



Portuguese restrictive trade act may “interfere” with competition law

Friday, 14 February 2014 (4 hours ago)

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As Portugal prepares for a new restrictive trade practices law, competition practitioners fear that the new regulation is poorly articulated and may clash with competition enforcement.

The new law due to be enacted this month introduces sharper definitions of what constitutes abusive conduct and establishes higher fining thresholds.

It also means that the responsibility for investigating restrictive trade practices will transfer from Portugal's Competition Authority to government agency the Authority of Food and Economic Security (ASAE). Under the previous regulation, the cases were supervised by ASAE and then referred to the competition authority at the investigation stage.

Because these offences will no longer fall under competition law, the ASAE will no longer need to establish that these offences have an appreciable effect on competition. However, it will have no power to prohibit those practices that are compliant with competition law.

The decree puts in place new definitions of what constitutes the illegal practices of discriminatory pricing, sales below cost, refusal to supply and abusive business practices.

Somewhat controversially, the law also establishes minimum prices for those industries that are not subject to sector regulation, ruling that sale prices should not exceed costs.

It sees the maximum fine for predatory pricing or abusive contractual behaviour increase from €15,000 to a maximum of €2.5 million for large companies and €50,000 for small and medium-sized businesses. For the first time, fines will be linked to a company's turnover.

The ASAE will also have the power to impose interim measures, meaning it can order immediate suspension of the practices that will likely cause serious and irreparable damage to other market players, and can impose daily fines for a lack of cooperation.

Ricardo Oliveira, at PLMJ in Lisbon, says it is high time responsibility for monitoring restrictive trading was transferred from the competition authority.

"The reform is positive since the competence to enforce the provisions concerned should have been handed over to a body other than the PCA long ago," he says. "The PCA shall in the future be able to concentrate its resources in the issues that are part of its core mandate and that should be applauded."

But other practitioners say the decree’s overlap with competition law may cause problems in its application.

“The law contains a novelty, as it is stated that if such practices are compliant with competition law the [ASAE’s] prohibition will not apply. Such an innovation may allow the interpretation that the scope of the prohibition mirrors the one envisaged in the Competition Act, significantly limiting its practical application, as under competition law discriminatory conduct is only sanctioned in limited circumstances,” says Ricardo Bordalo Junqueiro at Cuatrecasas Goncalves Pereira in Lisbon.

On the other hand, Bordalo says there is also a risk the ASAE may be called to rule on cases that essentially fall under competition law, matters that “may involve great complexity in economic terms”, and for which the agency is ill-prepared.

Miguel Mendes Pereira, at Vieira de Almeida & Associados in Lisbon, says the law will introduce a “schizophrenic element” to Portugal’s legal system.

“On the one hand competition law rules incentivise low prices, on the other hand the restrictive trade law prohibits sales at a loss. Competition law allows small firms to refuse to sell or to grant access, the restrictive trade law prohibits any company (large or small, dominant or non-dominant) to refuse to sell.”

Carlos Pinto Correia at Linklaters says while the new law will essentially run alongside competition law, in practical terms it may interfere with it.

“The new law has consequences in terms of competition because it severely limits the freedom of the parties to agree in certain areas and, as a matter of fact, it establishes a threshold to certain minimum prices. This is obviously highly questionable,” he says.

Pinto says the bill has raised a great deal of concern in the market.

“The law is far from clear,” he says. “Some rules are simply incomprehensible and should be amended for clarification. It is generally understood that ASAE is simply not up to the task and the sellers and suppliers are afraid of a highly mechanic application of the law, without due attention to the specific situation of the distribution sector and to the legal implications of the interpretation made. The risk that steep fines are applied in these conditions is frightening.”

The law will take effect on 25 February.