Organisation for Economic Co-operation and Development

DAF/COMP/WD(2017)67

Unclassified

English - Or. English

16 November 2017

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note by Portugal

5 December 2017

This document reproduces a written contribution by Portugal submitted for Item 5 of the 128th OECD Competition committee meeting on 5-6 December 2017.

More documents related to this discussion can be found at www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

JT03423078

Portugal

1. Introduction

1. While safe harbours and legal presumptions provide legal certainty and increase efficiency in competition law enforcement, they also carry disadvantages, such as the risk of false positives (i.e. the prohibition of innocuous conduct) and false negatives (i.e. the non-prosecution of harmful conduct).

2. This holds true not only with respect to conduct traditionally considered as hard-core infringements (e.g. vertical relationships, exclusive dealing) but also regarding novel issues such as fast-moving markets.

3. In line with the above and the latest developments in economic theory, the evolution of the competition law framework in Portugal has in some cases reflected a more economics-based approach, leading to the elimination of certain safe harbours and legal presumptions.

4. For example, under the 1993 Competition Act[1] there was a rebuttable presumption of dominance if a company held a market share of 30% or above. Likewise, collective dominance was presumed if a group of up to three companies held a market share of at least 50%, or if a group of up to five companies held a market share of at least 65%. The 2003 Competition Act[2] did not include any similar presumption, nor does the 2012 Competition Act,[3] currently in force.

5. This said, Portuguese competition law relies on a number of safe harbours and legal presumptions, most of which originate from EU competition law.

6. In this contribution, we will share our practical experience concerning safe harbours and legal presumptions in both antitrust (section 2) and merger control (section 3), concluding with final remarks.

2. Antitrust

7. As regards antitrust, a large number of the safe harbours and legal presumptions drawn from EU competition law have been integrated into the Portuguese competition law system through an explicit reference in Article 10(3) of the 2012 Competition Act.

8. According to Article 10(3), any agreements, concerted practices or decisions of associations which are prohibited by Article 9(1) of the 2012 Competition Act[4] may be justified, even in the absence of an effect on trade between Member States, if they comply

[1] Law Decree No. 371/93 of 29 October 1993.

[2] Law No. 18/2003 of 11 June 2003.

[3] Law No. 19/2012 of 8 May 2012.

[4] Article 9(1) of the 2012 Competition Act is the equivalent to Article 101(1) TFEU, whereas Article 10(3) of the 2012 Competition Act is the equivalent to Article 101(3) TFEU. Similar legal provisions already existed in the 2013 Competition Act.

with the remaining criteria established in EU Regulations adopted under Article 101(3) TFEU (e.g. the Vertical Restraints Block Exemption Regulation / VBER[5] or the Technology Transfer Block Exemption Regulation[6]). This legal provision has been used a number of instances in antitrust proceedings.

9. For example, in two separate but very similar cases decided in 2016, *PRC/2012/02 – BP Portugal Comércio de Combustíveis e Lubrificantes, S.A.* and *PRC/2012/03 – CEPSA Portuguesa Petróleos, S.A.*, the Autoridade da Concorrência ("AdC") rejected complaints by referring to Article 10(3) of the 2012 Competition Act, basing its arguments on safe harbours established in the VBER and citing the Commission's Guidelines on Vertical Restraints.[7]

10. The complaints related to a number of alleged anticompetitive practices by BP Portugal and CEPSA Portuguesa (the Portuguese subsidiaries of the BP and CEPSA Groups, active among others in markets related to oil and gas) concerning the relationship between each of these companies and their fuel distributors, notably the existence of non-competition clauses and resale price maintenance. As regards the resale price maintenance allegation, the AdC argued, specifically referring to the Commission's Guidelines on Vertical Restraints, that the conduct consisted instead on a price recommendation and, since the suppliers' and distributors' market shares were below 30%, it was covered by the VBER. The AdC also considered that the non-competition clauses were covered by the VBER given that (i) the market shares were below 30%, (ii) the contract duration was not longer than 5 years and (iii) there were no obstacles hindering the distributors from terminating the contracts. A number of non-competition clauses were longer than 5 years but related to the distribution of fuel from premises owned by the supplier and were thus covered by the VBER.

11. Furthermore, in its decisional practice the AdC has also referred directly to EU Regulations or the European Commission guidelines in order to apply safe harbours and legal presumptions.

12. For example, in *PRC/2013/05 - Peugeot Portugal Automóveis, S.A.*, the AdC accepted commitments based on the preliminary assessment that Peugeot Portugal could have breached Article 9(1) of the 2012 Competition Act and Article 101(1) TFEU due to a clause under which buyers of Peugeot motor vehicles could only benefit from an extension in the vehicle warranty if the repair and maintenance services were provided by authorised repairers. The AdC decision, referring to Commission's Guidelines on Motor Vehicles,[8] argued that (i) the contract could not benefit from the category exemption applicable to motor vehicle agreements and (ii) was unlikely to benefit from the individual exemption foreseen in Article 101(3) TFEU.

[5] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices.

[6] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the TFEU to categories of technology transfer agreements.

[7] Commission's Guidelines on Vertical Restraints of 19 May 2010.

[8] Commission Notice – Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles of 28 May 2010.

13. In *PRC/2014/05 – EDP – Energias de Portugal, S.A. and others*, a prohibition decision adopted in May 2017 imposing a fine of 38.3 million euros, the AdC focused its assessment on a 2-year non-compete obligation between EDP (a utility company active in the supply of electricity and gas, among others) and Sonae (a conglomerate active in telecoms,food retail, energy, among others) concerning the markets for the supply of electric energy, gas and retail food supply. According to the AdC, there was no need to show anticompetitive effects. The AdC based its assessment on the consistent case-law by the European Courts and concluded that, since the clause amounted to a market sharing agreement between potential competitors, it constituted a restriction by object, which under EU law amounts to a presumption of illegality.

3. Merger Control

14. As regards merger control, besides a number of safe harbours and legal presumptions originating from the EU competition legal framework, the major specificity regarding the legal system relates to the notification thresholds, since these include a market share threshold.

15. According to the 2012 Competition Act, the notification thresholds are as follows:

1. Acquisition, creation or reinforcement of a market share of at least 50 per cent in the relevant national market;
2. Acquisition, creation or reinforcement of a market share of at least 30 per cent but less than 50 per cent, 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 €5 million;
3. The aggregate turnover of the participating undertakings in Portugal, in the preceding financial year is over €100 million, provided that the individual turnover in Portugal of at least two of the undertakings exceeds €5 million.

16. While the majority of competition legal systems does not include market share thresholds, an in-depth analysis of the AdC's merger control case record carried out during the 2012 legislative reform showed that the market share threshold under (a) above ensures that a substantial number of mergers likely to raise competition concerns fall within the scope of the AdC's assessment, taking into account the fact that Portugal is a small economy susceptible to mergers involving firms with high market-shares and low turnovers.[9]

17. In addition to the above, there is a string of merger control decisions which have consistently applied EU safe harbours and legal presumptions relating to the substantive merger assessment.

18. For example, in *Ccent. 5/2013 - Kento*Unitel*Sonaecom/ZON*Optimus*, the AdC specifically refers to safe harbours established in the European Commission's Vertical Merger Guidelines[10] for the purpose of conducting its substantive assessment, claiming

[9] Had the legislator opted for turnover as the single notification criterion, nearly 25 per cent of the transactions that had raised competition concerns in the past (phase I decisions with commitments and phase II decisions from March 2003 to March 2011) would not have been notified to the AdC.

[10] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings of 18 October 2008.

that in a number of relevant markets no vertical effects were likely to result from the merger given that the market shares of the merged entities in the upstream and downstream markets were significantly below 30%.

19. Likewise, in *Ccent. 25/2010 – S.C. Johnson/Negócio de Insecticidas e Repelentes da Sara Lee*, the AdC assessed whether a non-competing clause and a number of non-solicitation clauses could be considered ancillary to the agreement and therefore approved together with the merger.[11] In its assessment, the AdC specifically stated that the qualification as ancillary restraint takes into account the European Commission's Notice on restrictions directly related and necessary to concentrations.[12] Based on the guidance provided in the Notice, the AdC considered that some of the non-solicitation clauses were not ancillary to the agreement and thus they would not be covered by the decision approving the deal.

4. Concluding remarks

20. The existing safe harbours and legal presumptions in the Portuguese competition law system mainly originate from EU competition law and have been applied in a consistent manner, even in purely national cases.

21. The use of safe harbours and legal presumptions has ensured a consistent decisional practice by the AdC overtime, which is predictable both to business and the Courts, thus contributing to legal certainty.

22. Nevertheless, the use of safe harbours and legal presumptions has progressed towards a more economic-based approach. This is namely visible in the evolution of the Portuguese competition legal framework where some legal presumptions have been replaced by a case-by-case analysis by the AdC. This may be interpreted as an indication of maturity in the system, building on developments in economic thinking and in the national and EU decisional practice.

[11] Under Article 12(5) of 2003 Competition Act, which was in force at the time, a decision authorising a merger covered restrictions directly related to the merger. The 2012 Competition Act, currently in force, has a similar provision in Article 41(5).

[12] Commission Notice on restrictions directly related and necessary to concentrations of 5 March 2005.