Competition - Portugal

Will shortcomings undermine the new Competition Act?

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Introduction

On February 6 2012 the government submitted a draft of the new Competition Act to Parliament. The reform of the country's key competition legislation attracted a level of public participation rarely seen in Portugal's recent legal history.

A revision of the act has been under consideration since 2008, if not before, but it was not until 2011 that it became one of the government's priorities. On May 17 2011 the government, the European Commission, the European Central Bank and the International Monetary Fund signed a memorandum of understanding which identified the revision of the act as one of the structural benchmarks of the financial assistance plan for Portugal.

The main aim is to make the act as autonomous as possible from the structures of administrative and criminal law and more closely harmonised with the EU competition framework. The memorandum identifies a need to:

- simplify the act, clearly separating competition enforcement rules from the rules of criminal procedure;
- rationalise the criteria that determine whether an investigation should be opened, allowing the Competition Authority to assess the relative importance of the claims submitted to it;
- establish procedures that bring Portuguese merger control more closely into line with the EU Merger Regulation (139/2004), specifically with regard to the criteria for mandatory filing;
- ensure greater clarity and legal certainty in the application of administrative procedural law to merger control; and
- evaluate the appeal process and amend it where necessary to increase fairness and efficiency in terms of due process and timeliness of proceedings.

The draft proposes several improvements to the existing act. However, if Parliament fails to amend it in certain key areas, the new act may fall short of the proposed objectives and leave a number of other questions unresolved.

Simplifying the act

The creation of a specific competition enforcement procedure, with its own rules and indicative timelines for the conclusion of investigations, would represent a significant step forward in terms of legal certainty. The draft act institutes a special procedure for antitrust cases that purports to be separate from criminal procedure. However, many antitrust matters continue to be governed - on a subsidiary basis and to an uncertain extent - by the general regime on misdemeanours. Furthermore, the draft assigns prerogatives to the authority that are typical of criminal procedure, without due regard to the rights of defence that should be accorded to undertakings and individuals.

Although the act is to be simplified by separating competition enforcement rules from criminal procedure, an explanatory statement in the draft states that the government wishes to safeguard the fundamental principles derived from the applicable legal framework on penalties (ie, the general regime on misdemeanours). This is reflected in several provisions of the draft whereby the rules on administrative offences apply on a subsidiary basis to antitrust investigations and appeals. The draft also contains rules that apply exclusively under criminal procedure, and often to only the most serious offences, such as the authority's power to search a person's home and the offices of lawyers and doctors. However, other aspects of the rules deviate from the general principles applicable to misdemeanours in Portugal, such as:

- the unlimited jurisdiction of the competent court to review antitrust decisions adopted by the authority;
- the fact that an appeal does not suspend the effects of a decision; and

- the authority's prerogative to undertake further investigations and diligence after a statement of objections has been issued and rights of defence have been exercised.

Opening investigations

In essence, the draft provides that the authority is no longer bound by the principles of legal duty in initiating and conducting antitrust investigations and penalising antitrust infringements, but is allowed to rank its priorities in exercising its functions. The problem with exercising discretion in prioritising the authority's objectives stems from the difficulty in striking a balance between flexible allocation of resources and ensuring rights of defence for complainants and defendants.

The solutions proposed in the draft seek to combine these two aims, but it is the application of the principle itself to a national competition authority that raises questions. It is easy to understand why the European Commission must operate on such a basis, and if it refuses to accept a complaint, the plaintiff always has recourse to the relevant national competition agency. From a lawyer's perspective, it may be difficult to accept that a national agency may decide which cases to take solely on the basis of other priorities or on information presented by the plaintiff on its own initiative.

The draft provides that a refusal to take up a complaint is subject to judicial scrutiny. However, this does not allay concerns - not least because the authority's exercise of its discretion to prioritise is not, in itself, open to challenge. Another potential issue arises if the authority is allowed to refuse to open an infringement procedure because there is a low probability of proving infringement or because the necessary investigative measures are too extensive. Both reasons are expressly mentioned in the draft act, but how can the authority form a view on these matters without investigating first? If it must investigate, even to the minimum extent necessary to decide not to proceed, the fact remains that all investigations of this kind must be conducted within the framework of a formal infringement procedure, so that companies and individuals are afforded the necessary rights of defence.

Merger control and legal certainty

The draft includes a number of innovations relating to merger control, such as:

- the elimination of filing deadlines;
- changes to turnover thresholds in order to adapt them to new economic circumstances; and
- the introduction, in the second phase of proceedings, of a mechanism similar to the statement of objections in European Commission proceedings.

In contrast, other aspects of merger control remain specific to the Portuguese regime, which may create uncertainties for parties involved in transactions that are subject to notification. Arguably, the main concern is the difficulty in predicting how long an investigation may take, given that an information request by the authority automatically stops the clock and there is no limit to the number and length of such suspensions.

Appeal process

It is difficult to envisage how the proposed amendments will increase fairness and efficiency in terms of due process. Arguably, it is misleading even to imply a need to amend the act in furtherance of this goal and to deter undertakings from challenging the authority's decisions in antitrust cases. The presumption of innocence and the right to a fair trial are both basic, universal principles in democratic societies. In practice, the Portuguese courts decide a significant number of antitrust appeals in the appellant's favour, quashing all or part of the authority's decision on either procedural or substantive grounds. This confirms the need to maintain effective judicial scrutiny of the authority's activity.

The most crucial aspect of the draft in this context is the provision that appeals in antitrust cases will no longer suspend the effects of the authority's decisions, except in relation to structural remedies. This contradicts fundamental principles of criminal and misdemeanour proceedings and raises serious constitutional questions. Moreover, the measure is not even justified from a competition policy viewpoint.

Comment

The revision of the act was considered a structural benchmark of Portugal's financial assistance plan and a means of making competition enforcement faster and more effective, thus making the Portuguese economy more competitive. These aims make it all the more important for Parliament to address the draft's shortcomings.

However, the act is only one of several tools that contribute to effective enforcement of competition law - the written word of law is no more or less important than the law in action. The memorandum sets forth specific targets to improve the independence of the national regulatory authorities and their means of coordination with the Competition Authority, whereas the government merely commits to afford the authority sufficient financial means to guarantee its effective and sustained operation, with no reference to the strengthening of independence. This disparity of approach is incomprehensible to many, and it is hoped that it will be considered as part of the ongoing revision of the legal framework of national regulators.

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