

ASSESSING THE CHANGES TO COME IN PORTUGUESE COMPETITION REGULATION - VIEIRA DE ALMEIDA

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This year will see changes to Portugal's Competition Act that may impact merger control, notification and judicial review, says Nuno Ruiz, Head of EU & Competition at Vieira de Almeida

"Competition law in Portugal is already being transformed by the financial crisis, but legislative changes are also forthcoming this year. The problem is that, while there are evident areas of concern, a lack of public consultation means that nobody in the market is yet entirely sure what to expect."

Last year's change of the Board of the Portuguese competition authority (Autoridade da

Concorrência – AdC), and the appointment of Manuel Sebastião as the new President, was almost universally welcomed, says Ruiz.

There is now an expectation that the investigative momentum previously seen will be maintained with some significant, albeit subtle, policy differences.

"The internal restructuring and reorganisation of the AdC will, it is hoped, transmit into positive practical changes. As a result of the crisis there are fewer merger cases and this should have allowed additional resources to target behavioural, including cartel, issues. In which respect, there is also an expectation of a more detailed analysis of cases."

The AdC seems now to be looking to take on more of a market 'watch dog' role, believes Ruiz, with no intention of helping to reshape markets. Last December finally saw the first convictions under Portugal's 2007 leniency and whistle-blowing rules, for collusion in the catering sector. Whether this is the first of many cases to come is not clear.

In addition, last Autumn saw major fines handed down to Portugal Telecom (PT), and its former subsidiary Zon Group, in a long-running abuse of dominance investigation by the AdC affecting the wholesale and retail markets for broadband access. PT was fined €45m and Zon €8m.

"The case stems from the start of the decade, but is notable for the severity of the penalties involved and that previous, arguably worse, infringements in France and Germany have resulted in less substantial penalties," says Ruiz.

He nonetheless believes that the Authority is set to become much more active and investigations more high profile. But in order for competition enforcement to become a real success in Portugal clear procedural issues still need to be fixed, and this is why there is such interest in the amendments being considered by the government.

"Many in the legal community agree that there is a need to change certain aspects of the law, mostly on the procedural side, but there is still no clear idea of what the Government will propose, or indeed what the position of the AdC will be on what is being suggested."

Criticism of a lack of public consultation is not new, says Ruiz. Some of the evident flaws in Portugal's 2003 Competition Act derive precisely because there was a lack of market input prior to its adoption.

"Among the issues that stand out are those around merger control procedures, including market share criteria, and the need for a simplified notification procedure, but also the interplay between Portuguese and EU rules – within Europe, Portugal may be a relatively small market but nonetheless important substantive issues need to be addressed."

Among these is the anomaly between merger control prenotification system. Important issues also surround the validity of merger SLC testing, the right of defence in infringement procedures, the judicial review deadlines and competent courts, and third parties' abilities to gain access to files held by the AdC, he says.

In addition, improvements are also required in the antitrust arena. "The system as it currently stands is designed for minor infringements and struggles in cases with a significant degree of complexity.

There are also no guidelines around the level of fines that may be imposed for competition violations, which creates extra uncertainty."

It is also unacceptable that a substantial amount of any fines recovered go straight into the AdC's budget, says Ruiz.

"We all want a robust competition authority, but there is an evident conflict of interest between being an independent regulator and having its capabilities determined by how much money it can

recover. Hopefully the amends that are proposed will start to look at, at least, some of these issues."