Portugal

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At the end of 1993 a new Portuguese competition law came into force (Decree-Law 371/93 of October 29) (the Competition Law) — 10 years after the first rules on regulating restrictive trade practices (Decree-Law 422/83, December 3 1983), and five years after the first rules relating mergers (Decree-Law 428/88, November 19 1988).

The 1993 Competition Law parallels European Union (EU) legislation on competition — regulating all anti-competitive activity that has an effect on trade between the member states. The law is applicable to "all economical activities exercised, occasionally or permanently, in the private, public and cooperative sectors" and to all "restrictive trade practices occurring within the national territory or having or being able to have effects therein" (Article 1). Credit institutions, financial companies and insurance companies continue to be excluded from the rules in regard to merger control.

Restrictive trade practices

The Competition Law (Article 2) follows the rules contained in Article 85 of the EC Treaty concerning the agreements, practices and decisions of associations. However, the reach of the Competition Law is limited to activities that have an adverse affects on trade and distort competition in Portugal rather than in the common market.

The main difference between Article 2 and Article 85 is the inclusion of an example of the prohibition to refuse, directly or indirectly, the purchase and sale of goods and the rendering of services. The only innovation is the concept of the abuse of economic dependency (Article 4). This innovation has not yet been tested to be correct or easily enforceable, as there has been no known case of it.

Portuguese legislation regarding abuse of a dominant position follows closely Article 86 of the EC Treaty. However, unlike EU legislation that allows third party interference to be used in determining *dominant position*, the Competition Law looks only at a companies autonomous position in the market. An undertaking will have a dominant position in the national market if it possesses 30% of the market share for a particular good or service. (This proportion of market share is increased to 50% in the case of up to three undertakings acting together in the market, and 65% in the case of up to five undertakings acting together.)

Economic balance

Generally, Article 5 of the Competition Law follows EU legislation with respect to exempting some otherwise forbidden conduct on the basis that the economic advantages outweigh inconveniences the relevant market may experience. However, Portuguese Competition Law, unlike EU law, does not provide for block exemptions nor does it exclude certain branches of activity. The entities responsible for applying the Competition Law (ie, the General Office of Competition and Prices and the Competition Council) want to analyze each case individually, because they recognize and have minimized the danger of being inundated with requests for clearance and questions on the construction of the new rules.

Procedure

To have a restrictive trade practice terminated, an instruction must be carried out by the General Office of Competition and Prices and a decision based on that instruction must be made by the Competition Council.

Decisions made by the Competition Counsel to deal with restrictive practices can result in the following actions (pursuant to Article 27 of the Competition Law):

- the filing of proceedings; and
- a declaration of the existence of a restrictive practice and consequent instructions to modify the conduct within a determined period of time.

The General Office of Competition and Prices can also fine undertakings in a number of situations (eg, when the defendants refuse to cooperate or when they supply false information) (Article 37).

All decisions taken by the Competition Counsel can be appealed to the Judicial Court of Lisbon.

Merger control

The operations of concentration in Portugal are regulated by the EC Merger Regulation No 4064/89, in force since September 1990, and by the Portuguese Competition Law.

According to the EC Merger Regulation, the European Commission is the sole authority with competence to deal with mergers that affect trade in the EU. Mergers which do not affect trade among the EU member states are to be dealt by the competent authorities in the member states.

Under Portugal's Competition Law (Article 7), the appropriate competition authority must be notified if a merger meets one of the following criteria:

- the creation or reinforcement of a share of the domestic market, or a substantial part thereof, exceeding 30% for a particular good or service which is the result of an operation of concentration; or
- the achievement by the group of undertakings involved in the operation of concentration of a net sales volume exceeding Esc30 billion ($19 million) in the last fiscal year.

The calculations of market share includes those undertakings directly involved in the concentration as well as and the undertakings indirectly participating in the concentration. Sales volume shall not include the transactions made between the undertakings directly or indirectly participating in the concentration.

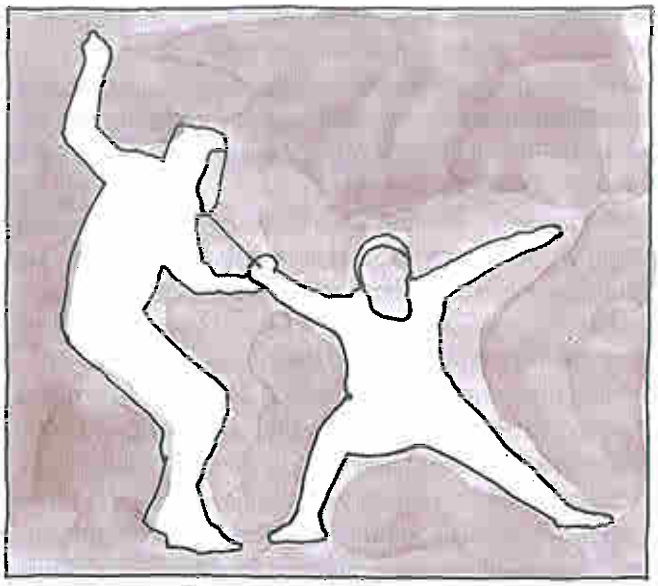
If one of these criteria is met, notification must be served "before the closing of the legal transactions necessary to the concentration" and "before the announcement of any public offer of acquisition" (Article 7).

All legal transactions executed with the objective of creating a concentration are ineffective until the competition authority either expressly or tacitly authorizes the concentration. If authorization is not obtained, the concentration is null and void and many justify measures necessary to re-establishment effective competition (ie, the separation of the undertaking or of the grouped assets or the cessation of control).

The definition of *concentration* in Article 9 covers mergers or acquisitions of control by one or more entities which already control an undertaking, or by one or more undertakings of parts of one or several other undertakings. The Competition Law defines *joint venture* as an incorporation by two or more undertakings of a common undertaking with enduring character.

Control stems from any act of an undertaking that creates the possibility of that undertaking exercising a major influence on the business of another undertaking, such as the acquisition of all or part of its capital stock, or the acquisition of rights which guarantee control of the board of the company. However, under the Competition Law there are two situations that are not considered to be concentrations of undertakings: (i) the acquisitions of stock participation in relation to a recovery special procedure, and (ii) the acquisition of stock participation for the purpose of guaranteeing or satisfying credits.

Concentrations which create or strengthen a dominant position in the domestic market of a particular good or service and which are capable of preventing, distorting or restricting competition, are forbidden (Article 10). However, even these concentrations may be authorized provided their positive effects outweigh



their negative effects (Article 5). Furthermore, the Competition Law provides that a concentration may be authorized if it significantly reinforces the international competitiveness of domestic undertakings participating in the operation of concentration.

Procedure

Decisions concerning mergers must be made by the Minister of Trade, but notices of mergers must be given to the General Office of Competition and Prices (Article 30). The General Office of Competition and Prices has instructive power regarding agreements, concerted practices, agreements of associations, and abuses of dominant position.

Notices must be served by all the undertakings involved in a merger, and in the other cases the notification may be served just by the undertaking or person intending to acquire control of all or parts of one or more undertakings.

The procedure to have a merger approved is more complicated under the 1993 Competition Law than it was under former legislation. The former legislation allowed the Minister of Trade — in cases where he considered there to be no risk of distortion of competition — to tacitly approve the operation within 15 days of notification. The minister must now give his approval within 60 days of notification — 95 days if the opinion of the Competition Council is required. This period can be extended even further (as determined by the General Office of Competition and Prices) should certain suspension conditions apply.

The Minister of Trade can make one of three decisions:

- not to oppose the operation of concentration;
- not to oppose the operation of concentration but to impose conditions and obligations sufficient to maintain effective competition; or
- forbid the operation of concentration and order measures necessary to re-establish effective competition (ie, division of the companies or of the grouped assets or the cessation of control). or

In the case of the two last decisions, a joint order is

required by the Minister of Trade and the minister responsible for the economic activities affected by the operation of concentration.

As mentioned above, the legal transactions related to forbidden or conditionally-authorized concentrations are null and void.

Decisions forbidding the operation of concentration or conditionally authorizing it can be appealed to the Supreme Administrative Court (Article 35).

Improvements and failings

Some improvements were made in the treatment of mergers with the enactment of the Competition Law in 1993, such as:

- market share and sales volume thresholds were increased so that fewer operations of concentration require notification to be given to the Minister of Trade;
- a better definition of forbidden operations of concentration such that operations of concentration capable of preventing, distorting or restricting competition are forbidden, but even then only when the final balance is negative;
- a more exact definition of the sales volume or turnover to be taken into account when calculating the market shares and sales volume of undertakings, whether directly and indirectly participating in the operation of concentration.

On the other hand, some important failings of previous legislation were not corrected or were even aggravated, such as the exclusion of credit institutions, finance, companies and insurance companies from the rules of control of concentration and the lengthening of the period in which the Minister of Trade may decide to grant, deny or modify an operation of concentration.

Fines

Because the fines provided for under the former law were outdated and had lost their dissuasive effect, the minimum and maximum amounts of the fines provided for in the new law were increased. In cases concerning restrictive trade practices, the fines may amount to Esc200 million ($1.28 million) for undertakings and half that amount for individuals. The system of fixing a fine based on a percentage of the turnover of the defendant-undertakings — common and effective in the EU context — is not used in Portugal.

However, the fines imposed in Portugal with regard to restrictive practices have been very low (the highest one amounts to Esc10 million ($64,000). This is perhaps the main reason why the new Competition Law has not achieved its purpose — there is little deterrent.

The fines for failing to notify the Minister of Trade of operations of concentration and for supplying false information may amount to Esc100 million ($640,000). To date, no fines of this type have been imposed and all the notified operations of concentration have been authorized by the Minister of Trade — 33 in 1993 and six in 1994. ■