GCR
GLOBAL COMPETITION REVIEW

Portugal readies new competition law

Wednesday, 9 November 2011

Stefano Berra

Portugal has released a draft of a new competition law it plans to enact by the beginning of 2012 which, among other things, changes the country's merger control rules. It has provoked mixed reactions among lawyers.

Portugal plans to introduce a new competition law

The Portuguese government published a draft bill last week for public consultation. With the new law, Portugal aims to simplify competition legislation, improve enforcement and align the country's law with EU rules.

The draft sets new criteria for merger control. A merger may now be investigated and blocked by Portugal's Competition Authority if it creates significant impediments to effective competition. Under the previous law, the authority was able to block an acquisition only if it was likely to create or reinforce a "dominant position" in the market.

In antitrust cases, the authority will be able to prioritise investigations of "public interest", while at the moment it must look into all complaints.

The authority will also have the power to raid the private houses of employees of companies investigated in cartels and abuse of dominance cases. Under the current law, unannounced inspections were limited to company offices.

The proposed law introduces the possibility to end antitrust cases by settlement and by adopting remedies.

Gonçalo Anastácio, at SRS Legal in Lisbon, says the reform is "overall a very important step forward, but there should be a number of significant corrections to its text."

One of the main discussion points is likely to be the market share threshold to merger notifications. According to the draft, a merger will be notified to the authority only if the turnover of two or more of the merging companies exceeds €5 million – up from €2 million under the existing law – and the merged entity has a market share of more than 50 per cent.

Anastácio says there were expectations the new merger guidelines would not consider market share.

"We expected the market share threshold would be eliminated and only the turnover threshold be kept in place," he says. "But the new law still provides for a mandatory notification if the market share of the companies exceeds a threshold. I think this point should be changed and we should not have a market share threshold. The mandatory merger control on the grounds of market share is against the International Competition Network guidelines, and is something that amongst the 30 countries of the European Economic Area only remains in force in Portugal, Spain, Greece and Slovenia."

The proposed law also incorporates a new leniency programme, guaranteeing more protection for whistle-blowers.

Anastácio says: "Portugal already had a leniency policy, but it did not work. It was applied in only one case in the past five years. A reason is that Portugal is a small market, where everybody knows one another, and therefore there is a historical and cultural reluctance to come forward and report wrongdoing to the authority. But another reason is that there were not enough guarantees for those who come forward."

Anastácio also says there is a lack of checks and balances to the powers that the new law grants to the competition authority.

He says: "The authority now can decide which antitrust cases to investigate and has more investigation powers. This major change gives rise to concerns. The project provides for much stronger and discretionary powers. The European Commission has the same level of powers, but also a number of mechanisms of control that must therefore be adopted in Portugal as well."

Joaquim Vieira Peres, at Morais Leitão Galvão Teles Soares da Silva & Associados in Oporto, says he has "mixed feelings" towards the draft of the new law.

He says: "I think the Portuguese competition law needed to be amended, and this is a good opportunity. But there are many points in the draft that are not balanced enough."

Vieira Peres says the Portuguese competition authority should have been more transparent when drafting the law.

He says: "The law was drafted at least three months ago and kept in secret since then. My main concern is that the proposal has been drafted by the competition authority itself. If you have the police drafting the penal code you would be suspicious. Now the time to assess the draft is very short."

Vieira Peres says is also concerned that the proposed law does not provide for a suspension of penalties in case a decision by the competition authority is appealed.

"This means that companies may have to pay a fine while the discussion on the case is still under way and before any court has taken a decision," he says. "This does not only regard fines, but also injunctions to sell part of a business, or decisions to bar a company from public procurements. These are decision that can hardly be overturned."

The introduction of a new competition law is part of the requirements of the EU and IMF bailout proposed in May. The draft bill, which was published last week, is opened to public discussion until 5 December.

87 Lancaster Road, London, W11 1QQ, UK | Tel: +44 207 908 1188 / Fax: +44 207 229 6910
http://www.globalcompetitionreview.com | editorial@globalcompetitionreview.com