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## Competition - Portugal

### Commercial printed forms cartel: application of new law reduces fines

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**Competition Authority decision**

**Court decision**

**Comment**

The Competition, Regulation and Supervision Court recently confirmed a 2012 decision of the Competition Authority which had fined three companies and their respective managers for operating a cartel in the commercial printed forms sector. However, the court concluded that application of the Competition Act 2012 was more favourable to the defendants than the Competition Act 2003 (the law in force at the time that the proceedings were initiated), and significantly reduced the fines imposed.

#### Competition Authority decision

The authority's investigation was triggered by a leniency application submitted by Copidata in October 2010, and concerned an agreement with its three main competitors in the commercial printed forms market (Contiforme, Formato and Litho Formas). The authority adopted an infringement decision on December 19 2012, finding that from 2001 to 2010 the four companies had coordinated their commercial behaviour regarding 'cheque letters' (ie, personalised letters with a detachable bank cheque, used by companies making a large number of regular payments to their suppliers or creditors) by establishing the companies' preference rights over their traditional clients, eventually allocating contracts to each company under a rotation system based on the weeks of the year. According to the decision, the defendants had also allocated large clients (eg, banks and utilities companies) among themselves by:

- ensuring that no client was offered a price lower than that submitted by its intended supplier; and
- establishing a compensation mechanism involving the subcontracting of the intended supplier so that the allocated revenues previously agreed between the four companies were attained.

Copidata, as the leniency applicant, received full immunity. The three other companies received fines totalling approximately €1.17 million (€604,173.03 for Contiforme, €147,911.98 for Formato and €398,279.80 for Litho Formas), which represented 5% of their respective turnovers in the final year of the infringement. Three individuals, who at the time were members of the managing bodies of the defendants and directly participated in the infringement, were also fined €6,000 each. The authority applied the Competition Act 2003 (Law 18/2003), as the proceedings had been initiated before the entry into force of the new Competition Act (Law 19/2012) in July 2012.

#### Court decision

After carrying out a thorough examination of the documentary and testimonial evidence – in particular, numerous emails and attached documents (including charts detailing each week of the year) exchanged between the defendants between 2001 and 2010 – the court confirmed the authority's appraisal of the facts. The court's conclusion is unsurprising, given the leniency applicant's admission of liability and the overwhelming documentary evidence against the defendants. The main point of interest in the judgment therefore lies in the issue of determining the amount of the fines.

The authority had decided the case under the 2003 act, the applicable law given that the new 2012 act applied only to proceedings initiated after its entry into force. However, the court analysed whether application of the new act would result in a more favourable outcome for the defendants, pursuant to the constitutional principle requiring the retroactive application of a more favourable criminal law rule. This is frequently a complex balancing exercise, since a legal instrument must be applied to a given situation 'in

block' (ie, the court cannot apply individual provisions of each instrument); therefore, the impact of all relevant material and procedural rules on the concrete situation must be properly weighed.

While under the 2012 act appeal courts have full and unlimited jurisdiction to review authority decisions imposing fines – including the power to increase fines (a power that did not exist under the 2003 act) – the court concluded in this case that the new act was more favourable to the defendants. The new act establishes that the relevant year on which to base the amount of the fine is the year before the adoption of the authority's final decision (in this case, 2011), whereas under the 2003 act the relevant year was the last full year of the infraction (2009). Since the economic situation of all defendants subsequently deteriorated, the maximum applicable fine (10% of the consolidated turnover) would be lower under the new act than under the 2003 act. In addition, the 2012 act limits the fines on individuals to 10% of their annual remuneration (eg, working wages), while under the 2003 act individuals were liable for fines of up to half of those imposed on infringing companies. Finally, the new act also introduced an express requirement for the economic situation of the defendant to be taken into account in the calculation of the fine (although the general regime for misdemeanours, applicable to both the 2003 and 2012 acts on a subsidiary basis, already provided for consideration of this criterion).

Noting that in 2011 and 2012 the economic situation of all defendants had deteriorated markedly, with all companies reporting negative annual results, the court observed that the preventive effect of penalties must be reconciled with the necessity of the companies' survival in the ongoing crisis. The court therefore issued significantly lower fines: €250,000 for Contiforme, €150,000 for Litho Formas and €55,000 for Formato. The court considered these fines – which represented only 38% to 41% of the fines imposed by the authority – to be necessary, reasonable and proportionate, and gave no further reasoning, even though they were significantly lower than the 5% of turnover imposed by the authority and considering the more recent, reduced 2011 turnover (which would be relevant pursuant to the new act).

### Comment

As the authority opted not to apply the new 2012 Competition Act to this case, the defendants could not benefit, during the administrative phase, from the application of procedural mechanisms which could have been more favourable, such as the settlement procedure (subsequently applied in the *Foam* cartel decision of July 2013<sup>(1)</sup>) or the 2012 rules on leniency, which may be more advantageous for companies that are not the 'first in the door'.

However, the authority adopted the decision just one day before publication of the guidelines on the calculation of fines (on December 20 2012), which contain detailed rules to determine fines and are based to a large extent on the European Commission's 2006 fining guidelines. The information available on this case does not allow for estimates to be made on the fines that would have resulted from applying the new guidelines. Nevertheless, it cannot be ruled out that the fines imposed could have been lower if calculated pursuant to the new act and the guidelines – even if the multiplying factor for duration, similar to that used by the European Commission, could somewhat reduce the likelihood of this scenario, given that in this case the conduct lasted for more than nine years.

The court's frugal reasoning on the calculation of the fines could also raise concerns from a transparency perspective, even though it is not rare for review courts (even EU courts) to be somewhat opaque when reducing fines originally imposed by competition authorities.

It will be interesting to observe the degree to which the Portuguese courts will consider themselves bound by the authority's 2012 guidelines in future cases. Although as a rule guidelines are binding only for the administrative authority itself, the 2012 Competition Act expressly provides that the authority must adopt (under its power to issue regulations) guidelines on the methodology for the application of fines – a provision which may debatably confer on these guidelines the legal force of an implementing regulation. It may therefore be argued that the courts must take into account the new guidelines (insofar as they do not contravene the Competition Act) for the benefit of transparency in antitrust cases.

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### Endnotes

<sup>(1)</sup> For further details please see "Competition Authority serves first settlement".

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