



Competition - Portugal

Competition Authority Evaluates Performance of First Council

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After a considerable delay, the Competition Authority has published its annual report and accounts for 2007, its fifth year of operations and the last complete calendar year of its first council.⁽¹⁾ The report summarizes the competition trends and milestones in Portugal during the authority's first five years.

Institutional Aspects

Although the Competition Act is considered up to date by European standards and the authority enjoys administrative and financial autonomy, the report acknowledges that the first two years of the authority's activities were characterized by limitations in its resources and its "creative work". The authority also notes the more intense workload of the following three years, which also saw it develop a more sophisticated decision-making approach.

Restrictive Behaviour

Between 2002 and 2007 the authority issued 27 decisions regarding restrictive behaviour in the Portuguese territory, including 13 findings of infringement and four decisions incorporating commitments concerning agreements, concerted practices and decisions by associations of undertakings. The authority estimates that these 13 decisions halted infringements that had cost Portuguese consumers between €430 million and €690 million.

Unlike Article 9 of EU Regulation 1/2003, the act provides no legal basis for termination decisions with binding commitments. However, the authority has introduced such decisions in its practice.

The highest fine imposed in the field of coordinated agreements and practices during the period was €16 million. It was imposed in relation to an alleged cartel arrangement involving five pharmaceutical companies in 22 hospital tenders for blood test strips.

In 2007 the authority issued its first decision in a case involving abuse of dominance. It fined the incumbent telecommunications operator Portugal Telecom €38 million for allegedly refusing access to its underground ducts to two competitors (for further details please see "[Regulator Fines Portugal Telecom for Refusing Access to Infrastructure](#)").

During this period most of the authority's decisions that identified an infringement or imposed a fine were challenged by the undertakings concerned. Few of the authority's decisions were upheld by the courts: many were quashed on procedural or substantive grounds and some appeals are still pending. The authority's practice of not publishing decisions in such cases has been sharply criticized.

Preventive Measures

Much of the authority's most visible work in its first five years of activity was in the field of merger control, mainly because of the importance of some of the sectors involved in the transactions that were referred to it (eg, banking, energy, retail and telecommunications).

The report states that the authority ruled on approximately 330 concentrations between 2002 and 2007. Only three of its decisions prohibited the concentration in question; a further 18 concentrations were cleared subject to conditions. The report claims that the remedies imposed by the authority have saved Portuguese consumers between €180 million and €380 million in the short term. However, two of the prohibitions have been challenged: one decision was reversed by the minister of the economy for reasons of national economic interest (for further details please see "[Minister Reverses Merger Prohibition](#)"), while the other decision is awaiting judicial review.

Advisory Role

The authority has played a significant role in submitting recommendations and opinions to the government, the European Commission and other institutions. Although some of its proposals remain confidential, others have been published and, according to the report, have "had important structural effects" on Portugal's competition framework. In particular, the report identifies:

- a recommendation on large-format retailers, which led to new licences and greater regulation;
- energy studies that influenced the Iberian electricity market;
- a recommendation on liquid fuels which suggested that supermarket chains could form a new group of competitors;
- work on the regulation of basic infrastructure;
- comments on the construction of an Iberian oil pipeline network; and
- a recommendation to eliminate entry barriers in the pharmaceutical sector.

The authority estimates that its work in these areas has led to changes with a value to the economy of between €37 million and €82 million.

Summary and Outlook

The report's overall assessment of the authority's first five years is positive. It states that by 2007 the authority had played a key role in creating a clear understanding among consumers and economic agents of the benefits of fair competition, as well as reinforcing the importance of abiding by competition provisions. The authority illustrates its impact on Portugal's economy by estimating that every euro of its public funding has yielded a return of €20 to consumers - a contribution of between 0.4% and 0.7% to Portugal's gross domestic product.

The report's conclusion, from the authority's former president, assesses the forthcoming challenges in competition law.

The first council has frequently expressed concern about judicial intervention in its decision making. In particular, the authority has criticized not only the length of judicial review proceedings, but also the arguably "excessive weight given [under the Portuguese legal] system to procedural questions" and what it describes as the "incentive inherent in the law to lodge appeals". The former president has presented to Parliament a proposal to amend the act. Among other things, the proposed reform would eliminate the restriction whereby an appellant may not be placed in a worse position than before it brought its challenge (also termed the *reformatio in pejus* principle). This would allow the courts to increase - and add interest to - the fines that the authority imposes.

The authority also highlights structural competition problems that the Portuguese economy still faces in some markets, such as telecommunications, banking, liquid fuels and healthcare, which require careful monitoring. However, the main challenge is to continue to strengthen Portugal's competition culture - a mission which, it could be argued, should be shared throughout the economy.

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Endnotes

(1) The council is the authority's highest body. It is responsible for enforcing legislation and managing the authority's departments. The authority was created by Legislative Decree 10/2003 on January 18 2003; its first council was appointed on March 24 2003.

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