

Competition - Portugal

Companies' rights of defence versus multiple statements of objections

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Facts

First decision

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Facts

In early 2004 the Competition Authority initiated an inquiry regarding an allegedly coordinated increase in the price of various types of flour. This led to the issuing of a statement of objections, in August 2004, against 12 companies engaged in the commercialisation of flour. The authority accused the companies of infringing Portuguese competition law, as it found that all of them had almost simultaneously sent a circular to their respective clients, announcing an increase in the price of various types of flour at approximately the same time (ie, the end of 2003).

In December 2004, having received the statement of defence from the flour companies and having requested further information, the authority surprisingly issued a supplementary statement of objections. The authority accused the defendants of having coordinated their behaviour between 2000 and July or August 2004, thereby vastly increasing the scope of the first statement of objections. In 2005 the authority adopted its final decision and charged all but one of the companies with engaging in an anti-competitive practice by fixing a table of prices among themselves. The undertakings in question appealed the authority's decision to the Lisbon Commercial Court.

First decision

The court held that the authority's conduct violated the constitutional right to a fair and equitable procedure, as the authority had issued a supplementary statement of objections which was based on answers that the defendants had provided to the first statement of objections and on evidence which was already available to the authority by that time. In February 2008 the court annulled the supplementary statement of objections and all of the authority's subsequent acts in this regard.

Despite this decision, the controversy took a further surprising turn. The authority decided to issue a third statement of objections, dated November 2008, which not only replaced the original statement, but also included all the facts and findings from the supplementary (ie, second) statement. Based on this third statement, the authority adopted a new final decision in July 2009, in which it accused the companies of fixing the price of flour between 2000 and July or August 2004.

Believing that the third statement of objections suffered from the same procedural defects as the second, the companies again appealed to the court, which issued its decision in March 2011.

Second decision

Contrary to the flour companies' allegations, the court considered that - in theory - the authority has the right to issue more than one statement of objections during the course of an investigation of a competition law infringement. The court referred to two previous cases in which the issuance of a second statement of objections had been permitted. However, in one of these cases the court in question described the authority's procedural conduct as "shocking", even though it was legally admissible.

Although the court theoretically accepted the idea of issuing more than one statement of objections, it clarified that this possibility does not amount to a right or privilege that the authority can exercise of its own free will or as a procedural strategy. The court noted that the third statement of objections contained elements that the authority had previously acquired, but had not included in its first statement of objections; moreover, it had used answers to requests for information as a basis for presenting new facts. The court found that such behaviour runs counter to the idea of a fair and equitable procedure, as it:

"reduces the defendants' right of defence to a mere formality that has to be exercised with caution in order not to provide elements that can be used against them in new statements of objections, thereby creating an effective inequality between the parties - in this case, the authority and the defendants."

According to the court, the authority's inadequacies in its investigation did not justify additional requests for information; nor did they justify the extension of the investigation phase after the defendants had exercised their rights of defence. The court therefore devised the following rule: the right to due process and the principle of 'equality of arms' dictate that only one statement of objections may be issued during the course of proceedings, although other statements of objections may be adopted if they do not restrict a defendant's rights of defence and are required in the particular circumstances of the case (eg, if new facts arise after the first statement of objections has been issued or if the facts require a new legal qualification).

Furthermore, the court agreed with the flour companies that there was no difference between the present case and the previous case (regarding the initial supplementary statement of objections) that justified different legal treatment. This means

that as the authority cannot issue a supplementary statement of objections to complement an original statement, it is also prohibited from issuing a new statement of objections that revokes and incorporates previous statements.

The authority has appealed to the Court of Appeal.

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