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Competition - Portugal

Recommendations as a proactive approach to competition problems

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Between 2009 and September 2011 the Competition Authority conducted an investigation into the Portuguese system for the integrated management of used oils - known by its Portuguese acronym SIGOU - which had begun operations at the start of 2006.

The authority was alerted to suspicions of anti-competitive practices by an individual complaint. It opened an investigation that remained ongoing for almost two years, but ultimately found insufficient evidence of infringement. The authority decided to close the case, but simultaneously issued a set of recommendations relating to SIGOU's future operation. (At the time, the system was undergoing a renewal process, as the first five years of its licence period had elapsed.) The authority's investigation had led it to conclude that certain aspects of SIGOU needed to be improved in order to ensure its future effectiveness, in terms of both economic efficiency and environmental requirements. In broad terms, the aims of the recommendations aim at:

- a maximum possible degree of competition when choosing the companies that are qualified to operate within the system;
- an adequate design and implementation of tender offers; and
- a fair, independent and impartial selection procedure, based on factors such as the selection criteria and the corporate structure and ownership of the licensee in charge of tender offers.

Earlier in 2011 the authority had issued another recommendation in a similar procedural context. In the course of an investigation into alleged anti-competitive practices in the purchase of raw milk in the Azores region, the authority realised that the regional government of the Azores had actively promoted meetings between the different market players. Although these meetings had no anti-competitive intent, the authority considered that they might facilitate collusion among market players. As in the case of SIGOU, the investigation was closed on the grounds of insufficient evidence. Nevertheless, the authority sought to ensure the free and competitive functioning of the market by recommending that the regional government refrain from convening or participating in meetings among industry players at which prices are discussed, in order to avoid the possible facilitation of collusion between purchasers of raw milk.

The ability to issue recommendations is indisputably within the authority's regulatory powers. Its statutes - approved by legislative decree - expressly state that it can adopt and communicate to undertakings and economic agents such recommendations and general directives as are necessary for the adequate enforcement of competition rules and the development of a competition culture.

This important facet of the authority's powers has been used in various economic sectors, although generally in contexts that were very different from the SIGOU or the Azores raw milk investigation. For example, recommendations have been issued:

- in association with a study on measures for the liberalisation of certain sectors, such as pharmaceuticals and public notary services;
- in the context of ongoing or projected changes in legislation, such as rules on commercial licensing; and
- as a result of, or as a follow-up to, sector-specific studies, such as those undertaken into postal services and food retail.

The draft proposal for a new Competition Act - which was subject to public consultation until December 5 2011, prior to the presentation of a final draft to Parliament - specifically addressed the authority's power to issue recommendations. Although the draft makes no substantive changes to such powers, it provides significantly greater detail and clarification - for example, it identifies specific situations in which recommendations are expected, setting out their potential scope and the parties to which they should be addressed.

The authority monitors compliance and its website provides an overview of the implementation of most of its past recommendations. In order for such recommendations to be truly effective, it would be important for the authority to ensure that they are appropriate and practicable, at least in less straightforward cases. This could be achieved through prior

consultation (or similar interaction) with the subjects of the recommendation, potentially involving other relevant market players, but the authority seldom takes such steps.

Despite the two cases discussed above, it is relatively rare for the authority to have recourse to recommendations that are directly linked to infringement investigations, particularly in order to correct or prevent potential problems which do not amount to breaches of competition law on the available evidence, but which may ultimately affect the functioning of the market. Still, the authority's pragmatic and proactive approach is to be welcomed and has the potential to make a valuable contribution to competition advocacy in Portugal.

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