

## Competition - Portugal

Financial rescue plan requires far-reaching competition law reform

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### Introduction

Enhancing the competitiveness of the Portuguese economy through structural reform is one of the main issues addressed in a memorandum of understanding signed on May 3 2011. Its signatories - the government, the European Commission, the European Central Bank and the International Monetary Fund - established an economic and financial adjustment programme that will allow Portugal to benefit from a financial assistance package worth up to €78 billion.

Several of the proposed reforms are related to or inspired by competition law. They include:

- the revision of the Competition Act;
- greater independence and resources for the Competition Authority and sector-specific regulators;
- the creation of a specialised competition appeals court as part of an ambitious reform of the judicial system; and
- measures to enhance competition in regulated sectors, such as energy, communications, postal services, healthcare, transport and the regulated professions.

### Revision of Competition Act

The government proposes to implement measures to "improve the speed and effectiveness of competition enforcement". It has undertaken to present Parliament, by December 2011, with a bill to amend the Competition Act.

#### *Procedural rules*

The principal aim of the reform is to make competition law as independent as possible from administrative and criminal procedural law, thereby ensuring effective enforcement of competition rules. The subsidiary application of criminal law procedures to competition law infringement actions has raised concerns in recent years and has resulted in the courts quashing a number of authority decisions on procedural grounds. The bill is likely to include new rules on:

- judicial secrecy and access to the authority's files;
- reasoning in statements of objections;
- time limits for exercising rights of defence; and
- complainants' rights and rights of appeal.

The government will also seek to "ensure greater clarity and legal certainty in the application of procedural administrative law to merger control", although the subsidiary application of administrative procedures to merger control cases has raised relatively little controversy.

#### *Opening competition investigations*

The government proposes to "rationalise the conditions that determine the opening of investigations, allowing the Competition Authority to assess the relevance of the

claims". At present, the authority is legally bound to initiate an investigation when it receives a complaint in respect of an alleged infringement.

### **Merger control**

The proposal states that "necessary procedures are to be established" to bring Portugal's law on merger control more closely into line with the EU Merger Regulation (139/2004), in particular, regarding the thresholds for a concentration to become subject to compulsory filing. Portugal's competition regime incorporates both turnover and market share jurisdictional thresholds - a concentration is subject to mandatory filing if it creates or reinforces a share of 30% or more in a relevant product market in Portugal.

In recent times there have been calls for the market share threshold to be repealed or revised. Although such thresholds provide less certainty for merging parties because of the need to define a relevant product market before filing, they play a part in the merger control rules of a number of jurisdictions, including Spain and the United Kingdom. One of the common arguments in their favour is that concentrations in niche or local markets may not meet the turnover thresholds, but may still raise competition concerns. One way of preserving the useful effect of a threshold might be to introduce a *de minimis* provision, similar to that added to the Spanish Competition Act in March 2011. The effect of the amendment in Spain is that for acquisitions of companies with a turnover of less than €10 million in Spain, filing is mandatory only if the parties have an individual or combined share of 50% or above in a relevant market.

Another likely change in the field of merger control concerns the substantive test for the assessment of mergers. The authority has previously suggested that the so-called 'dominance test', whereby a concentration is prohibited if it creates or reinforces a dominant position in a relevant market that impedes effective competition, should be replaced. The test is likely to be replaced by the 'significant impediment of effective competition' criterion in the regulation.

### **Appeals procedure**

The memorandum commits the government to "evaluate the appeals process and adjust it where necessary to increase fairness and efficiency in terms of due process and timeliness of proceedings". The creation of a specialist appeals court or chamber would make the appeals procedure significantly more efficient.

### **Competition Authority and sector regulators**

The government is committed to ensuring that the national regulatory authorities have the necessary independence and resources to exercise their responsibilities. An independent report will be commissioned from internationally recognised specialists, to be delivered by the end of 2011. The report will benchmark the appointment practices, responsibilities, independence and resources of the main national regulatory authorities against best international practice. It will also cover the regulators' scope of operations, their powers of intervention and the mechanisms by which they coordinate with the Competition Authority. On the basis of this report, the government will present a proposal to Parliament to "implement the best international practices identified... [and] reinforce the independence of regulators where necessary, in full compliance with EU law". A key issue in this respect will be the nomination of the heads of regulatory agencies (who, at present, are appointed by the government with no external oversight). There have been a number of recent proposals to increase the independence of the regulatory agencies, including the transfer of powers of appointment to the president, subject to the confirmation of Parliament.

The government is committed to ensuring that the authority has sufficient and stable financial resources to guarantee its effective and sustained operation.

### **New competition appeals court**

The memorandum sets out a comprehensive and ambitious set of reforms to improve the operation of the courts. The proposed measures are aimed at achieving:

- effective and timely enforcement of contracts and competition rules;
- greater efficiency through a restructured court system and the adoption of new case management models; and
- expedited operation of the court system by eliminating the backlog of cases and facilitating out-of-court settlement.

As part of the reforms, the government will establish a specialised competition appeals court and make competition and IP courts fully operational by March 2012. Although the creation of a specialist appeals court is welcome, the implementation of the proposal remains uncertain. An act of Parliament, which is expected to enter into force in the coming weeks, will create a dedicated IP court and a second specialist court for "competition, regulation and supervision". This court will have jurisdiction to hear appeals against decisions by all of Portugal's independent regulatory agencies, including sector regulators for the banking, insurance, capital markets, media and

communications sectors - as such, it will hardly be a dedicated competition forum. One way of ensuring that the memorandum commitment is met would be to establish a specialised chamber within the new court that deals exclusively with competition law cases.

### **Increased competition in regulated sectors**

The government has pledged to "address excessive profits and reduce the scope for [unsustainable] profit-seeking behaviour" in a number of regulated sectors.

#### ***Energy***

The government will seek to increase competition in the energy markets and to further the integration of the Iberian markets for electricity and natural gas. It will also anticipate the full liberalisation of the electricity and gas markets by phasing out regulated tariffs. The efficiency of support schemes for cogeneration and renewables (including options for reducing the implicit production subsidy) will be reviewed, and legacy support measures associated with the production of electricity will be reassessed.

#### ***Communications***

The memorandum expresses the aim of increasing competition in the communications markets by lowering entry barriers and facilitating the entry of new players. This will be achieved by:

- allocating rights to use new radio frequencies for wireless broadband access;
- lowering mobile termination rates;
- reducing restrictions on the mobility of consumers (along lines proposed by the Competition Authority); and
- ensuring that the provisions on universal service designation and the Portugal Telecom's concession contract (as the incumbent) are non-discriminatory.

The government has also undertaken to:

- renegotiate the concession contract for the provision of universal services; and
- launch a new tender for the designation of universal service providers.

#### ***Healthcare***

The government proposes to increase competition among private healthcare providers. It is committed to assessing compliance with EU competition rules in the provision of services in the private healthcare sector.

#### ***Postal services***

The government will further liberalise the sector by implementing the EU Third Postal Directive (2008/06/EC), and will ensure that the sector regulator retains adequate powers and independence in view of its increased role in monitoring prices and costs. It will also eliminate value-added tax exemptions for products within the universal service commitment.

#### ***Rail transport***

The rail regulator's independence and competences are to be strengthened, and the state-owned railway operator will be made fully independent of the state. The government also proposes to revise the existing public service obligations to allow for the gradual introduction of competitive tendering.

#### ***Regulated professions***

The government has promised to:

- review and reduce the number of regulated professions;
- eliminate restrictions on the use of advertising in such professions;
- improve the legal framework for recognition of professional qualifications; and
- relax the requirements for cross-border service providers in Portugal.

#### ***State's special rights over privatised companies***

By July 2011 the government will eliminate all provisions, whether established by law or in companies' articles of association, that give the state special rights over the decision-making processes of public companies. This move will particularly affect the special rights held over Energias de Portugal, GALP Energia and Portugal Telecom - the former incumbents for electricity, fuel and gas, and telecommunications.

#### **Comment**

This bold and far-reaching programme sets a strict implementation schedule, with several measures due to be in place by the end of July 2011. The international authorities will monitor its progress by means of quarterly implementation reports. The timely implementation of the programme will be one of the main challenges awaiting the new government following the general election on June 5 2011.

The government is expected to release a draft proposal to revise the Competition Act in the coming months. The proposal is likely to incorporate the commitments in the memorandum and may also include several recent proposals from the Competition Authority and legal practitioners relating to:

- the clarification of substantive rules on unilateral conduct;
- powers to impose fines for infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union and to accept commitments to end antitrust investigations;
- detailed criteria for the calculation of fines; and
- the introduction of a settlement procedure for cartels.

Given the scope of the expected changes, it is hoped that the proposal will be subject to public consultation before it is presented to Parliament.

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