

Constitutional Tribunal upholds non-suspensive effect of judicial challenges to Competition Authority fining decisions

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Introduction

Facts

Constitutional Tribunal decision

Comment

Introduction

Under the Competition Act (Law 19/2012 of May 18 2012), judicial challenges to Competition Authority decisions, including those that impose fines for competition law infringements, have non-suspensive effect (Article 84(4) of the Competition Act). The only exception to this rule is provided for decisions that impose structural remedies which are considered indispensable to end restrictive practices or their effects. However, in the case of fining decisions, the Competition Tribunal may, on the claimant's request, order that the effects of the contested decision be suspended if:

- its enforcement would cause the claimant considerable loss; and
- the claimant provides a guarantee within a prescribed period (Article 84(5) of the Competition Act).

Therefore, the addressee of a fining decision must, in principle, pay the fine even if it is challenging the decision before the Competition Tribunal.

In this respect, the Competition Act reverses the general rule applicable under the previous version of the act (Law 18/2003 of June 11 2003), according to which judicial challenges to fining decisions suspended the effects of the decisions (Article 50(1) of the previous Competition Act). The Competition Act also departs from:

- the general regimes for administrative and criminal offences; and
- several sector-specific regulatory regimes (eg, for securities, financial instruments and telecommunications).

The abolishment of the suspensive effect of judicial challenges to fining decisions – in conjunction with the introduction of the possibility of a judicial *reformatio in peius* (ie, an appeal decision that can result in a less favourable outcome), which enables the Competition Tribunal to increase fines imposed by the Competition Authority (Article 88(1) of the Competition Act) – was intended to:

- serve as a disincentive to unfounded judicial appeals lodged for purely dilatory purposes;
- reinforce the effectiveness and swiftness of the application and enforcement of competition rules, as agreed by the government under Portugal's Economic and Financial Assistance Programme; and
- approximate the procedural mechanisms to those provided under EU law (Article 278 of the Treaty on the Functioning of the European Union (TFEU) and Article 31 of EU Regulation 1/2003).

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However, given the often punitive magnitude of fines imposed under the Competition Act, these legislative changes have been criticised for infringing fundamental rights guaranteed under the Constitution, in particular:

- the presumption of innocence;
- the rights of access to the courts and effective judicial protection; and
- the principle of proportionality (Articles 18(2), 20(1), 32(2) and 268(4) of the Constitution).

In its June 8 2016 judgment (373/2016), the Constitutional Tribunal gave its opinion on this issue for the first time.

Facts

The case concerned decision INC/2015/1 dated June 26 2015, in which the Competition Authority had imposed a fine of €150,000 on Peugeot Portugal Automóveis for the provision of incomplete information in response to a request for information,⁽¹⁾ which constitutes an administrative offence under Article 68(1) of the Competition Act. The fine had to be paid within 10 days from the expiry of the time limit to appeal the decision or, if the decision was appealed and the attribution of suspensive effect requested pursuant to Article 84(5) of the Competition Act, within 10 days from the rejection of the request.

Peugeot challenged the decision before the Competition Tribunal claiming, among other things, that by not attributing suspensive effect to its appeal, Article 84(4) of the Competition Act violated the presumption of innocence guaranteed in Article 32(2) of the Constitution. Alternatively, Peugeot requested attribution of suspensive effect pursuant to Article 84(5) of the Competition Act, offering the required guarantee.

In Order 273/15.4YUSTR, dated October 2 2015, the Competition Tribunal considered that Articles 84(4) and (5) of the Competition Act did not conflict with the presumption of innocence, but that it did infringe, among other things, the rights of access to the courts and to effective judicial protection (Articles 20(1) and 268(4) of the Constitution). According to the tribunal, the unconstitutionality followed from:

- the absence of any possibility of discretionary attribution of suspensive effect; and
- the fact that the fining decision's effects could be suspended only in return for the provision of a guarantee, even if the addressee lacks the necessary financial resources.

As a result, the tribunal refused to apply Articles 84(4) and (5) of the Competition Act and suspended the effects of the contested decision pending judgment, based on the general regime for administrative offences (ie, without requiring Peugeot to provide a guarantee).

The public prosecutor disagreed with the Competition Tribunal's conclusions and appealed to the Constitutional Tribunal.

Constitutional Tribunal decision

The Constitutional Tribunal first considered the Competition Tribunal's reasoning – based on the claimant's potential lack of financial resources for the provision of a guarantee – to be irrelevant to the case at hand (and thus to have been given *obiter dictum*), as Peugeot had not claimed any such insufficiency, but had instead offered the required guarantee. The Constitutional Tribunal therefore excluded this from its analysis.

The tribunal then assessed whether Articles 84(4) and (5) of the Competition Act could be considered to violate the rights of access to the courts and effective judicial protection enshrined in Articles 20(1) and 268(4) of the Constitution. In that regard, it noted that addressees of Competition Authority fining decisions undeniably have access to judicial protection, given that they can appeal to the Competition Tribunal, which has full jurisdiction to review the contested acts (Article 88(1) of the Competition Act). Further, it considered that the constitutional right to effective judicial protection did not translate into a general rule that legal actions against decisions imposing administrative penalties are to have suspensive effect. The legislature had a wide margin of

discretion in designing the procedure for access to the courts and the exercise of this discretion could be reviewed only for the creation of excessive difficulties and for material inequities. Considering the nature of the public interests pursued by competition rules – which are also protected under the Constitution (Articles 81(f), 99(1)(a) and (c) and the TFEU (Article 3(3)) – the general rule that judicial challenges to fining decisions do not suspend their effects was not an unjustified or unreasonable legislative choice, but rather one that improved the effectiveness of the enforcement of these decisions by discouraging from unfounded and dilatory legal actions which would compromise the defence of the public interests pursued. Finally, the possibility foreseen in Article 88(5) of the Competition Act for claimants to request, against the provision of a guarantee, the suspension of the effects of a fining decision whose enforcement would cause them considerable loss, mitigated the risks of an effective infringement of the right to judicial protection (if the decision is annulled) without compromising the effectiveness of the fine (if the decision is upheld). This possibility represented a 'relief valve' which withdrew rigidity and automaticity from the system and allowed for a reasonable and proportionate balance between the protection of the individual sphere of the claimant and the enforcement of the public interest.

As regards Peugeot's claim that the contested provisions infringed the presumption of innocence protected by Article 32(2) of the Constitution, the Constitutional Tribunal considered that criminal and administrative offences were not substantially equivalent, given the significant differences in terms of the interests protected and the penalties foreseen. The principle (following from the presumption of innocence) that criminal penalties cannot be enforced before the conviction has become final could not, therefore, be entirely extended to the enforcement of administrative penalties.

As a result, the Constitutional Tribunal found that Articles 84(4) and (5) of the Competition Act did not infringe the constitutional rights at issue. It therefore declared the public prosecutor's appeal to be well founded and ordered the Competition Tribunal to amend the contested order in light of its judgment.

Comment

The Constitutional Tribunal has now confirmed that the system foreseen in Articles 84(4) and (5) of the Competition Act is in line with Articles 20(1), 32(1) and 268(4) of the Constitution (save for scenarios where the claimant, due to a lack of financial resources, is unable to provide the required guarantee). However, its reasoning is not entirely convincing.

Although penalties for the infringement of competition rules and their enforcement must undoubtedly be effective – and although the legislature disposes of a wide margin of discretion in designing procedural rules for access to judicial review – it must be subject to close scrutiny when, in doing so, it encroaches on the constitutional rights of the undertakings concerned – in particular, where the procedural rules concern the enforcement of potentially drastic fines, which can be as high as 10% of the annual revenue of the undertakings concerned and as such threaten their existence.⁽²⁾ It appears questionable that the scrutiny exercised by the Constitutional Tribunal meets these requirements.

First, it seems doubtful that the legislature's reasons can justify the abolishment of the suspensive effect. The discouragement from lodging unfounded and purely dilatory appeals would appear to constitute a potential justification only if empirical evidence suggested that a significant share of appeals against fining decisions feature those characteristics. However, the fact that in recent years a significant number of high-profile Competition Authority fining decisions were annulled, or the fines reduced, by the courts does not seem to allow for such a conclusion. The abolishment of the suspensive effect was also not required under EU law, because the enforcement of fines for infringements of national competition law falls outside the scope of EU law altogether and as far as infringements of EU competition rules are concerned, EU law requires only that national rules provide for effective penalties and do not render their enforcement impossible or unreasonably difficult.

Second, even if the deterrence from unfounded and purely dilatory appeals was accepted as a potential justification, the system foreseen in Articles 84(4) and (5) of the Competition Act seems to exceed what would be necessary to achieve this aim; this is all the more so if considered together

with the introduction of the possibility of *reformatio in peius* (Article 88(1) of the Competition Law). Given that the attribution of suspensive effect against the provision of a guarantee was considered by the Constitutional Tribunal to mitigate the risks of an effective infringement of the right to judicial protection without compromising the effectiveness of the fine, there appears to be no compelling reason why this should not also be an option for undertakings to which the enforcement of a fine would not cause considerable loss. Further, despite the relief valve foreseen in Article 84(5) of the Competition Act, the system still displays a significant degree of rigidity and automaticity in that it precludes the attribution of suspensive effect even in cases where an obvious or *prima facie* illegality of the fining decision can be established.

Finally, given the importance of the relief valve for any necessity and proportionality of the system foreseen in 84(4) and (5) of the Competition Act, it appears doubtful that the legislature was entitled to introduce a term as vague as "considerable loss" and leave its interpretation entirely to the courts. It remains to be seen whether the courts, and in particular the Competition Tribunal, will give the term a scope that reflects its significance.

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Endnotes

(1) The request for information had been issued in one of a series of Competition Authority investigations into suspected infringements of Article 9 of the Competition Act and Article 101 of the TFEU in agreements between car manufacturers (Peugeot, Ford, Fiat and Seat) and their licensed sales agents and repair shops, pursuant to which consumers could not avail themselves of the manufacturer guarantee if they had maintained and repaired the vehicle outside the network of licensed repair shops. All investigations were ended following the addressees' commitment to terminate the investigated practice.

(2) The economic situation of the undertaking concerned may be considered by the Competition Authority in the determination of the fine to be imposed (Recital 10(g) of the Authority's Fining Guidelines of December 20 2012).

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