
THE PUBLIC COMPETITION ENFORCEMENT REVIEW

SECOND EDITION

EDITOR
SHAUN GOODMAN

LAW BUSINESS RESEARCH

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THE PUBLIC
COMPETITION
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REVIEW

Second Edition

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EDITOR'S PREFACE

2009 saw unprecedented challenges to the global economy. For the first time in half a century, these challenges led western governments to question the free market principles on which their economies are based, and to consider whether longer-term economic stability and, with it, consumer welfare, can only be delivered with increased regulatory intervention. Nowhere was this tension between market economics and wider public interest principles more apparent than in the unconditional approval in the United Kingdom of the merger between retail banks Lloyds TSB and HBOS. While approval of that transaction was considered necessary in the short term to maintain financial stability, that was achieved at a significant cost to longer-term competition in the retail banking industry. The wisdom of that approval will no doubt continue to be questioned and debated, and it may be that the European state aid regime will provide a mechanism for reassessing and, potentially, restructuring the European banking industry with the benefit of hindsight. What is certainly true is that governments' natural tendency in difficult economic periods to revert to protectionist measures and to promote national champions has imposed on competition authorities an obligation vigorously to defend the importance of strong competition in delivering efficient markets and safeguarding consumer welfare.

That obligation has come at a period of considerable change for the agencies themselves. As the US administration enters its second year under President Obama, the European Commission has also witnessed a change in leadership with the appointment of Joaquín Almunia as the new Commissioner for Competition. Unlike his predecessor, Neelie Kroes, who enjoyed a successful business career prior to her appointment, Commissioner Almunia is a career politician, having been a leading member of the Spanish socialist party and a former socialist candidate for prime minister in Spain.

Although it has been suggested that, given his political background, he may be somewhat more sensitive to industrial policy and employment considerations, there are no indications that he intends to deviate to any material extent from the policies of his predecessors.

There is equally little sign that the difficult economic circumstances of the past year have led to any softening in the enforcement policies of the leading antitrust agencies. In May 2009, the European Commission imposed its largest ever fine on a single company of €1.06 billion on Intel Corporation for allegedly violating EU antitrust rules on the abuse of a dominant market position by engaging in illegal anti-competitive practices to exclude competitors from the market for computer chips. Just two months later, in July 2009, the Commission fined energy giants E.ON AG of Germany and GDF Suez SA of France €1.1 billion for agreeing not to compete on sales of natural gas in each other's home markets. While the deterrent effect of fines on this scale is unquestionable, it is less obvious that the same deterrent effect could not be achieved with more moderate sanctions and there is a risk that they reflect, at least in part, competition on the part of the agencies themselves to be seen as strict guardians of the consumer interest. The US agencies have been equally aggressive in seeking sanctions: in the past three years, over \$2 billion in criminal fines and more than 162 years of prison time have been imposed in cases prosecuted by the Department of Justice's Antitrust Division. Meanwhile, the US Federal Trade Commission enforcement action against Intel raises profound issues concerning the scope of its powers to give a construction to Section 5 of the Federal Trade Commission Act that goes beyond the antitrust reach of the Sherman Act.

The defence of firms alleged to have participated in antitrust infringements is becoming increasingly complex, with a need carefully to balance the possible benefits of the leniency and settlement regimes operated by public competition authorities against the risks of wider public enforcement (including in developing regimes such as China and India, which are quickly emerging as serious players on the antitrust stage) and private litigation (which is becoming more common, even in the absence of European legislation).

I would like to thank all of the contributors for their support and cooperation in preparing this Review, and the publishing team at Law Business Research for their tireless encouragement and enthusiasm.

Shaun Goodman

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Chapter 27

PORTUGAL

*Frederico Pereira Coutinho, Rita Leandro Vasconcelos and Ana Kéri**

I OVERVIEW

The Portuguese competition law framework encompasses a broad range of legislation. The main piece of legislation is Law No. 18/2003 of 11 June 2003 ('the Competition Act'), as amended by (1) Decree Law No. 219/2006 of 2 November 2006,¹ (2) Decree-Law No. 18/2008 of 29 January 2008² and, most recently, (3) Law No. 52/2008 of 28 August 2008.³

The Portuguese competition regime includes Law No. 39/2006 of 25 August 2006 ('the Leniency Act') and the Portuguese Competition Authority ('the PCA') has enforcement powers with regard to restrictive trade practices foreseen in Decree-Law No. 370/93 of 29 October 2009. The Portuguese competition law framework also comprises several regulations and guidelines from the PCA. In addition, Decree-Law No. 10/2003 of 18 January 2003 ('the PCA By-laws') provides the PCA with the power to secure the application of competition rules in Portugal, as well as providing for the efficiency of the markets and protection of consumers' interests, in respect of the principles of the market economy and free competition.

* Frederico Pereira Coutinho is a partner and Rita Leandro Vasconcelos and Ana Kéri are associates at Cuatrecasas, Gonçalves Pereira & Associados RL.

1 Introducing some changes with regard to merger control.

2 Bringing a new ancillary sanction for breaches of competition law carried out within, or in connection with, public procurement proceedings.

3 Amending the rules establishing the courts that are competent to handle appeals from decisions adopted by the Portuguese Competition Authority.

i *Prioritisation and resource allocation of enforcement authorities*

In the past year, the PCA has focused its activity mainly in putting an end to cases that were under assessment for quite some time.⁴ In fact, according to the PCA's activity plan for 2009, it notably presented as its main goal, the improvement of the quality of case management, especially with regard to timely decisions.

ii *Enforcement agenda*

The PCA has not yet released its 2010 plan. However, taking into account its activity in the past year and some recent developments, we may expect prioritisation in the sectors that have been the subject of detailed reports from the PCA, such as energy, electronic communications and banking, as well as high-impact sectors such as liquid fuels, the bread-making industry⁵ and large food retail chains.⁶

II CARTELS

Article 4 of the Competition Act establishes a cartel prohibition. Under national law, these agreements are null and void. Similarly to Article 101 of the Treaty on the Functioning of the European Union ('the TFEU'), Article 4 of the Competition Act applies only to undertakings. However, the responsibility over cartel offences may be held to apply to individuals, legal persons regardless of the regularity of their incorporation, and companies and associations without legal personality.⁷

Legal persons and equivalent entities are held responsible when the actions have been carried out on their behalf, on their account or in the exercise of duty by members of their corporate bodies, their representatives or their employees. The directors of legal persons and equivalent bodies will be subject to a specially reduced penalty when they know or should have known about the infringement and yet fail to take the appropriate measures to terminate it immediately, unless a more serious penalty is applicable in pursuance of another legal provision. Undertakings that are part of an association of undertakings will be jointly and severally liable for the payment of the fine to which such association is subject.

Despite any criminal liability that may apply to infringers of the competition law, the Competition Act only condemns participation in a cartel as a misdemeanour offence. The sanctions imposed are fines and other additional penalties. The main sanction for the participation in a cartel is a fine of an amount up to 10 per cent of the undertakings'

4 See, for example: PCA press release 16/2009, where the PCA announced to have imposed a fine on two electronic communications undertakings for facts that had occurred between 2002 and 2003 (more than six years before a decision); PCA press release 7/2009 announcing the discontinuation of eight cases involving fuel companies that have formally been initiated in 2004.

5 See Sections II and IV, *infra*.

6 The PCA's Preliminary Report on the Commercial Relationships between Large Food Retail Chains and the respective Suppliers, released on 5 January 2010.

7 Article 47 of the Competition Act.

turnover in the previous financial year. In the case of associations of undertakings, this fine will be up to 10 per cent of the aggregate annual turnover of the associated undertakings that have engaged in the prohibited behaviour. Although the Competition Act is not clear, the Lisbon Commerce Court has already stated that the ‘previous year’ corresponds to the last year where the breach has been in force and not the year previous to the PCA’s decision. When there is a case of non-compliance with a decision of the PCA, it may also impose a periodic penalty payment of up to 5 per cent of the average daily turnover in the past year, for each day of the delay. Additionally, the PCA may, at the offender’s expense, publish the decision taken in the official gazette, the *Diário da República*, or in a Portuguese newspaper with national, regional or local circulation, depending on the relevant geographical market affected by the prohibited practice.

An exception to this rule is the case of bid rigging. According to Article 230 of the Portuguese Criminal Code, participation in bid rigging constitutes a crime and is sanctioned by imprisonment of a maximum of two years. Additionally, the PCA may further prohibit the concerned undertakings from participating again in such type of proceedings for a maximum of two years.

According to the Leniency Act, a member of a cartel may be granted immunity from a fine when he is the first firm to bring relevant evidence of an agreement or a concerted practice to the PCA, before the PCA has started the investigation. As of the beginning of an investigation, a member of a cartel can only qualify for a reduction in the amount of the fine of at least 50 per cent, if he is the first to come forward with added value evidence to the PCA and until 50 per cent, if he is the second to bring value added evidence to the PCA. The Leniency Act also foresees an “immunity plus” policy. A member of a cartel can be granted a special or an additional reduction in the amount of the fine regarding a certain practice when it is the first one to bring evidence to the PCA regarding another agreement or concerted practice.

Significant cases

i Catering industry

In December 2009, the PCA imposed fines on five mass catering undertakings for anti-competitive practices pursuant to Article 4(1) of the Competition Act.⁸ The fines imposed amounted to €14.7 million.

According to the PCA, the undertakings, which jointly held approximately 65 to 70 per cent of the market, put into practice an illegal price-fixing cooperation mechanism in public tenders or invitations to tender, which enabled each to retain its original customers and to be entitled to compensation from its competitors should a service contract not be awarded, and to provoke a new tendering procedure when dissatisfied with the pricing conditions for the service provided, ensuring the ‘priority’ of the undertaking that had provided the services until then.

The importance of this decision is twofold. This is the first decision arising out of a leniency application, the complainant being exempted from punishment. Second, in addition to the imposition of fines to the undertakings, the PCA also fined five directors

8 PCA press release 24/2009.

and managers of those undertakings, pursuant to Article 47(3) of the Competition Act, in the total amount of €20,000. With this fine, the PCA showed a clear intention of actively enforcing the Competition Act regarding cartels.

Decree-Law No. 18/2008 of 29 January, while implementing a new public procurement regime, introduced a new ancillary sanction for competition law infringements carried out within, or in connection with, public procurement proceedings. According to the new Article 45(1)(b), the PCA may impose on undertakings participating in bid rigging the prohibition on applying for a public tender for two years as of the PCA's decision. In this case, however, the PCA did not impose this additional penalty on the undertakings because it only applies to acts occurring after 29 July 2008, the date where the said Decree-Law entered into force.

ii Milling industry

The PCA has been investigating the milling industry for a few years and held against 11 undertakings for price fixing in 2005.

Upon appeal of the alleged breaching undertakings, in 2008 the Lisbon Commerce Court reversed the PCA's decision on procedural grounds.⁹ In this case the PCA had adopted an unusual procedural strategy. After issuing the statement of objections and receiving the defences from the accused undertakings, the PCA sent them a second more complete statement of objections instead of directly issuing the final decision. On 12 February 2008, the Lisbon Commerce Court stated that according to the principle of fair process and effective defence, the PCA was not able to issue complementary statements of objections enlarging the accusations already established in the first.

The PCA subsequently decided to start a new investigation and in July 2009 fined the same 11 undertakings a total amount of €8.9 million for carrying out a concerted practice of flour price fixing (actually reducing the amount of the fines, since the first ones were in the amount of € 9.6 million).

The importance of this case lies in the significance of the bread sector and in the fact that the PCA, while monitoring the milling and bread-making sector since 2002, has consistently stated its intention to be attentive in this type of high-impact sector.

iii Procedural aspects

In 3 December 2009 the Constitutional Court has declared that the provision foreseen in the Competition Act giving the Lisbon Commerce Court jurisdiction to rule on appeals from PCA decisions complies with the Portuguese Constitution.¹⁰

The issue arose in the appeal of a PCA decision, in which the Physicians' Association argued that a judicial court, such as the Lisbon Commerce Court, could not rule on appeals of decisions of an administrative authority. The Constitutional Court did not accept this argument, because when scrutinising a decision from the PCA, the Lisbon Commerce Court is not analysing any matter of an administrative nature.

9 Case 1648/05.2TYLSB.

10 Case No. 103/08.

On 16 May 2009, the Lisbon Commerce Court has confirmed that the author of a complaint to the PCA cannot appeal the latter's decision discharging the alleged perpetrator.¹¹ In the case, Digal – Distribuição e Comércio SA had presented a complaint to the PCA against Lisboagás GDL – Sociedade Distribuidora de Gás Natural SA. On 27 November 2008, the PCA decided that there were no grounds to pursue the accusation and dismissed it. Digal did not accept this position and appealed this decision to the Lisbon Commerce Court. The court clarified that the Competition Act does not foresee the possibility of appealing a decision from the PCA discharging a company.

Trends, developments and strategies

Since its inception, the PCA has pursued its fight against cartels. This is a trend that has been being developed and has significant legislative landmarks, such as the entry into force of the Leniency Act in 2006 and an amendment to the Competition Act according to which the PCA may impose the ancillary sanction of not participating in public tenders on members of a bid-rigging cartel.

In 2009, the PCA issued its first decision based on a leniency application, the whistle-blower receiving total immunity. This is a trend that we may expect to see grow in the next years, especially taking into account the economic crisis.

Outlook

During 2010, we may expect a similar attitude from the PCA regarding the fight against cartels. An amendment to the Competition Act affecting the enforcement of competition law is also expected, notably cartels.

A review of the PCA's internal practices is also expected in order to accelerate the analysis of the cases and the issuance of the respective decisions.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The Competition Act foresees provisions that are similar to the ones provided for in Articles 101 and 102 of the TFEU condemning restrictive agreements (Article 4) or justifying them (Article 5), and condemning abuses of dominant position (Article 6). The sanction for breaches of Article 4 and 6 of the Competition Act are equivalent to the ones described regarding cartels.

Departing from European law, the Competition Act also foresees the prohibition of the abuse of economic dependence (Article 7), which occurs when one or more undertakings engage in the abusive exploitation of the economic dependence on it (or them) of any supplier or client that occurs on account of the absence of an equivalent alternative. This provision has been criticised and it is possible that the foreseen amendment to the Competition Act will abolish the abuse of economic dependence prohibition since the practices that fall within its scope may also fall within the scope of the prohibition of the abuse of dominant position.

11 Case No. 187/09.7TYLSB.

Another significant difference between Portuguese and European competition law is the remaining possibility (although not obligation) for the PCA to evaluate agreements prior to their entry into force upon request of the undertakings concerned (Regulation 9/2005 of the PCA).

In this context, it is noteworthy to mention Decree-Law No. 370/93 of 29 October (subsequently amended by Decree-Law No.140/98 of 16 May), which, by prohibiting certain unfair trade practices regardless of the undertakings' position in the market, can hardly be considered an instrument of competition law; nevertheless, it is the PCA's task to enforce it. The most significant practices that are prohibited by this Decree-Law are discrimination in terms price and other commercial conditions, resale at a loss (i.e., at the effective purchase price, which is the invoice price after deduction of rebates directly related to the transaction and identified in the invoice), refusal to supply (which applies only between economic agents and includes tying and bundling) and abusive business practices (aimed at preventing the exercise of market power by larger distributors over producers by prohibiting the former to obtain from the latter prices, payment conditions, sales arrangements or commercial cooperation conditions that are 'exorbitant' comparing to other distributors, meaning that they are not proportional to the volume of purchases or to the value of the services rendered on the supplier's request). The sanction for breaches of Decree-Law 370/93 is a fine of between approximately €250 and €15,000.

Significant cases

i myZONcard campaign

In January 2009, the PCA issued, for the first time, an urgent interim measures decision against one of the Portuguese largest communications group, ZON Multimédia – Serviços de Telecomunicações e Multimédia SGPS SA. ZON Multimédia Group holds the largest pay-TV operator in Portugal, also owning the largest cinema chain.¹² This group created a promotional campaign ('myZONcard') where its pay-TV clients could receive free cinema tickets to ZON Multimédia Group's multiplexes.

The PCA considered that, given the alleged dominant position of ZON Multimédia Group in certain local cinema exhibition markets and its penetration rate in the pay-TV market in Portugal, there was a high risk of anti-competitive effects pursuant to Article 6 of the Competition Act (abuse of a dominant position). The PCA therefore ordered ZON Multimédia to suspend the campaign.

There are some points of note particular to this case. This was the first – and until today the only – interim measure ever issued by the PCA under the Competition Act. Also, although the interim measures only last for 90 days, the PCA has not yet issued any decision on the merits of the case. This means that ZON Multimédia is no longer under such suspension, yet a final decision is still not available. Finally, as soon as ZON Multimédia was notified of the interim measure, it immediately changed the promotion, this time enabling its customers to purchase two cinema tickets for the price of one, an action that was not suspended.

12 PCA press release 1/2009.

This case demonstrates the difficulty in responding swiftly to movements in the market.

ii Broadband markets

On 28 August 2009, the PCA ruled against Portugal Telecom SGPS SA, PT Comunicações SA, ZON Multimédia and ZON – TV Cabo Portugal SA for abuse of a dominant position in the wholesale and retail markets for broadband access.¹³ Having established the existence of a dominant position in both markets, the PCA found that PT Group, which at the time of the alleged offences (2002 to 2003) included all the defendant undertakings, had engaged in squeezing margins, applying unequal conditions to equivalent services (thereby discriminating against retail competitors in favour of another company in the PT Group) and limiting production, distribution, technical development and investment with regard to the services at stake, to the detriment of competition and consumers.

These companies, some of which are now separate entities, received a fine in the total amount of €53 million (€45 million for the undertakings that are still part the PT Group and €8 million for the undertakings that are now part of the ZON Group).

This is the third time that the PT Group has been found guilty of abuse of a dominant position and is the highest fine yet imposed by the PCA.

The relevance of this decision lies in the fact that the PCA sustained that, in determining the abuses and their consequences, it used the methods set out by the EU in its guidance on the enforcement priorities in applying Article 82 of the EC Treaty (post-Lisbon, Article 102 of the TFEU) to abusive exclusionary conduct by dominant undertakings. It may be noted, however, that there was an excessive delay between the perpetration of the alleged breaches and the decision of the PCA – six years – a delay that undermines the effectiveness of the decision, not only with regard to the deterrent nature of the fine imposed, but also with respect to the competitors' position.

Trends, developments and strategies

The main development and trend with regard to antitrust is the willingness of the PCA in discharging cases subject to the acceptance of certain commitments by the undertakings at stake and thus reducing litigation. One good example is the recent announcement of the PCA, on 15 October 2009, making public its decision to discharge, under certain conditions, the case brought against the undertaking SUGALIDAL – Indústrias de Alimentação SA ('Sugalidal') for abuse of a dominant position.¹⁴ Sugalidal had allegedly abused its dominant position in the markets for the sale of tomato seeds for industrial use and the purchase of fresh tomatoes for primary industrial processing, by carrying out a tied sales practice. Sugalidal's suppliers had to supply the undertaking with fresh tomatoes grown from the seeds of the brand that was exclusively sold by the group, while no efficiency gains that could justify this practice could be shown. In accordance with the PCA's concerns, Sugalidal undertook to eliminate the imposition of tied purchasing.

13 PCA press release 16/2009.

14 PCA press release 20/2009.

Outlook

In 2010 we may still expect an increase in the number of discontinued cases on the grounds of the acceptance of commitments by the undertakings, not only with regard to restrictive agreement cases but also dominant position ones.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Article 6 of the PCA By-laws relies on this entity to enforce competition law and promote a competition culture, *inter alia*. Article 7 provides the PCA with the necessary powers to do it, notably, with regard to the possibility of conducting sectoral inquiries.

With regard to the relationship with other regulatory entities, pursuant to Article 28(2) of the Competition Act, any decision taken by the PCA, regarding either the existence of a restrictive practice, adoption of interim measures or authorisation of an agreement, affecting a market that is subject to sectoral regulation, must be preceded by an opinion from the respective sectoral regulatory authority.

Furthermore, the Competition Act provides rules regarding the coordination with sectoral regulatory authorities (Article 29 of the Competition Act). This provision establishes a legal duty and regulates the communication of facts and decisions between the PCA and a sectoral regulatory authority.

Significant cases

During 2009, the PCA has consolidated its role as an authority committed to the analysis of competition issues in key industries.

i Liquid fuel

In 2008, further to several fuel price increases in the Portuguese market, and the suspicion that these did not reflect the costs of production, the Minister of Economy and Innovation requested that the PCA report on the retail price formulation. The preliminary report was delivered in 2 June 2008, while the final report was released on 21 April 2009. The PCA's conclusions were that there was no evidence of restrictive practices that could be imputed to one or more economic agents operating in the market of liquid fuels at the national level. Notwithstanding, the PCA proposed a package of measures to ensure greater market competition. This report is in line with the PCA's decision to discharge eight misdemeanour proceedings against fuel companies, for lack of evidence of restrictive practices.¹⁵

Finally, on 30 September 2009, the PCA initiated the publication of a monthly bulletin on liquid fuel statistics. This bulletin is part of the PCA's strategy of accompanying the liquid fuel market, thus complementing the quarterly newsletters on the subject already released by the PCA since 2004.

15 PCA press release 7/2009.

ii *Banking*

In December 2009, the PCA released its report, 'Retail banking mobility in Portugal'. It concluded that the barriers to retail banking mobility in Portugal are higher than the European average. This is especially due to the existence of research costs (lack of information transparency) and switching costs (costs related to the termination of the banking relationship and ending commissions that are due with regard to certain banking products).

The PCA has also released reports on the electronic communications and electricity sectors.

Trends, developments and strategies

In line with its previous practice, the PCA continues to choose the sectors of energy, electronic communications, liquid fuel and banking and insurance to carry out its detailed reports and analysis. It is expected that the sectors identified above will continue to be under the PCA's scrutiny in 2010.

V STATE AID

Pursuant to Article 13(1) of the Competition Act, '[a]id granted to undertakings by a state or any other public body must not restrict or affect competition to a significant extent in all or part of the market'. According to Article 13(2), the PCA may analyse any aid or projected aid and address the government recommendations that it deems necessary to eliminate its negative effects.

As it is clear from the wording of Article 13, the PCA does not have power to impose measures on the state to stop any competition distortion originated by state aid, but may only recommend measures to be taken.

Significant cases

At a national level, there is not much to report except for the recommendation that Madeira's regional government file a notification for state aid to one of the local newspapers (*Jornal da Madeira*), announced on 29 July 2009. However, given the recent economic and financial crisis, there are some other state aid measures approved by the European Commission ('the Commission') that are worth mentioning.

i *Banco Privado Português (BPP)*

On 13 March 2009, the Commission approved a state guarantee to BPP in the amount of €450 million for a period of six months subject, notably, to submission of a restructuring plan. Portugal prolonged the guarantee for a further six months and informed the Commission of this fact,¹⁶ following which¹⁷ the Commission invited the

16 On 23 June 2009.

17 On 15 July 2009.

Portuguese authorities to immediately submit the requested restructuring plan.¹⁸ Having failed to fulfil this commitment, the Commission recounted that the rescue aid had become unlawful as of 6 June 2009 and, on 10 November 2009,¹⁹ pursuant to Article 88(2) of the EC Treaty (post-Lisbon, Article 108(2) of the TFEU) and Article 10(3) of the Council Regulation No. 659/1999, decided to initiate a formal investigation into whether this aid was in compliance with EU state aid rules.

On 8 February 2010, the European Commission issued a decision stating its doubts on the compatibility of the state guarantee scheme with the common market. For this reason it decided to initiate the procedure laid down in Article 108(2) of the TFEU and to enjoin Portugal to submit a restructuring plan within a period of 30 working days.

ii Caixa Geral de Depósitos (CGD)

CGD is wholly owned by the state and was the only financial institution to benefit from the Portuguese bank recapitalisation scheme approved by the Commission. From the total available amount of €4 billion, on 27 May 2009, CGD received €1 billion through an increase of share capital.

Trends, developments and strategies

Following the Commission's regulation and guidance on national measures adopted as a response to the financial and economic crisis of the years 2008 and 2009, the Portuguese government approved several measures in order to fulfil the Commission's recovery plan for the European economy, notably in the financial sector.

i Guarantee schemes

The use of state guarantees has been the scheme most used by public companies and financial institutions in order to fight their liquidation and solvency problems. Pursuant to Law No. 60-A/2008 of 20 October,²⁰ a budget of €20 billion for state guarantee was foreseen to cover loans incurred by Portuguese financial institutions. The Portuguese Guarantee Scheme for credit institutions, initially approved by the Commission on 29 October 2008,²¹ was, on 22 February 2010,²² extended until 30 June 2010.

Up to October 2009, €4.95 billion-worth of guarantees were granted pursuant to Law No. 60-A/2008. The majority of those guarantees took place in the first quarter of 2009,²³ and no request for a guarantee was denied. Overall, up to 30 June 2009, pursuant

18 IP/09/400.

19 IP/09/1691.

20 Modified by Decree Order No. 1219-A/20087 of 23 October, as well as the 2009 state budget (Law No. 64-A/2008, of 31 December).

21 IP/08/1601.

22 MEX/10/0222.

23 Report of the Portuguese Court of Audits No. 53/2009-2nd Section (*Ação de acompanhamento da execução do plano de recuperação financeira da União Europeia*) of December 2009 and *Relatório sobre a Concessão de Garantias pessoais pelo Estado para Reforço da Estabilidade Financeira e da Disponibilização de Líquidez nos Mercados Financeiros of the Ministry of Finance and General Government*.

to Law No. 60-A/2008 and other regimes,²⁴ the state approved guarantees to 10 financial institutions, in a total amount of €7.4 billion.

ii Recapitalisation schemes

As previously mentioned, on 20 May 2009,²⁵ the Commission approved a Portuguese bank recapitalisation scheme to strengthen the financing of the economy, in the total amount of €4 billion. This scheme was aimed to credit institutions registered in Portugal, and made available new capital to eligible credit institutions, whether financially sound or not, in exchange for ordinary or preference shares, for example.

CGD has been the only bank to benefit from this measure, which elapsed after a period of six months.

iii Temporary framework for the real economy

In 2009 and 2010, the Portuguese state has kept in force the aid measures scheme for businesses approved by the Commission on 19 January 2009.²⁶ The plan enables aid in an amount of up to €500,000 per company to businesses in difficulty as a consequence of the current economic crisis, or facing funding problems because of the credit crunch. Several measures have been adopted in various fields, notably in infrastructure and the energy sector.

Outlook

Similar to most Member States, through the use of the temporary state aid schemes and following the recommendations of the Commission to overcome the global financial and economic crisis, the Portuguese state has contributed to the functioning of financial institutions, supporting the recovery of the real economy. In 2010 it may be possible to evaluate whether the aid granted was enough to enable financial institutions to overcome the current difficulties and boost the real economy, even though the schemes available were not used to their full potential.

VI CONCLUSIONS AND OUTLOOK

On 6 January 2009, and for the first time since its creation in 2003, the PCA imposed interim measures on ZON Multimédia suspending the myZONcard campaign concerning pay-TV and cinema (see Section III, Significant cases, *i, supra*). Developments in this case were expected in the first semester of 2009, however, so far the PCA has not yet come to a decision. On 3 March 2010, however, the Lisbon Commerce Court entirely reversed the PCA's first abuse of dominant position decision. The PCA has appealed this decision.

24 The general regime for the concession of state or public entities' guarantees, approved by Law No. 112/97 of 16 September, and Law No. 62-A/2008 of 11 November.

25 IP/09/818.

26 IP/09/71.

Although already announced in 2008, the PCA has not yet publicised a formal proposal to review the Competition Act. We may expect the main changes regarding restrictive practices to aim at more effective enforcement of the Competition Act on the one hand and more coherent application of European and Portuguese law on the other. With regard to the former, the previous board of the PCA, when ceasing their functions (on 12 March 2008) highlighted the need for greater procedural specialisation and for a reduction of the incentives for undertakings to appeal its decisions, notably, giving the courts the possibility of *reformatio in pejus* and by including a penalty for the payment of the fine only after the court's decision. With regard to the latter, we should expect the provision of a specific sanction for a breach of Articles 101 and 102 of the TFEU, so that the PCA may fully exert its competence attributed by Regulation 1/2003.

Finally, it should also be highlighted that according to the PCA's activity plan for 2009, it is committed to improving the quality of the case management, especially with regard to the time spent by the PCA in each case and the years taken to issue a decision.

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