Competition - Portugal

Amendments to Rules on Merger Control Proceedings

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Comment

Decree-Law 219/2006, issued on November 2 2006, was adopted to implement the EU Takeover Directive (2004/25/EC). It amended the legal framework for merger control in the context of the general principle established in Article 3(1)(f) of the directive, under which member states must ensure that a bid for a target company does not hinder it in the conduct of its affairs for longer than is reasonable. The amendments relate particularly to the time limit for the notification of a takeover bid to the Competition Authority and the timeframe within which the authority must assess a notified concentration. Although these first amendments to the Competition Act 2003 apply to takeover bids, the changes are much wider in scope and may have unintended consequences for the competition regime.

Time Limit for Notification

The original wording of Article 9(2) of the act required that concentrations be notified to the authority within seven working days of the conclusion of the agreement or, where appropriate, by the date on which the takeover bid, exchange offer or bid to acquire a controlling interest was publicly announced. However, the time limit for notification of a takeover bid was unclear when read in conjunction with the provisions of the Securities Code. Article 175 of the code requires that, as soon as the decision to launch a takeover bid is taken, the offeror must make a preliminary announcement and apply to register the offer with the Portuguese Securities Market Commission within 20 days of the announcement. The interpretation followed by practitioners - and accepted by the authority - was that takeover bids should be notified by the registration date, not the date of the preliminary announcement. Contrary to this interpretation, the decree-law modifies the wording of Article 9, shortening the time limit for submitting notification of a takeover bid: a concentration arising from a takeover bid must be notified to the authority within seven days of the preliminary announcement.

Timeframe for Assessment of Concentrations

The second relevant amendment introduced by the decree-law relates to the timeframe within which the authority must assess notifications of concentrations. Despite the context in which the amendments were introduced, and contrary to the government's initial announcement,(1) the revised requirements for assessment by the authority apply to all merger control proceedings and are not limited to takeover bids.

The original wording of Article 36(1) of the act set the time limit for the adoption of a final decision by the authority as part of an in-depth, second-phase investigation at 90 business days from the decision to initiate the second phase. The authority has 30 business days from the initial notification in which to complete the first phase. However, it also provided for the unlimited suspension of both periods to allow the authority to submit requests for further information to the notifying parties.

The new decree-law establishes that, during a second-phase investigation, the authority has 90 business days from the submission of a notification in which to conduct an investigation and announce a final decision. By altering the date from which the time limit is determined, the decree-law reduces the maximum duration of merger control proceedings from 120 to 90 business days. Furthermore, the authority may not suspend the in-depth investigation period for more than 10 business days in total. Although the wording of the new provision is unclear, there are reasonable grounds to conclude that the limit on suspensions does not apply during the first phase, which may still be prolonged indefinitely by requests for information from the authority.

To counterbalance the reduction of the timeframe for merger control proceedings, the decree-law provides for the pre-notification assessment of concentrations by the authority, introducing into Portugal's legal framework a procedure similar to the informal pre-notification proceedings conducted at European level. However, Portugal's framework differs from the EU merger control regime, as in Portugal the obligation to notify a concentration within a specified time limit remains in force. The authority has yet to establish the procedure to be followed for pre-notification assessments.

Comment

The aims of the amendments - that is, the shortening of merger control proceedings and the reduction of the authority's discretionary powers - are to be welcomed. However, it is regrettable that the subject was not examined in greater depth before the legislation was introduced. Although it is reasonably clear that a time limit for submitting notifications is still necessary owing to Portugal's relatively new competition culture, greater consideration should have been given to the impact of the clarification in the context of takeover bids. Such transactions are kept confidential until the preliminary announcement. It is therefore impossible to draft a notification in advance and pre-notification proceedings will be of little use. In the case of takeover bids which involve complex competition assessments, it will be difficult, if not impossible, to comply with the seven-day time limit; notifications presented within the time limit are very likely to be incomplete and will have to be completed later.

As for the reduction in the timeframe for the authority's assessment of concentrations, the broad scope of the new provision is surprising, given that the decree-law was adopted as part of the transposition of the directive, and that the authority was not given the opportunity to advise on the legislation, even though it will be responsible for applying it.

The new wording of Article 36 is unclear and may give rise to misinterpretation, notably with regard to its impact on first-phase proceedings. If the limit on suspensions applies only to the second phase, there is a risk that the inherent structure and logic of two-phase proceedings will be inverted: by setting stricter standards when assessing the completeness of the notifications submitted to it and sending more requests for information during the first phase of proceedings, the authority will be able to extend the first phase artificially before deciding to begin its in-depth investigation. The failure to consult the authority on the legislation increases this risk, as it may well be unprepared to implement the new legal framework and may lack the human resources needed to cope with the new limitations on the timeframe for proceedings.

The fact that the decree-law codifies pre-notification proceedings and makes the authority responsible for their regulation may lead to the introduction of a new formal (although not mandatory) phase in merger control, thus negating the purpose of seeking pre-notification advice. Moreover, given that the seven-day time limit for the submission of a notification has been retained, it is as yet unclear how the authority will reconcile the option of establishing pre-notification contact with the parties' obligation to notify the transaction within a short time.

In spite of the reservations about its implementation, the decree-law is a first step in the process of reducing the discretionary power of the authority in relation to the duration of merger control proceedings. Parties to a concentration will be sure that, from the moment the authority initiates the in-depth phase of its investigation, the proceedings will last no more than 100 business days from the notification date. However, the decree-law represents a missed opportunity to progress further towards greater legal certainty and accountability of the authority.

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Endnotes

(1) The original government press release of September 7 2006 is available on the Council of Ministers' website.

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