

Competition law raising question marks

Competition regime aims to bring Portugal in line with the EU, but its practical application is as yet unclear.

Portugal recently published its new Competition Law 19/2012, introducing changes to its competition regime, a reform agreed under its Memorandum of Understanding with the 'Troika' to align it with the EU's framework.

Coming into force on July 7th, 2012, the Law increases the strength of competition enforcement, improves speed and efficiency and ultimately it is hoped it will help the competitiveness of Portugal's economy.

Notable changes

One of the main focuses of the Law has been on extending the investigatory and sanctioning powers of the Portuguese Competition Authority (PCA). The Law provides the PCA with a number of new enforcement tools that should give the agency the requisite conditions to increase its effectiveness, says Ricardo Oliveira, EU and Competition Partner at PLMJ in Lisbon. "In any event, the key will be the PCA's willingness to act. Enforcement has been very soft over the past few years."

Oliveira recently moderated an Iberian Lawyer Masterclass in conjunction with PLMJ and a panel of leading international experts, where they debated the potential international competition law lessons for Portugal.

The PCA may now also conduct company onsite inspections and audits, and search and seize premises, vehicles and property belonging to any employees, which lawyers worry affects an individual's right to privacy.

The Law strongly shifts the balance from the companies to the PCA, says Gonalo Anast cio, Partner in charge of the Competition Department at SRS Advogados, and it's inevitable that such changes will have material consequences.

Perhaps most notable is the introduction of a system to prioritise matters, a big step forward according to lawyers.

Legal directors, if responsible for the area under investigation, can now be fined, including if they knew or should have known about an infringement and did nothing to prevent or stop it. And a Tribunal for Competition, Regulation and Supervision (TCRS) has been set up to hear appeals, revisions and executions of PCA decisions, including those applying to fines. It also has the power to adjust fines or period penalty payments.

The substantive test for market dominance has also been brought in line with that of the EU and covers significant impediments to effective competition, stricter than Portugal's previous test. And the leniency regime has been altered; rather than applying to all restrictive agreements, now applies to cartel cases alone.

There have also been substantial changes to the thresholds, in particular in relation to market share, where the threshold has gone up to 50 percent from 30 percent, and the turnover threshold going down from  150m to  100m.

Cause for concern

While the Law has been generally positively received by lawyers, it has raised the issue that by increasing the PCA's powers, it may have unwittingly touched on privacy rights issues, and not enough focus has been given to company and individual rights of defence against potential criminal liability.

Others also stray from the EU Directive such as the retention of a market share criteria for notifying concentrations, which has become even more complex, says Joaquim Vieira Peres, Partner at Moraes Leit o, Galv o Teles, Soares da Silva, and the substantial widening of the concentration procedure.

The main source of concern is the perceived imbalance between the new enforcement tools given to the PCA and the rights of defence granted to the companies, says Oliveira at PLMJ. The objective of increasing the PCA's effectiveness may therefore have been met at the expense of companies' procedural rights.

For Anast cio at SRS Advogados, the concern is that the Law provides the Competition Authority with the complete set of tools of the most advanced jurisdictions while not including the corresponding control mechanisms that are in place in such jurisdictions. There is therefore a question mark as to how the Law will be applied by the Competition Authority and the Portuguese courts.

However, as long as the PCA maintains an appropriate level of transparency when it comes to its decisions and application of the Law, say lawyers, then these doubts may likely be put to rest.