

Competition - Portugal

Overview (July 2003)

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In a reflection of events at European level, Portugal's competition law framework has been substantially revised already this year as a result of increasing awareness of the importance of a 'competition culture'. In early 2003 the competition enforcement agencies were comprehensively restructured and a single Competition Authority was created (for further details please see "[New Competition Authority Commences Operations](#)").

The most recent development has been the enactment of the new Competition Act (Law 18/2003) on June 11, which approves the new competition regime and replaces Decree-Law 371/93.

Influence of EU Competition Law

The changes which have occurred at EU level have had a decisive influence on the amendments to the Competition Act, particularly those concerning the consequences of Council Regulation 1/2003 on the implementation of the competition rules set out in Articles 81 and 82 of the EC Treaty.

However, some features of the new act reflect an approach which diverges from that of the European Union. A key example is the retention of a voluntary prior notification procedure for restrictive practices. This differs from the approach recently adopted at EU level, which encourages self-assessment by undertakings of the practices in which they engage.

One important innovation of the new act is its express reference to the influence of EU competition law in the interpretation and application of the Portuguese provisions in cases where EU law is not applicable. In this context, Article 5(3) of the new Competition Act provides that restrictive practices without effects on intra-state trade may nonetheless be justified on the basis of the EU Block Exemption Regulations.

Scope of Application

The scope of the new Competition Act has been widened, and now includes undertakings which

were previously subject to special laws and were thus excluded from the scope of the former act (Article 1). Moreover, the particularities of services of general economic interest are also taken into account when applying competition law provisions, to the same extent as provided for under Article 86 of the EC Treaty (Article 3 of the Competition Act).

In relation to the merger control regime, however, the special rule which excluded credit institutions from its scope of application is partially retained in the new act (Article 8 (4)(c)).

Presumption of Dominance

The former Competition Act provided for a presumption of dominance on the basis of market share. If a single undertaking held at least a 30% market share, or a group of two or three undertakings held at least a 50% market share, dominance was presumed to exist. Although the law made such assessments dependent on the specific circumstances of the situation, the presumption was difficult to rebut in practice, as the former competition authorities frequently took a rather formalistic approach to its application.

The fact that Article 6 of the new Competition Act eliminates this presumption of dominance is thus a positive development, and one which is in line with EU rationale. The term 'dominant position' is now defined in the new Competition Act to reflect the notion widely developed and consolidated by EU case law. The list of examples of abuse of a dominant position has also been expanded to include refusal to provide access to an essential facility, pursuant to Article 6(3)(b).

Abuse of Economic Dependence

The notion of 'abuse of economic dependence' set out in Article 4 of the former Competition Act is retained in the new act, even though it has rarely been applied. It is doubtful whether it will be applied with greater frequency in the future, as the conditions for its application have become even more difficult to fulfil.

Abuse of economic dependence is the abusive exploitation by one or more undertakings of the economic dependence of a supplier or client due to the fact that there is no available alternative to the products or services provided by those undertakings. This provision was specifically intended to regulate the commercial relationships entered into between hypermarket chains and suppliers.

Merger Control

Several innovations harmonize the merger control regime with the EU Merger Regulation (4064/89, as amended) and corresponding interpretative notices. However, the new Competition Act does not seem to have been influenced by the draft Merger Regulation which will soon be approved at EU level.

Scope of control

The Competition Act has widened the scope of merger control, and there is no longer a special regime for insurance and credit institutions (Articles 8 and following). However, there is still a limited waiver for temporary acquisitions of non-financial undertakings made by credit institutions.

Mandatory payment of notification fee

One major change is the introduction of a mandatory fee for filing a notification of a concentration with the Competition Authority. The imposition of fees for the provision of services is one way in which the authority can ensure it is self-financing, and thus ensure its independence from the Ministry of Economy. The new Competition Authority has already published on its website (www.autoridadedaconcorrenca.pt) a fee regulation which provides for variable amounts to be imposed upon the delivery of mandatory notifications of concentrations, depending on the turnover of the participants.

Full-function joint venture

Another positive feature of this new act is its amendment of the notion of 'full-function joint venture' in line with the EU Merger Regulation, and its submission to the mandatory notification requirement under the merger control regime (Article 8(2)). Accordingly, Article 12(6) of the new Competition Act establishes that partial-function joint ventures are subject to the legal provisions on restrictive practices.

Thresholds

The Competition Act has provided long-awaited clarification on the thresholds over which concentrations will be subject to the prior notification requirement. The former legislation provided that notification was required if either (i) the proposed concentration would create or strengthen a market share of over 30% in the national market for the relevant goods or services, or (ii) the net turnover in Portugal of the participants exceeded approximately €150 million in the preceding financial year.

These criteria resulted in a considerable amount of notifications during the last 10 years, even though many concentrations did not raise any competition concerns. The Competition Act has therefore made them more precise by specifying, in relation to the second requirement, that at least two of the participants must also have an individual annual turnover in Portugal of at least €2 million.

Schedule for filing

From now on, the concentration must be notified within seven weekdays of the conclusion of the agreement (Article 9(2)).

Execution of the deal before clearance is obtained

The new Competition Act provides that concentrations cannot be implemented until they have received clearance from the Competition Authority, and the validity of any concentrations implemented before this is obtained is dependent on express or tacit authorization. However, the Competition Authority is now entitled to grant a waiver of this rule in appropriate circumstances, pursuant to the provisions of Article 11(4).

Assessment of concentrations

The new act expressly provides that merger control is aimed at assessing the effects of a transaction on the competitive structure of the relevant market, in light of the need to preserve and develop effective competition in the best interests of consumers. The new act confirms that conditions ensuring the existence of a positive economic balance are a prerequisite for clearance, and provides several examples of criteria used in the assessment of concentrations. These include the structure of the relevant markets and the existence of competition between the undertakings established on those markets.

State Aid

While the former Competition Act established the concept of state aid, the corresponding provisions were not applied in practice. Article 13 of the new act is thus an improvement, as it not only clarifies the concept itself, but also establishes the procedural steps to be taken by the Competition Authority in this context, thus facilitating its application.

Cooperation between Authorities

The new Competition Act expressly recognizes that sectoral authorities and the Competition Authority must cooperate in their application of competition law and sectoral legislation, so that both fields of law remain effective. This concerns, for example, the investigation of anti-competitive practices where the participating undertakings are active in regulated sectors, and merger control in regulated markets.

Increased Investigatory Powers

Article 17 of the new Competition Act grants the Competition Authority broad investigatory powers, including the right to:

- carry out dawn raids at the premises of undertakings which are under investigation;
- request information and documents; and
- seal off certain locations.

The act provides that the authority may only order dawn raids with the formal authorization of a judicial court.

Increased Transparency

The new Competition Act introduces a major innovation in relation to investigation and sanctioning procedures (Article 20), by establishing that the Code of Administrative Procedure is of secondary application.

There is a growing concern to increase the transparency of such procedures, in line with those which take place at EU level. To this end, the new Competition Act provides a detailed description of:

- the investigations of restrictive practices that will be undertaken by the Competition Authority (Articles 22 to 26 and 28);
- the merger control procedure (Articles 30 to 41); and
- the interim relief that may be obtained (Article 27).

Similarly, the act sets out criteria for the calculation of fines (Article 44). This is of particular importance as there has been a significant increase in the maximum fines that can be imposed, in line with Council Regulation (EC) 1/2003 (Article 43).

The new act also reflects increasing concern for the rights of the public in general, and includes measures such as (i) the Competition Authority's presentation of its annual competition report to the government and Parliament, and its subsequent publication (Article 16), and (ii) publication of the essential features of notified concentrations in national newspapers under a strict timeframe, in order to enable the timely submission of observations to the authority (Article 33).

The act shows the same increased concern for the rights of interested third parties. This is clear from the legal provisions that specify (i) the time limits for presenting observations in the context of the merger control regime (Article 38), and (ii) the authority's obligation to notify a complainant of its intention to close an investigation procedure before doing so (Article 25(2)).

The Competition Authority recently published a development strategy setting out the key priorities and principles to be followed in order to consolidate the 'competition culture' in Portugal. This is reported in detail in "[Competition Authority Issues Ambitious Development Strategy](#)".

For further information on this topic please contact [Carlos Botelho Moniz](#) or [Margarida Rosado da Fonseca](#) at [Morais Leitão, J Galvão Teles & Associados](#) by telephone (+351 21 381 7400) or by fax (+351 21 381 7499) or by email (cmoniz@mlgt.pt or margarida.rfonseca@mlgt.pt).

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