Competition - Portugal

Regulator Fines Portugal Telecom for Refusing Access to Infrastructure

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On August 1 2007 the Competition Authority issued its first decision on a case involving abuse of a dominant position. It fined incumbent operator Portugal Telecom €38 million for abusive practices in the market for access to underground duct systems for cables and other electronic communications infrastructure. Portugal Telecom's practices were held to have infringed Article 3 (1) of Decree-Law 371/1993, Article 6(1) of the Competition Act (18/2003) and Article 82 of the EC Treaty.

Portugal Telecom was found to have refused access to its underground ducts to two pay-television cable operators on numerous occasions. One of the operators, TvTel, submitted an initial complaint in June 2003 that led to the authority's investigation and decision. In February 2004 TvTel successfully applied to Lisbon Civil Court for an injunction under which Portugal Telecom was obliged to grant access to its underground ducts in Porto and in four adjacent municipalities, provided that at least 6.3 square centimetres of the internal cross-sectional area of the ducts in question was available.

According to the authority's findings during the administrative stage of its investigation, between 2001 and 2005 Portugal Telecom rejected at least 52 requests for access to its ducts, either refusing access entirely or granting only partial access to unconnected sections of underground infrastructure - the effect of such actions being to impede the expansion of its competitors' cable networks. Furthermore, Portugal Telecom's excessive and unjustified delays in replying to requests, which in some cases exceeded 300 days, were found to have had a similar effect to a refusal during the period pending a reply. Other aspects of Portugal Telecom's behaviour, including a lack of transparency in its criteria for infrastructure management, were deemed instrumental to the abuses, but not abusive in themselves.

This is a landmark decision by the authority, not least because it is the first abuse of dominance case to be concluded since the authority was founded in 2003. In addition, the fine imposed on Portugal Telecom is the largest ever issued in Portugal for anti-competitive restrictive practices. However, the decision is also the first insight into the authority's construction and practical enforcement of the statutory provisions on abuse of dominant position, particularly regarding refusal to supply. The authority's reasoning appears thorough and rather cautious, as reflected in its narrow interpretation of the concept of 'essential facilities'.

In identifying the relevant market, the authority ruled out several hypothetical alternatives to the provision of access to the ducts, concluding that options such as satellite platforms, other operators' underground infrastructure in the relevant areas and utilities networks (eg, those used by gas and electricity suppliers) did not generally constitute feasible alternatives. The authority carried out a detailed analysis of the costs which the two operators would incur if they were to construct underground ducts, rather than leasing space in Portugal Telecom's nationwide system. The authority found significant cost differentials: for an average network cell in an urban area, which covers around 2,000 homes, the construction of new underground infrastructure would cost 223% more than a lease for the equivalent space in existing ducts owned by Portugal Telecom. Using figures from 2003/4, the authority also found that even TV Cabo - the dominant pay-television operator and a subsidiary of the Portugal Telecom group - which has far more subscribers and a more extensive network of cable-supplied homes, would make a profit if it were able to lease space in Portugal Telecom's ducts, but would make a loss if it had to bear the cost of building its own infrastructure.

The authority defined the geographical market narrowly, considering each duct or section of infrastructure between two specified points as a relevant market. Viable alternatives to Portugal Telecom's ducts were identified in the case of 13 of the rejected requests; therefore, only 39 of the 52 refusals were deemed abusive.

The authority clarified that a dominant undertaking's refusal to supply a competitor will be deemed to constitute an abuse under Article 6 of the Competition Act only if the goods or services in question are essential inputs for which there is no feasible alternative.

Portugal Telecom's refusals to provide access to its ducts were found to have affected competition in the downstream retail markets for pay-television, broadband internet access and fixed telephone services, in which the Portugal Telecom group holds a dominant position. Overall, the authority concluded that the competing cable operators in question had been prevented from extending their networks to a further 73,000 homes, to the detriment of consumers who were thus denied alternative offers of pay-television and internet services. Portugal Telecom has announced that it will appeal the decision.

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