

# THE PORTUGUESE COMPETITION AUTHORITY AND THE PORTUGUESE COMPETITION AND REGULATION JOURNAL – A MEETING OF THE MINDS

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*ABSTRACT: Competition law and economics in an EU Member State such as Portugal is multi-faceted. This paper will focus on one particular facet of this matter: the activities of an independent competition authority and the potential, mutually beneficial interaction with an independent academic journal related to competition and regulation issues. The paper provides an overview of the work undertaken between April 2008 and November 2009 in five areas of the Portuguese Competition Authority (PCA) activity: competition cases; market studies and competition advocacy; international agenda; institutional building; and other matters. And it puts into a better perspective why the PCA is so committed to teaming up with the Institute of Economic, Financial and Tax Law (IDEFF) to edit the new Portuguese Competition and Regulation Journal.*

**SUMMARY:** 1. Introduction. 2. Competition cases. 3. Market Studies and Competition Advocacy. 4. International Agenda. 5. Institution building. 6. Other topics. 7. Conclusion.

## **1. INTRODUCTION**

The launching of a new academic journal as a result of the team work between a competition authority and a law school is a time to celebrate and a time to take stock.

It is a time to celebrate the joint effort of the Portuguese Competition Authority (PCA) and the Institute of Economic, Financial and Tax Law

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(known for its Portuguese acronym IDEFF).<sup>2</sup> This joint effort made the dream of a Portuguese academic journal on competition and regulation come true. And it is indicative of how important competition matters have become in the Portuguese society. But as always happens in this kind of initiative, publication of the first issue is no more than the end of the beginning of a long journey. Among other innovations that the future may bring, the journal is open to future partnerships.

It is also a time to take stock of past work and draw lessons that could help us pave the way for the future. As in many human endeavors, more than the past, what counts most are the present and the future. Hence, the PCA wants to be an institution that fulfils its mission—to defend, to protect and to promote competition in Portugal—in a way that makes it always proud of its past, always engaged in its present, always committed to its future.

Competition law and economics in an EU Member State such as Portugal is multi-faceted. It is comprised of legal and economic theory and analysis, empirical economic studies, competition advocacy, enforcement activities, case law, as well as legal and institutional frameworks and interface with the European Commission and the other EU National Competition Authorities (NCAs). This paper focuses on one particular facet of this matter: the activities of an independent competition authority and the potential, mutually beneficial interaction with an independent academic journal related to competition and regulation issues.

Despite being only seven years old, the PCA's enforcement and advocacy track record speaks for itself. This record can be seen into two phases. Phase I spanned the creation of the PCA to the end of its first five years. This phase corresponded with the tenure of the first Board of Directors. Phase II commenced twenty months ago when the current Board of Directors began their work.<sup>3</sup>

In short, Phase I can be described as the “taking off and climbing phase” – the phase during which the PCA was created from scratch as an independent regulatory institution, recruited most of its human capital, and put

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<sup>2</sup> IDEFF is an Institute of the Classical University of Lisbon Law School.

<sup>3</sup> The present Board of Directors of the Portuguese Competition Authority was sworn in on March 25, 2008, with a 5-year mandate. The board comprises Mr. Manuel Sebastião, President, and two Members, Mr. Jaime Andrez and Mr. João Espírito Santo Noronha. The previous board, whose tenure lasted from March 2003 to March 2008, comprised Mr. Abel Mateus, President, and two Members, Mr. Eduardo Lopes Rodrigues and Ms. Teresa Moreira.

its name on the map, at home and abroad. During Phase II the institution, having reached its cruising altitude and speed, has to engage in the serious institution-building necessary to ensure its appropriate functioning and the work of its staff, prioritise investigations, enhance the quality and timeliness of its decisions, and cope with major challenges regarding market studies and competition advocacy.

This paper provides an overview of the work undertaken between April 2008 and November 2009. It will touch on key aspects in five areas of the PCA activity: competition cases; market studies and competition advocacy; international agenda; institutional building; and other matters. And it puts into a better perspective why the PCA is so committed to teaming up with IDEFF to edit the new Portuguese Competition and Regulation Journal.

## 2. COMPETITION CASES

To achieve the goal of enhancing the quality and timeliness of PCA decisions and taking into account that staff resources are always limited, it is critically important to pursue, at any given time, only the number of cases that can be dealt with in a timely manner by the available staff. To this end, the following three-pronged strategy was adopted:

- a. In the Merger Control Department, as of September 18, 2008, the number of notifications under assessment was reduced to a single digit. This number has not been exceeded since 2008. An electronic merger notification system was also introduced.
- b. In the Antitrust Department, a backlog of cases, dating back to 2001, was reduced. Remaining cases were prioritized.
- c. The mandate of the Legal Department was reinforced and enlarged. A new Head of Department was hired from outside of the organization and a more sound approach to court proceedings was adopted.

During the period under review, 93 merger operations were notified and 103 final merger review decisions were adopted, 5 of which were under the phase II review process. The PCA blocked one merger case and imposed remedies on 7 other (5 in the phase I review process and 2 in the phase II review process). Two notified mergers were withdrawn by the notifying parties. One of these notified mergers was withdrawn as the PCA was concluding the phase II review process.

The Merger Department was the first department to reach a PCA Phase II objective: to permanently maintain a portfolio of less than ten active cases (a single digit portfolio). This goal was achieved in September 2008 and has been maintained ever since. In reaching this objective, a number of instrumental decisions were made quickly and efficiently. In particular, the department completed a phase II review process decision in record time. The decision, which cleared the soft drinks producer Sumolis' acquisition of rival Compal in August 2008, was taken in the midst of the summer holiday season, just 30 days after the PCA investigation moved to the phase II review process, beating the previous record of 57 days. The speed and efficiency of mergers decisions was recognised in the 2009 Global Competition Rating of the PCA, which stated "... sources across the board are impressed by the authority's merger work, which, they say, is improving rapidly. The average length of merger reviews has decreased to two months in simpler cases and three to five months for complex deals.

Reducing the backlog of antitrust cases required a two-step approach. First, the PCA identified longstanding investigations with no results to date. Second, the available evidence was evaluated in order to determine whether or not each investigation should be kept open. As a result of this process, the PCA no longer keeps inactive, outstanding cases on its books. This major effort allowed the PCA to redeploy its resources to more productive investigations and priority cases. Ultimately the PCA aims to keep open cases that are no more than 2-3 years old. The Antitrust Department plans to achieve this objective during 2010.

PCA case prioritization is guided by the principle of legality, which requires the agency to consider all complaints concerning possible infringements of competition rules. Therefore, it is critically important to make a reasonable assessment of actual and potential evidence during the early stages of each investigation in order to avoid tying up resources in cases where evidence is not clear cut and may be inconclusive.

During the period under review, 12 new antitrust investigations were launched. In the same period, 34 decisions were taken. Of these, 4 involved fines, 3 involved commitments, and 27 were closed due to insufficient evidence.

In 2008, 2 infringement decisions were taken, resulting in combined fines of approximately €3.3 million levied on the Association of Lisbon Bakers, for a price fixing cartel, and on Portugal Telecom for an abuse of dominant position involving a discount policy in circuit leasing.

In January 2009, the PCA also adopted for the first time interim measures against the ZON Group in order to prevent it from abusing its dominant position in the movie exhibition market. This measure took into account ZON Group's position in the associated cable pay TV market. The interim measure concerned a fidelity card for ZON cable pay TV clients, which entitled holders to free movie tickets up to 52 times a year (as long as earmarked seats were available).

In September 2009, the PCA imposed its largest fine ever in a case regarding the abuse of dominant position (margin squeeze) in the wholesale and retail broadband access markets. Portugal Telecom Group (PT Group) and ZON Group were fined for infringing the Portuguese Competition Law. Infringement of Article 82 of the EC Treaty was also considered an aggravating circumstance. The companies were fined a little more than €45 million and €8 million respectively. Both groups appealed the PCA decision in the Commercial Court of Lisbon.

Court proceedings are extremely important for the success of a competition authority. Besides introducing new leadership in the Legal Department, the PCA addressed this issue by thoroughly revising and resubmitting cases to the Commercial Court of Lisbon. These cases were under appeal on procedural grounds and had been returned to the PCA. The PCA decided not to appeal one decision of the Commercial Court of Lisbon because it was likely that the higher court would come to the same decision.

During the period from April 2008 to November 2009, there were 12 appeals against PCA decisions. The PCA won 4 cases and lost 1. The remaining 7 cases are pending.

### **3. MARKET STUDIES AND COMPETITION ADVOCACY**

Advocacy efforts were at the cutting edge of PCA activities during the period under review. It is in this area that the joint effort between the PCA and IDEFF to edit the Portuguese Competition and Regulation Journal gains full meaning.

In June 2008, the PCA published a preliminary report on fuel markets in Portugal, including an analysis of the different components making up the retail price of liquid road fuels, following a legal based request by the Minister for Economy and Innovation. In December 2008, and as an in-depth follow-up to the June report, the PCA concluded an Interim Report on the Liquid Fuel and Bottled Gas Sectors in Portugal, with its final version being

completed end-March 2009. The reports are available on the PCA website in Portuguese and in English.

The three reports were produced entirely in-house, which bears testimony to the PCA staff's professionalism, technical expertise, and capacity to work under pressure. The PCA was a pioneer in analysing the impact of the 2008 oil shock on the domestic prices of liquid fuels. In fact, no other competition authority from the EU or the OECD has completed such a comprehensive market study. The study includes state-of-the-art statistical and econometric analysis of the two price transmission mechanisms in these markets—from Brent to Platts and from Platts to domestic pre-tax prices.

The Final Report provides a structural description of the liquid fuel and bottled gas sectors in Portugal. Particular attention is paid to storage, transportation, and sales to final consumers at service stations. Moreover, the Final Report identifies and assesses the main competition issues, as well as the asymmetries in the adjustment process of liquid fuel domestic pre-tax prices to international prices for crude (Brent) and refined products (Platts) across the EU. The final report also presents a set of recommendations aimed at fostering competition in the liquid fuel and bottled gas markets.

In a nutshell, the PCA market study concluded that the liquid fuel sector in Portugal is a tradable goods sector where retail prices fundamentally reflect international prices and taxes. Besides a number of regulatory and behavioural recommendations, structural measures may enhance competition if they expand imports and storage facilities as well as making these facilities more accessible to potential competitors.

The liquid fuel market in Portugal behaves in a similar way to other EU and OECD countries. Ex-refinery or imported liquid fuel prices follow the previous week's Rotterdam prices (Platts CIF NWE) plus activity-specific spreads. The close relationship between these domestic prices and international prices is economically consistent with the fact that Portugal is a small, open market economy and liquid fuels are tradable goods.

Further to these three reports, the PCA initiated in September 2009, the publication of Monthly Liquid Fuel Statistics. The Monthly Bulletin containing these statistics complements the quarterly Newsletters on liquid fuels and bottled gas that the PCA has been publishing since 2004. The Monthly Bulletin is published on the PCA website and provides regular statistics with a shorter time-lag than the quarterly Newsletters. Information is provided regarding liquid fuel prices and quantities. By adding these monthly statistics

to the quarterly Newsletter, the PCA seeks to continue contributing to a better understanding of the market, based on data, rather than unsubstantiated opinion.

The PCA is now engaged in another major market study on the purchasing power of supermarkets vis-à-vis their suppliers. The interim report is due in December 2009 and the final report in June 2010. Other reports are in the pipeline and will be issued as they are concluded.

A series of open seminars has also been hosted by the PCA on competition law and economics, enforcement, advocacy, and institutional matters. Most seminars have been presented by international guest speakers, both from academia and competition agencies.

#### 4. INTERNATIONAL AGENDA

The international agenda of the PCA reflects its strong commitment to work closely with the European Commission Directorate General for Competition (EC DG COMP), the Organization for Economic Cooperation and Development (OECD), the International Competition Network (ICN), the Latin-American Forum, the Ibero-American Forum, and the United Nations Conference on Trade and Development (UNCTAD). During the period under review, the PCA was involved in major international activities on all fronts, including the organisation of a three-day ICN Cartel Workshop, which was held back-to-back with an international conference entitled “*Cracking cartels: recent international developments*,” in October 2008. These activities reflect the PCA’s commitment to following international best practices.

At the bilateral level, the PCA signed a Memorandum of Understanding (MOU) with the Turkish Competition Authority in March 2009, participated in the 4<sup>th</sup> Iberian Competition Forum with the Spanish Competition Authority in May 2009 and organised the 1<sup>st</sup> meeting between the French and the Portuguese Competition Authorities in July 2009.

The PCA will host the III Lisbon Conference on Competition Law and Economics in January 2010. This conference will serve as a platform for the exchange of ideas and experiences on the various aspects of competition enforcement and advocacy. The quality of the speakers and moderators, along with the topics chosen for debate ensure that it will be an excellent international conference that attracts highly qualified participants from different areas such as politics and business, regulators, the judiciary, private and public legal practice, academia and the media. The agenda includes the five follow-

ing topics: two-sided markets, energy, competition policy in times of crisis, intellectual property and single-firm conduct.

## 5. INSTITUTION BUILDING

Steering the PCA into Phase II required setting the strategic goals and operational objectives for the five-year term of current Board of Directors. The goals and objectives are consistent with the PCA's new motto: "*In the service of competition.*" There was also a thorough institution-building process, which included redesigning and simplifying the organisation of the PCA as well as approving the internal rules and regulations necessary for the proper functioning of the agency. The new organisational framework was necessary to provide PCA staff with a more efficient working environment, to enhance the quality and timeliness of PCA decisions, and to prioritise PCA investigations.

The new organisation is comprised of three departments, which deal with competition cases (the Mergers Control Department, the Antitrust Department and the Legal Department), two smaller horizontal departments (the Economic Research Bureau and the International Relations Bureau), as well as an IT unit and the Administrative and Financial Department, which handles human resources, financial management and procurement.

Putting the new organisation into place required some staff reassignments and was followed by a new and selective recruitment process, which resulted in the hiring of 3 new lawyers and 3 new economists.

Another major institutional change concerned the evaluation of staff performance. Annual staff evaluations are now a meaningful exercise, with 50% of staff performance rated as average, 35% above average, and 15% as outstanding. It is worth noting that an average performance at the PCA is equivalent to above average performance at many other institutions.

As of the end of November 2009, the PCA consists of 89 staff members and 3 board members. Among the staff members, 13 are managers (heads and deputy heads of department and heads of unit), of which 9 assigned to front office departments (the three competition case departments and the two horizontal bureaux). There are 47 competition officers. The PCA is a unique institution in the sense that all its teams of case handlers have to be staffed evenly by lawyers and economists. Finally, there are 29 other professionals and administrative personnel.



The PCA has pursued a policy of transparency, which involves explaining all major decisions concerning competition cases or market studies. Press releases and extensive Question and Answer documents are issued simultaneously with the announcement of all major decisions. This ensures that all stakeholders and the public at large understand how the PCA works and the rationale behind its decisions.

Exceptional circumstances also required the current PCA President to attend 8 Parliamentary hearings in the first 15 months of his mandate, 4 of which concerned gasoline prices, where he had the opportunity of presenting the full range of PCA activities. For an independent regulatory authority as the PCA, Parliamentary hearings are the appropriate forum where the Authority's President reports the activity and decisions of the institution.

## 6. OTHER TOPICS

The 2008 economic and financial crisis highlighted the advantages of having convergent state aid rules among National Competition Authorities (NCAs) in the EU. The application of exemptions to the general prohibition of state aid rests exclusively with the European Commission. In this context, governments notify state aid cases directly with the European Commission (Directorate General for Competition, DG COMP), thus ensuring a level playing field when DG COMP assesses this issue in different Member States.

Following an internal stocktaking of the PCA experience in dealing with and deciding on antitrust and merger control cases, as well as an assessment of case-law regarding appeals against PCA decisions, an internal working paper was drawn up. The paper identifies possible amendments to the *Competition Act*, which are deemed necessary to increase the effectiveness of PCA decisions. The latest IMF Article IV Mission to Portugal (December 2009) identifies amendments to the *Competition Act* as one measure that could improve the performance of the Portuguese economy.

## 7. CONCLUSION

In conclusion, competition is an evolving field of law and economics, which never gets old. It requires constant adaptation to new challenges. It requires continuous efforts in applying current knowledge to competition cases, advocacy, and market studies. It requires both engagement in the present and openness to future innovation within Portugal, the European Union and elsewhere.

Modern societies prosper under the rule of law and the smooth functioning of sound institutions. The PCA strives to be this type of institution. It is a regulatory agency, which is equally committed to the professionalism of its work and the independence of its decisions.

Independence is a common thread of the PCA and the new Portuguese Competition and Regulation Journal, which welcomes input from all segments of the competition and regulatory fields, provided that authors fulfil all procedures typically associated with an academic journal.

The new Competition and Regulation Journal is a much welcome initiative in Portugal at this time. It fills a void. It provides the ideal forum for the debate of ideas, policy decisions, competition cases and case law, competition advocacy, market studies, legal and institutional issues. It bridges the gap between present and future knowledge. It benchmarks domestic practices with international best practices. For all these reasons, the PCA is proud of being one of the driving forces behind this initiative.