in case of non-compliance with merger control rules, the Authority has been able to deal with a high number of cases (more than 350 between 2003 and July 2008) in a professional way.

Some of those cases were undoubtedly complex and presented challenges for both the companies and the Authority. For instance, in 2006/2007 the Authority had to deal with the filings of two takeover bids in the telecom³ and financial⁴ sectors in Portugal⁵, which accounted for the most valuable and among the most

complex concentrations brought before the Portuguese competition authorities to date⁶.

Also, it is worth mentioning that prior to July 2008 the Authority adopted 21 non-opposition decisions subject to conditions and obligations⁷ and three opposition decisions⁸. Among the opposition decisions, only one now has the force of *res judicata*, since one of the cases was in the meantime reversed by the Minister of Economy in light of the existing extraordinary review procedure and the other is still pending judicial review.

Further developments

The Authority is chiefly responsible for the modifications that have taken place in the past five years in the competition culture in Portugal. Nowadays, the subject is present in companies' decision-making process, in the minds of economic entities, in the agenda of the media and in the curricula of the universities.

This period has also witnessed the increasing effort the Authority has been making in order to strike an important balance between flexibility and legal certainty in this field of law. A recent set of initiatives aiming at the clarification and improvement of several substantive and procedural issues creates the expectation that this trend will continue in the upcoming years.

As to forthcoming legal events, there is some indication that the Authority might be preparing a proposal for the amendment of the Competition Act. Although the precise scope of the prospective changes has not yet been disclosed, we agree that there are modifications that could improve the Portuguese merger control regime.

For instance, the substantive test for appraisal of concentrations provided in the Portuguese Competition Act still relies on the 'dominance test' of the former EC Merger Regulation and should thus be harmonised with the new test provided in Regulation (EC) No 139/2004.

In addition, modifications should clearly be considered in terms of the time frame for scrutiny of a merger by the Authority and especially in the harmonisation of timetables between phase I and phase II of the proceedings.

Presently, in accordance with the new wording of the Competition Act⁹, the Authority is entitled to suspend indefinitely the time period set out in phase I, but is bound by an overall limit of ten working days in the information requests addressed in phase II. But there is much controversy concerning the interpretation of these time limits.

Finally, we think merger control procedures in Portugal would be improved if two of its current features were eliminated, as follows: (i) the existence of a market share threshold, the triggering of which is sometimes difficult to assess, especially in the absence of a solid decision practice involving the markets concerned; and (ii) the existence of a deadline for submitting the notification to the Authority, which is clearly dispensable as the Competition Act provides for a mandatory waiting period prior to the completion of a concentration and the engagement of pre-notification contacts is becoming more frequent. ■

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¹ Law No 18/2003, 11 June, as amended.

² The Authority was created by Decree-Law No 10/2003, 18 January, but the legislature provided for a transitional installation period, which led the Authority to start performing its duties circa 60 days after that date (in late March 2003).

³ Case "Ccent. 08/2006 – Sonacom/PT".

⁴ Case "Ccent. 15/2006 – BCP/BPI".

⁵ The latter having been historically excluded from the Portuguese merger control procedure until 2003.

⁶ For instance, the Authority ended by delivering an approximately 850 page decision in the first case and a decision with more than 670 pages in the second case. Both proceedings lasted about one year and each of them involved dozens of information requests.

⁷ Ten of those decisions were adopted in phase I, with the remaining eleven in phase II.

⁸ Cases "37/2004 – Barraqueiro/Arriva (ATMS)"; "45/2004 – Petrolgal/Esso" and "Ccent. 22/2005 – Via Oeste (Brisa)/Auto-Estradas do Oeste/ Auto-Estradas do Atlântico".

⁹ Decree-Law No 219/2006 of 2 November.