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Judicial Perspectives on Competition Law

-- Portugal --

This paper first describes the judicial review system of competition cases¹ in Portugal and evidentiary matters in competition cases before courts. Then the paper describes the interaction between the Portuguese Competition Authority (AdC) and the Courts. Finally, we discuss the Portuguese experience regarding the specialised Competition, Supervision and Regulation court and draw some final remarks.

1. The Portuguese system for judicial review of competition cases

1. The AdC is the only administrative authority responsible for the enforcement of competition law in Portugal since it was created in 2003.
2. The AdC's single task is the enforcement and promotion of competition in all areas of economic activity, including those subject to sector regulation, and was awarded operational, administrative and financial autonomy to perform its sanctioning, supervisory and regulatory powers.
3. All AdC's decisions in antitrust procedures (which have a mixed administrative and quasi-criminal nature) are appealable to Courts, except if the law explicitly excludes such possibility. This is the case of merely bureaucratic decisions or decisions to file a case, with or without imposing conditions.
4. In Portugal, there are two instances of appeal in antitrust matters. The AdC's decisions are appealed, in the first instance, to the Competition, Regulation and Supervision Court, a specialised Court created in 2012. The rulings of the Competition, Regulation and Supervision Court are appealable to the Lisbon Court of Appeal, in 2nd and last instance.
5. Under article 88 of the Portuguese Competition Act², the Competition, Regulation and Supervision Court has powers of full jurisdiction and can reduce or increase the amount of the fine or of the periodic penalty payment. The possibility of "*reformation in pejus*" was introduced in 2012 and, thus far, the Court has not use this prerogative.
6. In pure administrative proceedings, such as those of merger control, the AdC's decisions are appealed in the 1st instance to the Competition, Regulation and Supervision Court and, in the 2nd instance, to the Lisbon Court of Appeal. Differently from antitrust cases, in these pure administrative cases, there is a 3rd instance of appeal to the Portuguese Supreme Court, but the appeal shall be limited to issues of law. There can also be direct appeal of rulings of the Competition, Regulation and Supervision Court to the Portuguese Supreme Court if the appeal is limited to issues of law.

¹ By competition cases we refer to the appeal of AdC's decisions. Other Courts are competent for private litigation in which competition issues may arise, as for instance an anti-competitive clause laid down in a contract.

² Law No. 19/2012, of 8 May.

2. Evidentiary matters in antitrust cases before courts

7. In general terms, the AdC has the burden of proof of the infringement, while the company that files the appeal against the AdC's decision has the burden of proof of the facts that it alleges.

8. However, it is sufficient for the company, in order to be acquitted, to create a reasonable doubt in the court about the accurateness of the AdC's decision. The judge has a very large power to define which facts and arguments it considers relevant, namely to be questioned during the trial, for example, by examining witnesses.

9. The Court must take into consideration every fact and argument, including of an economic nature, alleged by the company, but it is not obliged to address every specific item and sub-item of the arguments and may aggregate a major set of arguments and provide for its judgment on them in a more generic manner.

10. These rules are also applicable to economic evidence in competition cases, as well as to other technical matters.

11. Nevertheless, the increasing use of economic evidence by competition authorities in antitrust cases has posed new challenges to judicial review, in particular given the complex nature of the economic reasoning used.

12. In the past, the Courts have allowed both the AdC's economists and the economic consultants of companies to testify as witnesses during the trial.

13. An example is the salt cartel judgement, following a decision by the AdC in 2006 which was confirmed by both the first and the second instance courts. Economic evidence was presented to court to estimate the damage caused by the cartel. At that time, the Lisbon Commercial Court (1st instance until 2012) did not resort to an economist to assist the court, but allowed for the AdC's and the parties' economists to testify as witnesses during the trial. They explained the methodology used to estimate the damage and were questioned and cross-examined by all parties and the judge.

14. Save in special cases provided for in the law, the evidence is assessed in accordance to the rules of experience and the free persuasion of the judge³. This is how the testimony of a witness is evaluated, for instance, including if the witness is an economist and provides its testimony on economic matters. However, if the economist is heard in the capacity of "expert", the opinion of the expert cannot be assessed freely by the judge, meaning that if the view of the judge is different from the opinion of the expert, the judge must indicate the reason why he rejects the expert's opinion⁴. To date, as mentioned, the court has heard the economists on economical evidence as "witnesses", and has explained in the recitals of the judicial decision, at least in general, why such opinion should be accepted or rejected.

15. The Competition, Regulation and Supervision Court (1st instance Court since 2012) has adopted a novel approach, which has proven to be particularly adequate in cases of abuse of a dominant position.

16. The specialized Court has hired economic experts to assist the court in economic matters in the two cases of abuse of dominant position that were judged to date, in the

³ Article 127 of the Portuguese Penal Procedural Code.

⁴ Article 163 of the Portuguese Penal Procedural Code.

markets of trading of pay TV sports programmes⁵ and of studies and information on the activities of pharmacies⁶. In both cases, the infringement of competition rules and the AdC's sanctioning decision was confirmed by the court.

17. The Court decided to appoint an economic advisor to assist it in the hearings, in particular in the examination of conflicting sets of economic evidence. The public prosecutor, the AdC and the parties⁷ also appointed an economic advisor.

18. This solution ensured that the Court was well-advised by experts, and ultimately could reach a solid decision in terms of economic reasoning.

3. Cooperation between the AdC and judiciary

19. Due to the principle of separation of powers, the AdC does not discuss cases pending in court with judges. The AdC has autonomous standing in Court proceedings, and it may appeal Court decisions irrespective of an appeal by the Public Prosecutor⁸.

20. However, the AdC and national Courts cooperate within court proceedings, such as in competition proceedings as described above as well as in private disputes. In private disputes in which a competition law issue arises, the AdC may be called by a court to provide information or clarification on competition issues, generally of an economic nature.

21. The AdC and the judiciary have also cooperated in the framework of training and advocacy initiatives on substantive, evidentiary and procedural issues of competition law.

22. The AdC has participated in courses, conferences and workshops organised by the national training institute for judges and public prosecutors, the Centre for Judicial Studies, as well by Universities specifically aiming at the judiciary.

23. Likewise, judges and public prosecutors have also been invited by the AdC to provide training in procedural issues to AdC staff.

24. Another example of interaction in the advocacy area is the Portuguese Moot Court of Competition Law organised in 2017 by the Competition, Regulation and Supervision Court, the Faculty of Law of the NOVA University of Lisbon, the University of Lisbon School of Law, with the cooperation of the AdC. This project allowed for a direct contact of law students with a mock trial of a competition case and was a forum of debate of competition law issues. A public prosecutor of the Portuguese specialised competition

⁵ For more information on the Sport TV case:

http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/Pressrelease_201504.aspx?lst=1&Cat=2015.

⁶ For more information on the AdC's decision against the ANF Group for abuse of dominance position:

http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201531.aspx?lst=1&Cat=2015.

⁷ Lawyers may be assisted during the trial by economic consultants if the judge so authorizes, under Article 50 of the Portuguese Civil Procedural Code

⁸ Article 89 (2) b) of the Portuguese Competition Act.

court, a judge of the General Court of the EU and AdC staff, among others, participated in this event.

4. Experiences regarding Courts specialised in competition matters

25. In Portugal, there is a specialised 1st instance Court for competition matters, the Competition, Regulation and Supervision Court, since 2012.

26. Until 2012, the Lisbon Commercial Court was the court competent to judge AdC's competition cases (antitrust and mergers). However, the Lisbon Commercial Court was also competent in all other areas of commerce, including bankruptcy and intellectual property rights. At the time, certain claims in administrative proceedings, such as access to AdC's file in merger control procedures, were lodged by companies before general administrative courts, which led to divergent rulings on the competent court to assess such matters.

27. The attribution of competences to the Lisbon Commercial Court in 2003 (when the AdC was created) constituted a significant step forward in ensuring a more consistent and specialised judicial review. The fact that a single Court was competent to assess AdC's decisions allowed for a certain degree of specialization in competition law of a number of judges serving at that court.

28. However, the fact that the Court had to handle other types of procedures implied some limitations in the degree of specialisation and delays, due to the high amount of other types of proceedings that the Court had to deal with.

29. Therefore, in 2012 a new specialised Competition, Regulation and Supervision Court was created to handle competition matters, as well as those related to sector regulators, such as telecoms, energy, media, insurance and others.

30. The creation of the specialized Court was one of the structural reforms foreseen under the Adjustment program in Portugal in 2011, with the aim of improving the functioning of the economy through effective and timely enforcement of competition rules.

31. The overall assessment of the functioning of the new Competition, Regulation and Supervision Court is very positive.

32. The creation of the specialized Court has allowed for a timelier judicial review, issuing judgements in lesser time than before, which is crucial for effective enforcement and deterrence.

33. The Court has heard several appeals of AdC's decisions, and has upheld all its antitrust decisions in substance, albeit with reductions of fines in some cases.

34. The Court has also developed expertise and novel approaches in proceedings, such as the use of economic experts as described above.

35. Nevertheless, there is still room for improvement when it comes to the functioning of the Court and the degree of specialization of judicial review.

36. One important aspect is to ensure a stable group of judges in the specialized Court that may develop further experience in dealing with competition matters overtime. There is still a high rotation of judges in the Court.

37. Another issue is the current appeals' mechanism, as it may reduce the benefits of the specialised court since the judges at the Appeal Court are specialised in criminal law but not in competition law, so far.

38. The law provides for the possibility of Appeal Courts to have sections dedicated to competition, supervision and regulation (as well as to other specialised matters) in the condition that the volume or the complexity of the work at stake justifies it. So far, no special section for competition, regulation or supervision has been created.

39. Therefore, the creation of a specialised competition section in the court of appeal would be an ideal step to take in order to ensure further specialisation in judicial review.

5. Concluding remarks

40. The judicial review system in Portugal has evolved towards an increasing degree of specialisation, in particular since 2012 when the Competition, Regulation and Supervision Court was created.

41. This evolution has allowed for timelier decisions by the specialised Court, which are crucial for effective enforcement and deterrence of competition law infringements.

42. Another positive aspect of this evolution is the fact that the Competition, Regulation and Supervision Court has resorted to novel approaches towards the assessment of economic evidence, by using economic advisers in abuse of dominance cases. This approach has strengthened the assessment by the Court of economic reasoning used in competition cases.

43. However, the system may be further fine-tuned, by reducing the current rotation of judges in the specialised Court and by considering the creation of a specialised section in the Appeal's Court for competition, regulation and supervision matters.