Competition- Portugal

Controversial Interpretation of Merger Control Rules

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Introduction

Portugal's legal framework for merger notifications was recently the object of important modifications introduced by Decree-Law 219/2006 (for further details please see "Amendments to Rules on Merger Control Proceedings").The decree-law introduced the first changes to the Competition Act (18/2003) since its enactment and focused essentially on procedural aspects, such as the time limit for the submission of merger notifications and the overall timeframe within which the Competition Authority must complete its assessment of notified transactions. In particular, the overall maximum duration of merger control proceedings was shortened to 90 business days from the submission of the notification, while the maximum period for which proceedings may be suspended pursuant to information requests by the authority to the notifying party was limited to 10 business days.

Both amendments were inserted into Article 36 of the act, which covers in-depth, second-phase investigations. Interpretative guidelines issued by the authority at the beginning of February 2007 were intended to clarify the exact scope and meaning of the new provisions, but an unfortunate and apparently hasty piece of drafting by the legislature seems to have given rise to an equally unfortunate construction of the rules by the authority.

Suspension of Proceedings

The guidelines confirm that, in accordance with the new wording of Article 36(1) of the act, merger control proceedings are now subject to a maximum duration of 90 business days, reckoned from the date on which the notification is deemed effective. Read in conjunction with Articles 31 and 32 of the act, this implies the submission of a valid notification, including the provision of all relevant information and documents, and payment of the required fee. This interpretation is uncontroversial and is clearly supported by the wording of the relevant provision. However, the authority's view of the new Article 36(3) is another story.

The legal and practical relevance of the time limit is connected with the outcome of the merger control proceedings. According to Articles 35(4) and 37(3) of the act, failure to issue an express decision within the stipulated deadline is equivalent to a tacit approval of the notified transaction. Thus, the existence of a time limit benefits the notifying undertaking - as time goes by, the (largely theoretical) possibility that the merger will be tacitly approved becomes greater.

However, in accordance with Article 34(3), proceedings are suspended if the authority deems it necessary to request additional information or documents from the notifying party, which must be provided within a "reasonable time". This applies both in the initial stages of the assessment and in the course of an in-depth investigation. Before the decree-law was passed, the act was silent on how long proceedings could remain suspended pending information requests; in practice, the time taken by the notifying undertaking(s) to complete and submit replies to any number of information

requests was subtracted from the maximum period allowed for the proceedings as a whole. However, the new wording of Article 36(3) states that suspensions for information requests made by the authority (arguably only during the in-depth investigation stage) "may not exceed 10 business days in total". Surprisingly, and despite the clarity of this wording, the authority has stated in its general guidelines that a limit of 10 business days applies to each information request. It has indicated that, in future, it will consider that the 90-day countdown is stopped every time it asks for additional data from the notifying undertaking, regardless of the number of requests it submits. Therefore, the authority considers that suspensions for information requests may extend the procedure indefinitely, and certainly well beyond 10 business days.

Comment

The interpretation put forward by the authority raises a number of issues. Most importantly, it seems a clear contradiction of both the spirit and the wording of the law. The legislative intent behind the modifications to Article 36, as stated in the preamble to the decree-law, was to reduce "the assessment deadlines for the administrative authority with jurisdiction over competition". This goal could be seriously jeopardized if the relevant legal provision is construed and applied as described above. The reference in Article 36(3) to 10 business days in total seems to leave no room for doubt. Moreover, the authority's grounds for its interpretation appear not to hold up to closer inspection.

The authority states that its decisions must be duly grounded so that they can be submitted to third-party scrutiny; it further underlines the importance of obtaining information from the notifying party in order to carry out a thorough assessment of the transaction, which can hardly be criticized. However, it goes on to submit that a suspension of proceedings (for an information request to the notifying undertaking(s)) is intended to preserve the overall 90-day limit for a final decision. The authority refers repeatedly to a 'stop-the-clock mechanism', which is claimed to represent:

> "*an essential instrument at the stage of discussing remedies, as well as in balancing the incentives of the notifying party (which may benefit from tacit approval) with the authority's need to issue a well-founded decision.*"

However, there is no such mechanism in the act. The law provides for a suspension of proceedings - and thus, indirectly, for a suspension of the benefit derived by the notifying party as the date for tacit approval approaches - in order for the authority to request relevant data or documents from the notifying party. The rationale for this, which is in line with Article 108(4) of the Code of Administrative Procedure, is that the countdown towards tacit approval (which is designed to protect individuals from undue or indefinite delays by the administrative authority in situations where such individuals are required to obtain authorization or approval) should be stopped when the notifying party is required to provide the authority with relevant and necessary information. In other words, the notifying undertaking should not benefit from the submission of incomplete information or from a refusal or reluctance to provide additional data. The suspension for information requests should not be construed - as it apparently has been - as a mechanism with which the authority has been provided in order to extend or delay proceedings.

The interpretation submitted by the authority in its general guidelines appears inconsistent with the legislative intent of the recent amendments and the current wording of Article 36(3) of the act. Furthermore, if future merger control proceedings exceed an overall duration of 90 business days (plus 10 business days' suspension for information requests), the authority may face claims by the notifying undertakings that their transactions have been tacitly approved.

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