



A mixed offering

Thursday, 2 August 2012

Faaez Samadi

FEATURED IN: [AUGUST 2012 \(VOL. 15 ISS. 7\)](#)

Portugal's Competition Authority is an anomaly: a world leader in merger control but poorly performing in cartel enforcement. Faaez Samadi investigates how such divergent standards have arisen within the same organisation

Last June, Portugal's Competition Authority announced that seven driving schools in Funchal – a city of 111,000 people – had conspired to fix the price of driving lessons between December 2007 and March 2008. The punishment: a combined fine of €9,865, with the lowest coming in at €684. The investigation took three and a half years.

Observers say the case is emblematic of how the authority's cartel enforcement programme has stalled dramatically in recent years.

But in the time taken to carry out the driving schools investigation, the authority's merger division handled more than 160 filings, some of which called for in-depth assessment and either required remedies or were blocked. What's more, just a quarter of the authority's non-administrative staff work on mergers.

No wonder, then, that the authority is simultaneously considered a "world class" organisation and a "mystery" by those that deal with it on a regular basis.

Enforcement

The authority offers a host of reasons for the length of the driving schools investigation. The companies' unsophisticated structures made obtaining information time-consuming; the involvement of a tax authority slowed everything down; a severe storm in February 2011 disrupted proceedings. The level of fines took into consideration the ability of the companies to pay and that they were small, regional businesses.

While it would be unfair to dismiss these factors, that such a small case consumed so much time and resources for so little reward is the main concern for Portuguese competition lawyers. A case taken in isolation can also be misleading, but overall the figures don't make for easy reading.

In 2009, the authority meted out €24 million in cartel fines; last year it was just €326,000. The other case contributing to this was a bid-rigging matter in the industrial cleaning market, where two companies were fined €316,000. This pales in comparison with Portugal's neighbours, and the gulf is becoming more apparent.

Miguel Mendes Pereira, at Vieira de Almeida in Lisbon, says: "In France and Spain, there is a flurry of activity and increasing respect felt by companies for the competition authorities. This is fading in Portugal."

Dawn raids are a key enforcement tool for competition agencies. The head of Portugal's authority, Manuel Sebastião, says the authority is happy to carry out unannounced inspections "whenever we feel the need". Yet only two dawn raids were carried out last year, and just five have taken place over the past three years.

Competition lawyers are left scratching their heads. "The authority has resources and the people are competent, but the fact is that only a limited number of decisions have been issued," says Carlos Pinto Correia at Linklaters in Lisbon.

It must be made clear that while resources may not be scarce, the authority lost 10 per cent of its staff last year and received a €1 million budget cut, both significant blows to any organisation. Public bodies face a difficult road ahead in austere times due to the financial crisis in Portugal, and observers say that with wages being cut public servants are frequently looking to the private sector for better pay.

But those issues have affected the merger team too, which contrasts starkly with the investigation unit. It was once again ranked fourth in the Centre for European Law and Economics' global merger control index, out of 71 competition authorities. Lawyers have nothing but praise for the speed of the team's work, its flexibility and transparency.

Despite the drought in enforcement activity, the quality of the authority's staff isn't being called into question. Winning five out of seven cases on appeal at Lisbon's Commercial Court in the past year quickly extinguishes any murmurings of incompetence. If anything, it adds to the mystery.

"The authority has very good case handlers and lawyers so it's very strange," says Nuno Ruiz, at Vieira de Almeida in Lisbon. Another lawyer is quick to say that despite its difficulties the authority has improved its case handling, evidenced in its €2 million abuse of dominance fine against a car park management association in January 2011.

Ruiz adds that it's not fair to compare the merger and antitrust teams purely on their workloads. While the mergers team is undoubtedly good, he says, it faces very different challenges from those faced by the antitrust team, and only handles a handful of complex deals each year.

For his part, Sebastião recognises that enforcement has been slow and he puts it down to a large backlog of cases that need to be cleared before moving on to newer matters. "This was the first year that we were

reasonably well out of the backlog and we produced a lot of work," he says. "Unfortunately we could not finalise some decisions, but they are going to be finalised in the first half of this year."

This sounds promising, but lawyers remain sceptical. "There is a considerable backlog and the authority seems to be moving slowly," says Marques Mendes. "It is clearing the backlog but this should not mean shutting the door on the other cases."

What the authority can do now, though, is choose which new cases it wants to investigate. The passing of a new competition law, which came into force in July, has afforded the authority a raft of new powers and Sebastião is insistent that they will reinvigorate the authority's enforcement agenda.

New regime

Under the new Portuguese Competition Act, the authority will be able to raid private homes and prioritise, as well as have more flexibility when closing cases, among other things. Added to this is the establishment of a new specialist court that will have jurisdiction over competition appeals. Sebastião is hopeful that this will speed up court proceedings, the pace of which in the past certainly hasn't helped the authority conclude its cases.

"The appeals process is just amazing," Sebastião says with a touch of exasperation. "Abuse of dominance [cases] still elude us to a large extent because judges have difficulty understanding the economic arguments. Even in preliminary rulings they are very reluctant."

The dominance case brought against Portugal Telecom is a clear example of the authority's difficulties at court. It fined the telecoms incumbent €2.1 million in August 2008, which the company appealed against. There was then a gap of more than three years until the hearings began.

Sebastião says he is hopeful that the new court will improve the management of the authority's cases.

Practitioners are in agreement that the new law is generally an improvement. But they say it will require more than new powers to make the authority an effective enforcer. It needs a change in attitude.

"The authority will claim that the old law was a reason for its lack of success," says Ruiz. "The new law is better, but if the mentality and the management don't change, the law won't help. The law helps the authority investigate, but it has simply removed some difficulties that would not exist if they had acted properly from the beginning."

The willingness to enforce is at the heart of most lawyers' concerns. Carlos Botelho Moniz, at Morais Leitão Galvão Teles Soares da Silva & Associados in Lisbon, points to the new statute of limitations in antitrust cases as an example.

"It is very long, potentially to encourage settlements," he says. "But to get settlements you have to initiate the cases."

Observers say there has been a notable shift towards soft enforcement, in the form of market studies and advocacy initiatives. As one lawyer puts it, the authority "does not seem to feel the urgency of its role" in antitrust matters, leading to fewer cases being intensely pursued.

This could be influenced by both Sebastião and his predecessor Abel Mateus's backgrounds as banking sector regulators, which tend to prefer a less active enforcement agenda than the competition authority, lawyers say.

"There is a different culture of regulation," says one Lisbon-based practitioner. "It's something of an old boys' network, which can't work in a competition authority. You have priorities and you have to talk to people [in competition enforcement], but you have to take decisions as well."

Regardless of current attitudes, what is crystal clear is that a lot of work has been done to elevate the role of competition enforcement in Portugal. As well as new powers, under the terms of the memorandum of understanding that Portugal's government signed with the European Commission, the European Central Bank and the International Monetary Fund, the competition authority must be adequately resourced.

The gravity of this commitment, at a time of great financial strain, is not lost on Sebastião.

"We hope we can use the measures in the law that provide for recognition of our needs, which are human resources, to improve our performance quickly," he says. "We are really prepared to do that. We will exploit the new opportunities to the fullest and we will become a visible agency."

These are encouraging claims that if acted on could make the authority's enforcement programme as universally acclaimed as its merger control division. But, as Stan Lee once put it, with great power comes great responsibility.

"Certainly the much-voiced lack or insufficiency of powers can no longer be alleged," says Marques Mendes.