

Poland

MERGERS

Concentration—duty to provide information—non-compliance—fine imposed

☞ Competition procedure; Concentrations; Failure to disclose; Fines; Investigations; Merger notices; Pipelines; Poland

In August 2016 the President of the Office of Competition and Consumer Protection raised competition concerns regarding a concentration among Gazprom and five other international companies that altogether financed a new gas pipeline, called Nord Stream 2. The concentration was notified to the Polish competition authority, but before the concentration proceeding went into the second phase, the notification was withdrawn. In April 2017 the Polish Competition Authority decided to initiate an explanatory proceeding (a proceeding in a case, still not against a particular company) in order to examine circumstances under which a party to the concentration notified to the Polish competition authority created a consortium. In May 2018 the President of the Office of Competition and Consumer Protection initiated a regular proceeding against Gazprom and five other international companies (the companies were suspected to complete their concentration despite a withdrawal of a notification). In November 2019 the President of the Office of Competition and Consumer Protection announced that a fine was imposed on one company being a party to the proceeding regarding the Nord Stream 2 consortium. Surprisingly, it was not a fine for completing a concentration without a consent of the Polish competition authority (a fine can be up to 10 per cent of an annual turnover). The Swiss company—Engie Energy Management Holding Switzerland—was fined for an intended non-provision of information demanded by the President of the Office of Competition and Consumer Protection. The fine amounted for 172,000,000 PLN that equals to c. €40,000,000. The proceeding regarding a concentration without a consent was continued.

Agata Jurkowska-Gomułka
Modzelewska & Pasnik, Warsaw

Portugal

LEGISLATION

National transposition—Directive 2019/1—public consultation

☞ EU law; Leniency programmes; Mutual assistance; National competition authorities; Portugal

On 25 October of 2019 the Portuguese Competition Authority (“PCA”) launched a public consultation of its proposal for a draft project law for the transposition of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (“ECN+ Directive”), which will be open for written observations by any interested parties until 15 January.

The PCA was appointed by the Ministry of Economy to propose a draft project for the transposition of the ECN+ Directive, together with an informal working group comprising representatives from different stakeholders, as well as government areas, which would in turn be submitted for consideration to the Portuguese Government.

Due to the 2012 reform of the Portuguese Competition Act, the Portuguese competition regime was generally already in line with the standard of EU law and therefore the transposition of the ECN+ Directive did not seem to demand an extensive revision of the national competition law framework. However, the PCA’s proposal comprises substantive amendments, inter alia, to most of the main procedural rules of Portuguese Competition Act and PCA’s Statutes, putting aside a seemingly minimalist revision, which would have been anticipated. Indeed, the PCA took this opportunity to propose several changes to the Portuguese Competition Act going beyond the requirements of the ECN+ Directive.

In this context, the amendments proposed by the RCA to the Portuguese Competition Act in the draft project may be distinguished into the following categories:

- (i) Amendments required by the implementation of the ECN+ Directive. This is the case, for instance, of those relating to: (a) the mutual assistance and cooperation between national competition authorities within the European Competition Network (which required the introduction of a new section in the Portuguese Competition Act relating to this mechanisms); (b) the powers of the authority (in particular the power to examine and use as evidence electronic messages, an issue which is unclear in the current Portuguese regime); (c) access to file/use of information; and d) leniency programme (which appear to require fewer changes);
- (ii) further amendments to the Portuguese Competition Act non-related to the ECN+Directive, which comprise, inter alia, changes, related to: (a) the rules regarding judicial review; (b) the treatment of confidentiality claims; (c) attorney-client privilege; and (d) implementation of an electronic procedure.

Considering the above, the non-ECN+ proposals of amendments should be carefully considered to determine their pertinence within the current regime and alignment with the Directive's objectives.

Special attention should also be paid to certain amendments which, according to the PCA's explanatory memorandum to the proposal for a draft project law, are justified as transposing specific recitals/provisions of the Directive but rather seem to derive from interpretations of such recitals/provisions by the PCA which is not undisputed. This is, for example, the case of changes proposed by the PCA relating to the suspension of the limitation period pending judicial review, which contends with the existence of an absolute limitation period, generally provided in the Portuguese jurisdiction, and which the ECN+ Directive safeguards.

We hope that the replies to the welcomed public consultation launched by the PCA may provide good assistance in fine-tuning some of the proposed legislative choices and changes.

Cláudia Coutinho da Costa

Vieira de Almeida

On 23 December 2019, the PCA published its Competition Policy Priorities for 2020. In line with its 2019 Priorities, the PCA maintains a high focus on the pursuit for cartels and on the increase in capacity for detection and investigation of anti-competitive practices, namely through complaints by consumers and other market players, and through its leniency programme.

Following its previous work in this field, the PCA will create a task force dedicated to the new challenges brought by the digital era which may facilitate and promote anti-competitive practices.

The Priorities also emphasise the need to ensure a swift procedure, to prevent further damages to economy and consumers, while reassuring the respect for rights of defence and improvement of internal procedures of checks and balances.

The PCA also reestablishes its focus on raising awareness for the respect of competition policies and conditions across the board of the Portuguese economic sectors, namely by continuing to push forward its sector recommendations, by organising communication campaigns against

Portugal

GENERAL

Priorities published—digital era taskforce—improved accessibility

& Cartels; Competition policy; Digital technology; National competition authorities; Portugal; Transparency

bid-rigging in public procurement, open seminars, podcasts and other communication materials and promoting competition in the context of business associations.

Finally, to increase transparency and accountability, the PCA's website will be improved to provide easier access to PCA's decisions, studies, opinions and recommendations.

Cláudia Coutinho da Costa
Vieira de Almeida