New Competition Act in Portugal: A fresh impetus?

by Miguel Mendes Pereira, Vieira de Almeida & Associados

A new Competition Act has entered into force in Portugal in 2012. This article looks into the main novelties brought about by the new legislation and into the functioning of the Competition Authority when it enters its 10th anniversary. It also looks into how law firms with dedicated competition law practices have dealt with the economic downturn throughout 2012.

There seems to be a fresh wind in the Portuguese competition law ecosystem. The great overhaul in competition law enforcement in Portugal occurred in 2003 with the creation of an independent Competition Authority along with the adoption of refurbished legislation. In 2012, almost 10 years later, Portugal adopts a new Competition Act. What can we expect?

The 2012 Competition Act does not carry the seeds of revolution. It strengthens the investigation powers of the Competition Authority, brings the national regime closer to EU law and underlines the autonomy of competition proceedings vis-à-vis criminal and misdemeanour investigations. It does not, however, touch upon the pillars of the existing substantive law.

The novelties are therefore mostly, although not exclusively, procedural in nature.

Novelties in antitrust

The most striking feature in the 2012 Act is the adoption of the principle of opportunity (prosecutorial discretion). The Competition Authority may now establish priorities in terms of competition policy and assess complaints accordingly.

The likelihood of proving the existence of an infringement and the extent of the necessary investigation measures are additional elements to be taken into consideration when deciding whether or not to investigate. This puts an end to the principle of legality that had so far reigned in competition matters (and still rules in criminal investigations).

The powers of investigation of the Authority have been strengthened. It is now entitled to carry out searches in the domiciles of partners, members of governing bodies or employees of the undertakings concerned and to use as evidence confidential information containing business secrets, as well as information and documents obtained in the exercise of its supervisory powers.

Partial immunity from fines may be granted to the first, second and subsequent undertakings that provide substantial additional evidence of an infringement.

Defendants are now offered the opportunity to settle with the Competition Authority such as to close an investigation without sanctions or to obtain a reduction in the fine.

At its end, the Authority may impose the behavioural or structural remedies deemed essential to put an end to the infringement or to its effects. It may also prevent a company from participating in public tenders for a maximum period of two years.

Novelties in merger control

A significant novelty in merger control is the adoption of the “significant impediment to effective competition” substantive test along EU lines but probably the most welcome change was the elimination of the seven-day post-transaction filing deadline which was the source of recurrent headaches (and frequent acrobatics) by both Portuguese and foreign counsels.

Thresholds were also adjusted. The following circumstances are now subject to mandatory filing of the underlying transaction:

• acquisition, creation or reinforcement of a market share of at least 50% in the relevant national market;
• acquisition, creation or reinforcement of a market share of at least 30% but less than 50%, in the relevant national market, provided that the individual turnover of at least two participating undertakings (registered in Portugal) in the preceding financial year exceeds €5m;
• the aggregate turnover of the participating undertakings in Portugal, in the preceding financial year is over €100m, provided that the individual turnover in Portugal of at least two of the undertakings exceeds €5m.

The Competition Authority

Throughout the past decade Portugal came to know the pros and cons of having an independent...
The lack of a director-general may explain in part the significantly lower antitrust output of the Authority when compared with peers such as the Spanish CNC or the French Autorité.

As regards the survival rate of decisions in court, figures are not impressive, in particular as regards abuse of dominant position cases. This may be attributed to the lack of systematic internal screening of decisions before they are adopted, under the form of devil’s advocate panels or mandatory review by a horizontal legal service. Again, a full separation of the services from the deciding Board could possibly foster a more technical review of decisions.

**Transparency in decision-making**

Transparency has been the Holy Grail of Portuguese competition lawyers.

Until 2012, the Authority did not publish any of its antitrust decisions (as opposed to merger decisions) and even now only a few of them have
have been published. Lawyers scratch their heads trying to understand what the case law is and how to best advise their clients. Fortunately Portugal is a small jurisdiction, so Sherlock Holmes-type lawyers eventually manage to put the pieces together.

The 2012 Competition Act now compels the Authority to publish on its website the final decision in infringement proceedings, with reference to any pending appeals, as well as the courts’ judgments resulting from such appeals. Lawyers are already drooling at the thought of it.

This is an area where the Merger Control Department excels. An extremely useful database was created two years ago, allowing users to search merger cases according to a vast number of criteria (type of decision, economic sector, commitments, name of parties, etc) and granting full access to decisions.

This adds to swift handling of most cases by well-prepared teams and leads to unanimous praise from practitioners.

**Consistency in applying fines**
Unsurprisingly, the lack of access to antitrust decisions adopted by the Authority has not favored consistency, namely in the way fines are calculated. Aware of the growing criticism among companies and lawyers, the Authority adopted in December 2012 Guidelines for the Setting of Fines.

Although the Guidelines are quite general in nature, there is a perceived hope that the existence of a published document, together with the obligation to publish antitrust decisions, may contribute towards a more consistent approach by the Authority.

**The legal market**
Law firms having dedicated competition practices in Portugal have been affected by a number of factors throughout these past few years.

The amount of antitrust work has generally decreased. During the first mandate of the Authority (2003-2008) a high number of cartel and abuse of dominant position cases was opened and a significant portion of them materialised in fines.

The Authority often made the headlines and at one point the President of the Authority was portrayed by a newspaper dressed as Robin Hood. (The flip side of the coin was the Authority sometimes being accused of hyperactivity by companies.) The ongoing mandate has been characterised by a lower profile and a significantly lower number of antitrust cases.

The number of mergers between national companies has suffered from the general economic downturn and from the particular harsh recession in Portugal.

However, the tender offer for the outstanding shares of Brisa, the largest highway concessionaire in the country, and the privatisations carried out in accordance with the Memorandum of Understanding entered into between Portugal and the International Monetary Fund, the European Central Bank and the European Commission have provided a number of high profile opportunities for merger related work for several law firms during 2012.

After the sale of a controlling stake in EDP (largest energy operator) at the end of 2011 to the Chinese group Three Gorges, the most significant privatisations in 2012 were ANA (airport management) and TAP Air Portugal, the airline. The privatisation of TAP aborted during the last steps of the transaction involving the controlling shareholder of AviancaTaca, the South American aviation group.

In spite of the obvious link between both operations, the TAP incident did not affect the ANA deal and ANA was sold to the French group Vinci during the last days of December 2012 for €3bn.

Expected privatisations during 2013 are CTT (mail services), Aguas de Portugal (water distribution) and EGF (waste management).

Another opportunity for competition law work (this time in the State aid field) was provided to a number of firms by the recapitalisation of Portuguese banks. At the end of 2011 a new recapitalisation scheme was approved by the European Commission and in 2012 BCP, BPI and Caixa Geral de Depósitos (CGD) were recapitalised by the State, followed by BANIF in January 2013. The CGD and BANIF recapitalisations were approved as individual aids outside the scheme.

State aid has displayed the highest growth rate in terms of work for some firms. The fact that Portugal is under an Economic Adjustment Programme adopted further to the MoU entered into with the IMF, the ECB and the EC has increased the degree of scrutiny by the Commission.

On the other hand, both the stringent austerity measures negotiated with Portugal’s creditors and the privatisation processes provide ample opportunities for the Commission to investigate.

Last but not least, private enforcement has finally kicked in. There are at least three major actions for damages pending in Portuguese courts, following on abuse of dominant position decisions by the Competition Authority. Issues such as the statute of limitations and the way to calculate damages have been the subject of intense discussion.
Expectations

When asked by journalists or members of Parliament about the decrease in antitrust cases or about defeats in court, the President of the Authority has often referred to shortcomings in the law that substantially complicated the investigation of cases and rendered their survival in court particularly difficult.

Considering that the new Competition Act originates in a draft prepared by the Competition Authority and that the Authority was closely involved throughout the whole process until formal adoption, it is reasonable to infer that the new Competition Act pretty much fulfils the Authority’s wishes.

This means that the Authority has now been given all the means it considers necessary for an effective enforcement. Expectations are therefore running high and the Authority is now definitely under the spotlight. This places a serious responsibility on the shoulders of the Authority.

Furthermore, the mandate of the current members of the Board is coming to its end and it is expected that new members are appointed before summer.

A new Competition Act and a new mandate within the Authority may provide two important ingredients for a fresh impetus in competition law enforcement in Portugal. This would be a most appropriate way of celebrating the 10th anniversary of the Competition Authority.

Author:
Miguel Mendes Pereira, Partner
Vieira de Almeida & Associados
Av. Duarte Pacheco 26
1070-110 Lisbon
Portugal
Tel: +351 21 311 3513
Email: mig@vda.pt
Website: www.vda.pt