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Competition - Portugal

Competition Authority Imposes Provisional Measures on Promotional Campaign

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Background

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Background

The European Commission and the EU member states' national competition authorities have the power to adopt interim or provisional measures in applying Articles 81 and 82 of the EC Treaty. The legal basis for this power is Article 5 of EU Regulation 1/2003, which states that:

"The competition authorities of the member states shall have the power to apply Articles 81 and 82 of the treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may... [order] interim measures."

Article 27 of the Competition Act (18/2003) largely reflects Article 8 of the regulation in stipulating the circumstances in which interim measures may be granted.⁽¹⁾ It states that:

"Whenever an investigation indicates that the practice which is the subject of the proceedings may cause damage which is imminent, serious and irreparable or difficult to rectify for competition or for third-party interests, the authority may, at any moment in the investigation or during the taking of evidence, issue a preventive order for the immediate suspension of the practice or take any other provisional measures that are necessary immediately to re-establish competition or are indispensable for the useful effect of the decision to be pronounced at the close of the proceedings."

The imposition of interim measures to maintain pre-existing competitive conditions pending completion of an investigation is intended to ensure that the Competition Authority's final decision will prove effective. By their nature, interim measures are temporary and seek to maintain the status quo; thus, such measures must be limited in time and their effects may not exceed what is strictly necessary to remedy a specific situation.

Until January 2009 the authority had never exercised its powers under Article 27.

Facts

The authority considers that no fundamental changes have occurred in the markets for film distribution and screening since its detailed review of the markets in the context of Sonaecom's takeover bid for Portugal Telecom in 2006.⁽²⁾ Therefore, the authority summarily restated its opinion that ZON Multimédia holds a dominant position in these markets, both at national level and in eight specified districts, including Lisbon and Oporto.

In its 2006 merger decision the authority estimated that in 2005 ZON held a nationwide share of 47% of the film-screening market, in terms of both ticket sales and revenue. The authority has since temporarily suspended a promotional campaign whereby subscribers to ZON's pay-television service, TV Cabo, were offered free tickets to films in cinemas managed by ZON. According to its financial statements for the first semester of 2008, ZON had a portfolio of 206 cinemas at that time.

Decision

In its decision to order the provisional suspension of the campaign, the authority concluded that it

constituted a *prima facie* infringement of Article 6 of the Competition Act, fulfilling the requirement that there be an apparently sound basis for the case. Additionally, the authority emphasized the danger of delay, as precautionary suspension measures were urgently needed to preserve the existing competitive conditions and reduce the risk of anti-competitive effects. The authority considered that the campaign posed an imminent and serious risk of irreparable damage to individual consumers and to the public interest, emphasizing that the anti-competitive effects could affect "ZON's present and potential competitors and, directly or indirectly, consumers themselves", and stressing that this might occur:

"not only through the direct exclusion from the market of ZON's existing competitors, but also through the creation of barriers to the entry and expansion of other competitors in the market, by means of a loyalty system for ZON/TV Cabo clients."

In accordance with Article 50(3) of the act and Article 55(2) of Legislative Decree 433/82, the decision on provisional measures may be appealed to the competent commercial court, but the order is not suspended in the event of an appeal.

For further information on this topic please contact [Gonçalo Machado Borges](#) or [Mariana de Sousa Alvim](#) at [Morais Leitão Galvão Teles Soares da Silva & Associados](#) by telephone (+351 21 381 7400) or by fax (+351 21 381 7411) or by email (gmb@mlgts.pt or msalvim@mlgts.pt).

Endnotes

- (1) However, Article 8 of the regulation mentions only damage to competition, not the effect on third parties.
- (2) See *Sonaecom/PT* (8/2006).

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