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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session I: Cartels: Estimation of Harm in Public Enforcement Actions

-- Contribution from Portugal --

4-5 April 2017, Managua, Nicaragua

The attached document from Portugal is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



15th Latin American and Caribbean Competition Forum
4-5 APRIL 2017, Managua, Nicaragua

Session I: Cartels: Estimation of Harm in Public Enforcement Actions

-- CONTRIBUTION FROM PORTUGAL --

1. Cartel enforcement is one of the key priorities of the Portuguese Competition Authority (AdC), as cartels are considered one of the most serious competition infringements.

2. Under the Portuguese Competition Act¹ and EU competition law, cartels are considered as infringements by object, therefore is no need to prove effects to establish a breach of competition law. Nevertheless, harm may be taken into consideration, namely when setting the fines imposed to cartel participants.

1. Legal background for fines in Portugal

3. The AdC may impose fines on undertakings and individuals when they infringe the Portuguese Competition Act². In addition, the AdC may impose ancillary sanctions, when the seriousness of the infringement and the fault of the party concerned so justifies. The fines and ancillary sanctions have an administrative nature.

4. The aim of the fines is to punish the offenders and deter them from future violations, as well as to deter the wider community from breaching the competition rules. Therefore both factors, punishment and deterrence, play a role when setting the fines. However, as explained below, the factor of harm plays only a minor role in cartel enforcement in Portugal.

5. According to the Portuguese Competition Act, the AdC may impose a fine up to 10% of the company's total turnover in the business year preceding the AdC's decision³. Fines may also be imposed on administrators and directors of the companies involved up to 10% of their remuneration⁴.

¹ Portuguese Competition Act, Law No. 19/2012, of 8 May.

² Article 68 of the Portuguese Competition Act.

³ Article 69 (2) and (4) of the Portuguese Competition Act.

6. The Portuguese Competition Act also lists the main criteria for determining the fines' amount. Within the limits set by the Portuguese Competition Act, the AdC enjoys a considerable margin of discretion when imposing a fine. Notwithstanding, the offenders can appeal to the courts against the AdC's decision to impose a fine.

7. In order to enhance transparency, impartiality and legal certainty of its decisions, as well as the deterrence effect of its fines, the AdC adopted guidelines on the method of setting fines in December 2012, following the entry into force of the 2012 Competition Act (the Guidelines). These Guidelines follow closely the practice of the European Commission.

2. Role of harm in the methodology to set the fines

8. The Portuguese Competition Act establishes the upper limit of the fines and foresees factors to be taken into account when determining the fine's amount. The main factors are: (i) seriousness and (ii) duration of the infringement; (iii) the nature and size of the affected market; (iv) the level of the company's involvement in the infringement; (v) the gains taken from the infringement; (vi) whether the company has terminated the infringement and has repaired damages; (vii) the financial and economic situation of the company; (viii) whether the company is a repeated offender; (ix) the level of cooperation with the AdC throughout the investigation. This list is not exhaustive and the AdC may take into account other factors to determine the amount of fines.

9. According to the Guidelines, the AdC follows a three step methodology to set the fines. First, it establishes the basic amount of the fine of each company involved. Secondly, it adjusts that basic amount taking the specific aggravating or mitigating circumstances into account. Thirdly, it may revise the adjusted basic amount upwards or downwards for specific deterrence and proportionality reasons.

10. The basic amount is determined by reference to the value of sales of goods (or services) to which the infringement relates. Where the figures available are not reliable or where the sales related to the infringement are disproportional to its economic impact, the AdC may take the total turnover as a reference (bearing in mind the legal limit of the fine). Depending on the gravity of the infringement, the AdC establishes a percentage (up to 30%) of the value of sales to take into consideration. This proportion of the sales' value is then multiplied by the number of years the company has participated in the infringement, in order to set the basic amount.

11. The basic amount will be adjusted upwards or downwards depending on the aggravating or mitigating circumstances.

12. Among aggravating circumstances, the AdC usually takes into account: (i) recidivism, (ii) leader or instigator role, including any steps taken to coerce other companies to participate in the infringement, or retaliatory measures to enforce the anti-restrictive practice; or (iii) refusal to cooperate with, or obstruction of, the AdC's investigation. These factors are behaviour based, and harm does not play a role at this point.

13. As mitigating circumstances, the AdC takes into account: (i) the fact that the conduct was authorised or encouraged by a public authority or legislation; (ii) evidence that the company's involvement was substantially limited and, while being part of the offending agreement, the company avoided its implementation by adopting a competitive conduct; (iii) any steps taken by the company to terminate the infringement and to repair respective damages; or (iv) cooperation with the AdC during its investigation (outside the Leniency Programme). Under the assessment of mitigating circumstances, the harm-related factor is the potential repair of damages, which may be taken into account.

⁴ Articles 69 (4) and 73(6) of the Portuguese Competition Act.

14. As a third step, this adjusted amount may be revised upwards in order to ensure deterrence, where the company has significant market power and financial resources, or where it is necessary to exceed the gains improperly made⁵ as a result of the infringement, or/and the affected market is of particular economic relevance.

15. Conversely, the AdC may revise the basic adjusted amount downwards to ensure proportionality where the company's core business takes place on the affected market.

16. Therefore, it can be observed that the focus in the methodology when setting the fines is not based on the estimation of actual harm caused, but harm is a factor which may be taken into consideration. In step two, harm is considered in a limited way as a mitigating factor in case damages were paid, whereas in step three harm may be taken into account if, for example, the fine is significantly lower than the unlawful gains.

3. Cartel cases where harm was estimated

17. As it can be seen from the above, calculating harm is not a key factor in establishing a cartel infringement or in setting the fine. In practice, the AdC estimated harm so far only in three cases out of its 25 closed and ongoing cartel investigations.

18. In 2009, the AdC estimated the global gains earned by the five companies involved in a cartel related to the management and operation of cafeterias, canteens and restaurants in schools and hospitals. The estimated gains amounted to EUR 172.6 million.

19. For the purpose of determining unlawful gains, the AdC analysed the situation on the market during the period in which the cartel operated and compared it with the periods before and after by identifying the economic advantages.

20. The AdC took into account all segments in the scope of the management and operation of cafeterias, canteens and restaurants (companies, education, health, prisons, amongst others); all clients within the scope of that market; the commercial margin of the undertakings involved; the territorial scope of the agreement; as well as the period of validity of the agreement, between 1997 and 2004.

21. Evidence of gains from cartelization was found on the market share level, the level of total commercial margin and the level of the commercial margin per meal for all the undertakings involved in the cartel.

22. The estimation of gains was carried out solely for the purpose of setting the fines, as the cartel was treated as a by object infringement.

23. In 2006, the AdC took the gains by the cartelists in a salt cartel into account when determining the fines totalling EUR 918.7 thousand. The parties had fixed quotas and minimum prices for wholesale salt for industrial and food purposes.

24. The quantification of the damages required a comparison between the behaviour of the undertakings in the cartel and in a hypothetical competing market.

25. In this case, the evidence allowed for the determination in a simple and intuitive manner of the minimal value of the economic benefit received by the infringing parties from the cartel.

⁵ Recital 37 of the Guidelines.

26. The undertakings ensured the payment of compensations under the agreement. The compensation scheme among cartel members imposed that, at the end of each year, undertakings whose annual sales exceeded their quota paid compensation to those selling below their quota. The AdC therefore concluded that the profit resulting from the cartel must have at least matched the compensation each undertaking was obliged to pay.

27. In a 2005 cartel decision against 5 pharmaceutical companies concerning the reagent for the measurement of blood glucose to hospital establishments, the AdC estimated the harm caused to up to EUR 3.2 million in 2002 and 2003 in the hospital sector and up to EUR 10.4 million for the pharmacy sector. The case concerned 36 tendering procedures with 22 hospitals in Portugal in 2005. The fine amounted to EUR 15.8 million.

28. In the analysis of the economic damages resulting from the cartel, 90 public procedures in the years 2000 to 2004, covering 24 hospitals in 12 districts of Portugal were defined as a sample. The damage was determined as the difference between the overall value of the transactions found and the value that would be incurred in the absence of the cartel, considering the prices before and during the cartel. The AdC also took into account the impact of the cartel on a regulation which set prices for the pharmacy sector administratively.

29. Although the AdC's decision was judicially confirmed, the court considered there was no sufficient evidence on the level of prices in the absence of cartel and on the impact of the cartel on prices set for products sold in pharmacies, thus dismissing the estimation of harm/economic benefit.

4. Private enforcement

30. The European Directive on antitrust private enforcement ("Damages Directive")⁶ of 26 November 2014 aims to remove legal barriers to effective redress. The Damages Directive also aims to improve the interaction between private enforcement of EU competition rules and public enforcement carried out by the Commission and EU national competition authorities.

31. The Directive is accompanied by a communication and a practical guide of the European Commission on the quantification of harm for the national courts in case of damages actions for antitrust infringements⁷.

32. Portugal is currently transposing the Directive into national law, therefore there is no practical experience on its application yet.

33. After a public consultation, the AdC issued a draft legislative proposal which is currently under review by the government. The draft legislative proposal prepared by the AdC foresees that the payment of damages to the injured parties following an out-of-court settlement may be taken into account when setting the amount of the fines. Article 17 (para 2) of the Damages Directive provides the presumption that cartel infringements cause harm, which was also included in the draft proposal by the AdC⁸.

⁶ Directive 2014/104/EU.

⁷ Available on http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html

⁸ Art. 9 para 1.

5. Concluding remarks

34. In the AdC's experience, estimation of harm is seldom performed in cartel cases, which are considered an infringement by object.

35. The fining policy of the AdC aims at deterrence and punishment. The orientation at the market share in the affected market with adaptations leads in most cases to a satisfactory result. Harm is a factor which can be taken into account when setting fines in cartel proceedings but was only applied in a limited number of cases.