

## Competition & Antitrust - Portugal

### Healthcare services merger highlights dominant position of NHS

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#### Main findings Comment

In a December 19 2014 decision the Competition Authority cleared the Fidelidade/Espírito Santo Saúde merger (Case Ccent 26/2014). Fidelidade is a major national insurance company, while Espírito Santo Saúde is one of the leading national healthcare services providers. The merger received Phase I clearance with no commitments due to the absence of horizontal overlap in the parties' activities.

#### Main findings

In addition to identifying the traditional insurance-relevant product markets (eg, health and employment insurance markets) during the appraisal of this vertical transaction, the authority deemed *ex novo* that healthcare services provided by public and private hospitals constitute autonomous product markets. The main factual and legal reasons put forward by the authority for this division – notably based on a non-biding opinion of the health sector regulator – were as follows.

#### **Provision of healthcare services by public hospitals**

The National Health Service (NHS), which includes public hospitals, is funded by tax revenues. NHS users can access only a limited number of private healthcare providers, as such private providers must have a convention or agreement with the NHS. Further, access to a public hospital (excluding emergency situations) is subject to preliminary referral by the public primary healthcare network, which drastically reduces patients' choice – patients thus cannot directly access and choose a public hospital. Waiting lists and waiting periods are also extensive at public hospitals.

#### **Provision of healthcare services by private hospitals**

Healthcare services providers are financed by private and social healthcare subsystems and the insurance sector, based on payments made directly by private users to the healthcare services provider. Further, patients have direct access to private hospitals through multiple funding channels, such as health insurance, health subsystems (private and social), conventions with the NHS or via direct payment by the patient. In contrast to public hospitals, users of private hospitals have freedom of choice and do not require referral by the public primary healthcare network to access the hospital. Waiting periods and lists are shorter in comparison with those of the public sphere. According to the authority's reasoning, public and private hospitals are also distinguished by differences in relation to:

- preferences regarding the convenience and comfort of facilities;
- the institutional image of healthcare providers;
- the perception of healthcare professionals' prestige; and
- overall patient experience.

In terms of relevant geographic market definition, the authority adopted a regional approach grounded on Level III of the Eurostat Nomenclature of Territorial Units for Statistics, which basically divides the national territory into 30 sub-regions.

#### Comment

This merger case highlighted the existence of a monopoly in the provision of healthcare services in the public hospital sector, as all supply in this regard is managed and provided by the NHS. The case indirectly emphasised that the NHS holds a dominant position, as all national public hospitals, without prejudice to their formal legal autonomy, can be deemed one company for antitrust purposes.

When interacting with patients – notably those who pay an NHS fee – public hospitals must adopt a transparent, objective and non-discriminatory policy, or else face potential competition law penalties. For instance, the NHS should not impede or refuse patient access to innovative medicines which are available at private hospitals; nor should it delay the introduction of such innovative medicines in public hospitals to the detriment of users, which would violate the applicable regulatory framework.

#### Author

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When interacting with suppliers – such as in relation to medicines that are almost exclusively acquired by public hospitals (eg, those that can be administered only in hospitals) – public hospitals should adopt preventive mechanisms to decrease the risk of specific hospitals' actions being deemed abusive. Abusive actions may include:

- unilaterally demanding non-agreed retroactive rebates to suppliers;
- requesting the provision of services not related to the product supply;
- forcing the supplier to decrease its prices during the supply period; or
- applying different payment terms to suppliers.

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