

The Portuguese Competition Authority approves guidelines implementing the new competition law

Portugal, Procedures, Notification (mergers), Leniency, Change of control, Reform, Cartel, All business sectors

Portuguese Competition Authority (Autoridade da Concorrência), 4 December 2012, Guidelines on Leniency

Portuguese Competition Authority (Autoridade da Concorrência), 20 December 2012, Competition policy priorities for 2013

Portuguese Competition Authority (Autoridade da Concorrência), 26 December 2012, Guidelines regarding the calculation of fines

Portuguese Competition Authority (Autoridade da Concorrência), 31 December 2012, Guidelines regarding the preliminary evaluation in merger proceedings

Portuguese Competition Authority (Autoridade da Concorrência), 17 January 2013, Guidelines regarding priorities in the use of its sanctioning powers

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Between December 2012 and February 2013, the Portuguese Competition Authority (PCA), in the use of its regulatory powers, adopted a series of guidelines and orientations that it was due to adopt under the new Competition Act (Law 19/2012, of 8 May). These guidelines regard the issues of: (1) leniency [1] (Regulation 1/2013), (2) the Priorities for 2013 (adopted on 24 December, 2012) [2], (3) the guidelines regarding the calculation of fines (adopted on 26 December 2012) [3], (4) the Guidelines regarding the preliminary evaluation in merger proceedings (adopted on 31 December 2012) [4], and (5) the Guidelines regarding priorities in the use of its sanctioning powers (1 February 2013) [5]. Furthermore, the PCA has also launched a public consultation concerning (6) Draft Guidelines on the economic analysis of horizontal mergers (1 February 2013) [6], and published a (7) preliminary report on the merger notification forms Regulation (6 February 2013) [7], the final consolidated version of which was published in the Official Journal (*Diário da República*) last 14 February, as Regulation n.º 60/2013 of 25th January (DR, II series, nr. 32, of 14.2.2013, pp. 6353-6360) [8].

The adoption of the administrative regulation guidelines listed in (1), (3), (4) and (5) (and (7), once published) followed public consultations launched between July and August and ended in 30 September, in which all the stakeholders were invited to submit any comments. The PCA has,

generally, divulged reports on the changes it introduced in the guidelines following the public consultations.

Leniency

Regulation 1/2013/AdC is the first administrative regulation to be published in the Official Journal after being adopted under article 80 of the Competition Act, under which the PCA adopts the administrative proceedings regulation regarding the leniency application. An English form of the abbreviated submission form is also provided. It is worth mentioning that the new leniency regime shows many relevant differences from the original and previous regimen under Law 39/2006 (revoked by the new Competition Act). As already happened in practice under Law 39/2006, the new Competition Act only allows for leniency applications in relation to agreements and concerted practices between competitors (horizontal agreements) and vertical agreements seem to be formally excluded, both under article 9 of the Competition (or the equivalent article 101 TFEU). With the far reaching powers conferred upon the PCA under the new Competition Act, it is expected a significant increase of leniency procedures to be opened in the near future, if the PCA resumes a proactive attitude regarding the public enforcement of restrictive practices prohibitions under article 9 that it failed to adopt in the past four five years.

The PCA did not include some of the suggestions we have made in the public consultation but expressly admitted in the final wording that leniency requests may be submitted through email and even created a dedicated email, clemencia@concorrenca.pt, which may allow for speedier submissions. The regulation also admits that the PCA may adopt a "mark-up" submission, although that is not deemed as such automatically and the PCA may grant an extended deadline (of at least 15 working days) in order for the leniency applicant to complete its application.

Priorities for 2013

Under article 7(3) of the new Competition Act, the PCA must publish, in the last trimester of each year, the priorities it has determined for the enforcement of competition policy in the following year. This document is the first example of the Priorities adopted under this provision.

The Priorities for 2013 have been defined around 3 main pillars: (i) optimization of enforcement and advocacy; (ii) effective application of the new Competition Act (with a view to improving judicial success rate); and (iii) reinforcement of PCA capacities (review of organisational structure, consolidation of financing model and rightsizing human resources).

The Priorities confirm the PCA's understanding that the current economic situation calls for a strengthening, rather than a lessening of competition policy enforcement. In what concerns supervisory powers, special attention shall be paid to merger control and to the payment cards, energy, telecommunications and postal sectors. The Competition Act forbids any sectoral references in what regards the exercise of sanctionatory powers in the following year.

Calculation of Fines

The adoption of these Guidelines was required by article 69(8) of the new Competition Act, but is

also framed within the PCA's efforts for increased transparency. Indeed, given the non-public nature, up until recently, of its decisions concerning restrictive practices, as well as the absence of such a general document, the PCA was often criticised for the murkiness of its policy concerning the calculation of fines.

The document was admittedly inspired by and closely follows the method set out in the 2006 European Commission's Guidelines on calculation of fines. As we pointed out during the public consultation, this may come to raise legal issues, in particular given the drastic distancing from previous administrative and judicial practice. The expected significant increase in the level of fines gives further grounds for concern thanks to the fact that appeals from PCA decisions will no longer have, as a rule, a suspensory effect.

Preliminary Merger Evaluation

These Guidelines replace others, adopted under the previous Competition Act and built on the PCA's experience in the preliminary evaluation of mergers. Undertakings may initiate a preliminary evaluation of a proposed merger before or after the signing of the respective contracts (or equivalent), with an indicative deadline of 15 days prior to actual notification being provided.

The procedure provided for in these Guidelines is characterised by informality, confidentiality and dialogue between the undertakings and the PCA. These contacts will tend to be conducted on the basis of a draft version of the filled-out notification form. Although the PCA's opinion, expressed in the framework of a preliminary merger evaluation, is not binding on it, the PCA has committed itself to acting within the confines of the principle of good faith, with the implication that it will maintain the same opinion in the following formal notification, as long as the basis for the previous assessment remains unaltered.

Priorities in the use of sanctioning powers

Article 7 of the new Competition Act introduced, arguably, some discretionary margin for the PCA in deciding which cases it would pursue, under its sanctioning powers for articles 101 and 102 TFEU, its national equivalents (articles 9 and 11) and in abuse of economic dependence institute (article 12). In order to implement these provisions, the PCA has now defined what it understands to be its current priorities for the use of its sanctioning powers, in the general framework of the general priorities it has set for competition policy. It should be noted that these guidelines were adopted in an effort of increased transparency, as their publication is not required by the new Competition Act.

The Guidelines naturally stay rather close to the letter of the law, which already set out parameters for the assessment to be carried out by the PCA.

The PCA's interpretation of the extent to which the new Competition Act may exclude the so-called legality principle (i.e. the extent to which it shall deem itself free not to pursue a specific infringement, *maxime* in the context of a complaint), as expressed in these Guidelines, is likely to give rise to legal disputes. It may be stressed that if a complaint is lodged, the complainant has the right to a decision and this decision may be appealed against before the specialised Court of Competition, Regulation and Supervision residing in the beautiful city of Santarém.

Merger notification forms

Regulation 60/2013 approves the new merger notification forms, constituting a significant change over the former model, with an emphasis on simplification (adoption of a simplified model for certain mergers) following the criteria laid down by the European Commission. Also, it deals with some of the previously identified flaws and clarifies some of the issues the PCA's faces under the former notification model. It also intends to carry out the necessary revisions to accommodate the provisions of the new Competition Act.

Regrettably, despite this having been suggested during the public consultation, it would seem that the PCA will continue to require the notification to be presented in Portuguese, which means foreign undertakings will continue to have to count on the time required for translation in their management of submission deadlines. Also, due to the amount of information required even under the "simplified procedure", it seems that the opportunity of creating a really simplified procedure, *v.g.* for mere market share *acquisition* operations - as proposed by us in the Public Consultation period - is, for now, lost. The regimen of confidentiality of business secrets will also require a careful consideration by the undertakings involved when notifying or transmitting information to the PCA. Finally, savings for companies could better achieve if, under a simplified procedure, notification taxes would be significantly reduced.

Economic analysis of horizontal mergers

With an identifiable influence from the *DOJ/FTC Horizontal Merger Guidelines*, this draft document is an extensive (125 pages) description of the economic principles the PCA proposes to apply to the analysis of mergers between competitors. Notwithstanding potential fragilities, once adopted the document shall constitute a very significant contribution to the PCA's efforts to increase transparency in the enforcement of competition policy, its benefits extending far beyond the scope of horizontal merger control. As an example, it should be noted that this document contains the PCA's proposal to adopt the first national guidelines on market definition.

[1] Approved by the Board (Conselho) of the PCA (Autoridade da Concorrência) on 29 November 2012, it was made public on its website on 4 December and published in the Official Journal of 3 January 2012 (no English version is available as yet - See <http://www.concorrencia.pt/vPT/Prat...> and http://www.concorrencia.pt/vPT/A_Ad...).

[2] See <http://www.concorrencia.pt/vEN/News...>

[3] See <http://www.concorrencia.pt/vPT/Noti...>

[4] See <http://www.concorrencia.pt/vPT/Noti...>

[5] See <http://www.concorrencia.pt/vPT/Noti...>

[6] See <http://www.concorrencia.pt/vPT/Noti...>

[7] See <http://www.concorrencia.pt/vPT/Noti...>

[8] Available through the PCA webpage in http://www.concorrenca.pt/vPT/A_Ad...

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