
THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THIRD EDITION

EDITOR
SHAUN GOODMAN

LAW BUSINESS RESEARCH

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REVIEW

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EDITOR'S PREFACE

While 2010 largely represented a return to 'business as usual' for the US and EU authorities following the challenges of 2009 in responding to the financial crisis, the year also saw the arrival of a number of new players on the antitrust enforcement stage.

Foremost among this new breed is the Competition Commission of India ('CCI'), which took rein of its functions in March 2009, charged with investigating all trade-related competition disputes in India. In its first decision, adopted in December 2010, the CCI rejected a complaint that banks and home finance companies in India had acted anti-competitively by imposing prepayment penalties on borrowers switching lenders to obtain improved rates or facilities. The decision displays an admirable confidence for a new regulator, choosing to adopt as its first decision not only a finding of non-infringement, but also one that has apparently attracted the ire of the banking regulator, the Reserve Bank of India. With a compendium of ongoing cases across a diverse range of sectors including cement, glass, sugar, air transport and oil, the CCI looks set to assert its authority from the outset.

More established, but no less active, is Russia's Federal Antimonopoly Service ('FAS'). According to recent statistics published by the FAS, the authority initiated a staggering 5,437 competition cases during the first six months of 2010, including 1,289 cases related to abuse of a dominant market position, 277 cartel cases, 2,907 cases of anti-competitive actions by public authorities and 427 cases of unfair competition. Notable among the FAS's early successes was its decision of December 2010 finding that three companies engaged in the production and wholesaling of power-generating coal had infringed the Competition Act by participating in anti-competitive agreements aimed at fixing prices for power-generating coal and allocating the market among themselves. Criminal proceedings have also been initiated in the same case by the Ministry of the Interior. The case is notable as the first occasion on which the FAS has investigated

and proved a cartel existed in close cooperation with the Ministry, and on the basis of materials and information obtained through investigative activities, including court-sanctioned interception of telephone communications.

Not to be outdone, during the last week of 2010, two of China's antitrust enforcement agencies, namely the National Development and Reform Commission ('NDRC') and the State Administration for Industry and Commerce ('SAIC') respectively issued the long-awaited rules implementing the Anti-monopoly Law of the PRC ('AML'). These new rules clarify key areas of the agencies' antitrust enforcement practice, in particular, the constituent elements of monopoly agreements and abuse of dominance, and the defensive justifications potentially available to undertakings. The rules also provide practical guidance on investigative procedures, the leniency programme and delegation of investigation powers, and address certain key concerns. The new rules, which came into force on 1 February 2011, represent a significant milestone in the effective enforcement of the AML.

These developments confirm the increasingly global nature of public antitrust enforcement, and reinforce the importance of cooperation and convergence at all levels, both public and private.

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

Shaun Goodman

Kirkland & Ellis International LLP

London

June 2011

Chapter 30

PORTUGAL

*Frederico Pereira Coutinho and Rita Leandro Vasconcelos**

I OVERVIEW

The authority that is responsible for the enforcement of competition law in Portugal is the the Portuguese Competition Authority ('the AdC' or 'the Authority'). Within the AdC it is the Department of Restrictive Practices, and subsequently the Litigation Department in the case of appeals, that are in charge of antitrust cases. The Economic Studies Department also plays an important role in the supervision activity of the AdC. The Portuguese competition law framework is comprised by a somewhat extensive group of legislation.

The main piece of legislation is Law No. 18/2003 of 11 June 2003 ('the Competition Act'),¹ but other legislation is also relevant, such as Law No. 39/2006, of 25 August 2006 ('the Leniency Act'). In addition, the Portuguese competition law framework comprises several regulations and guidelines from the AdC. Finally, Decree-Law No. 10/2003 of 18 January 2003 ('the AdC's Bylaws') provides the AdC with the power of securing the application of competition rules in Portugal as well as providing for the efficiency of the markets and consumers' interests, based on principles of the market economy and free competition. The AdC also has enforcement powers with regard to restrictive trade practices foreseen in Decree-Law No. 370/93 of 29 October 2009, which aims at protecting competitors or consumers, or both, rather than competition. Therefore it applies regardless of an appreciable effect (even if only by object) on competition.

* Frederico Pereira Coutinho is a partner and Rita Leandro Vasconcelos is an associate at Cuatrecasas, Gonçalves, Pereira R L.

1 Amended by subsequent legislation.

i Prioritisation and resource allocation of enforcement authorities

In the past year, the AdC has continued to focus its activity mainly on putting an end to cases that had been under assessment for quite some time (more than three years) and trying to reduce the time spent in investigating cases by 25 per cent.

Also, during this year we expect a willingness to improve competition law enforcement and the predictability of the AdC's procedures, at a minimum through the approval of Guidelines concerning conducting restrictive practices procedures,² and potentially through a full review of the Competition Act.

ii Enforcement agenda

The AdC's activity in the past year has focused on sectors such as mobile communications, postal services and banking, as well as high-impact sectors such as liquid fuels and large food retail chains.

According to recent public statements from the president of the board of the AdC,³ its activity in 2011 will prioritise cases initiated based on leniency applications. As far as specific industries are concerned, the AdC will focus its activity on electronic communications, notably, contents.

II CARTELS

Article 4 of the Competition Act establishes a cartel prohibition. Under national law, these agreements are null and void. Similar 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 for cartel offences may be placed on individuals or legal persons regardless of the regularity of their incorporation, and companies and associations without legal personality (Article 47 of the Competition Act).

Legal persons and equivalent entities shall be held responsible when the acts have been carried out on their behalf or on their account or in the exercise of their duty by members of their corporate bodies, their representatives or their employees. The directors of legal persons and equivalent bodies shall be subject to the penalty foreseen for the author, especially attenuated, when they know or should have known 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 the latter is subject.

Despite any criminal liability that may apply to the initiators of a competition law infringement for acts that constitute a crime, the Competition Act condemns participation in a cartel only as a misdemeanour offence. The sanctions imposed are fines and other additional penalties. The main sanction for the practice of cartels is a fine of up

2 See Draft Guidelines on the conduction of restrictive practices procedures released on 23 December 2010, available at www.concorrenca.pt.

3 Speech at the Conference Europe 2011 – Regulation and Competitiveness, available at www.concorrenca.pt.

to 10 per cent of the undertakings' turnover in the previous financial year. In the case of associations of undertakings, this fine shall be up to 10 per cent of the aggregate annual turnover of the associated undertakings that have engaged in the prohibited behaviour. The 'previous year', as interpreted by the Lisbon Commerce Court, corresponds to the last year where the breach has been in force. When there is a case of non-compliance with a decision of the AdC, this Authority may also impose a periodic penalty payment of up to 5 per cent of the average daily turnover in the last year for each day of delay. Additionally, the AdC 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 in which the prohibited practice had its effects.

An exception to this rule is bid rigging. According to Article 230 of the Portuguese Criminal Code, the participation in bid rigging constitutes a crime and is punished with prison sanctions for a maximum of two years. Additionally, the AdC may further prohibit the concerned undertakings from participating, for a maximum of two years, in such proceedings.

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 AdC, before the AdC has started the investigation. As of the beginning of an investigation, a member of a cartel can only qualify for a 50 per cent reduction in the fine if he is the first to come forward with added-value evidence to the AdC and a reduction of up to 50 per cent, if he is the second to bring value-added evidence to the AdC. The Leniency Act also foresees an 'immunity plus' policy. A member of a cartel can be granted a special or an additional reduction to the fine regarding a certain practice when it is the first one to bring evidence to the AdC regarding another agreement or concerted practice.

The AdC decisions on cartel matters (as well as other restrictive practices) may be appealed to the Lisbon Commerce Court and these to the Lisbon Court of Appeal, whose decision will be final, unless there has been an appeal to the Constitutional Court.

i Significant cases

2010 has seen high-profile decisions from the courts responsible for reviewing the AdC's decisions.

Catering industry

In December 2009, the AdC imposed fines on five mass catering undertakings for anti-competitive practices pursuant to Article 4(1) of the Competition Act.⁴ The fines imposed amounted to €14,720,283.27.

According to the AdC, the undertakings at stake, 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.

4 AdC press release 24/2009.

In 2010, following an appeal from the convicted undertakings, the Lisbon Commerce Court has decided to entirely reverse the AdC's decision on the grounds that the AdC should not have refused to require further evidence, which had been requested by one of the undertakings in question.

It should be remembered that the catering industry decision was the first case where the AdC had relied on a leniency application, which, as far as public data is available, is an instrument that has not had the success that the AdC had wished.

Pharmaceutical industry

After a very long process and an entirely reversed decision by the Lisbon Commerce Court in 2007, the AdC finally saw its decision convicting five pharmaceutical companies for fixing prices in several public hospitals' tenders upheld both by the Lisbon Commerce Court and the Lisbon Court of Appeal.⁵ Although the AdC had fined those companies for several competition law breaches, the Lisbon Court of Appeal ruled that the presentation of proposals in those tenders should be treated as a continuous breach instead of a plurality of offences. The result was a significant diminishment of one of the offenders' fines and the annulment of another's. This notwithstanding, this was a case where an undertaking was fined very close to 10 per cent of the relevant turnover, showing that it is not only the AdC, but also the courts, that are willing to prosecute cartel cases vehemently.

Milling industry

Another relevant case was the confirmation by the Lisbon Commerce Court in June 2010⁶ of the AdC's decision condemning the Lisbon Industrial Bread-makers Association ('AIPL').

In December 2008, the AdC had convicted AIPL, comprising 14 undertakings, for price information exchange, fining it €1,177,429.30.

The Lisbon Commerce Court upheld the AdC's decision (including the fine) after concluding that the exchange of sensitive information (in the case, current prices), was a breach 'by object' and as such there was no need to demonstrate the effect of the information exchange on the prices charged. This case shows desire to approximate the interpretation of national competition law to the European competition law.

ii Trends, developments, strategies and outlook

From its very beginnings, the AdC has been pursuing 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 the amendment to the Competition Act, according to which the AdC may impose on members of a bid-rigging cartel the ancillary sanction of not participating in public tenders.

In 2009, the AdC had adopted its first decision based on a leniency application, having the whistle-blower received total immunity. However, as stated above, the leniency

5 Case 350/08.8TYLSB.

6 AdC press release of 28 June 2010.

is an instrument that has not had the 'success' that the AdC had wished. This is probably why the AdC has announced that it will give priority to cases initiated on the basis of leniency applications.

During 2011, we may expect a review of the AdC's internal practices in order to improve predictability and accelerate the analysis of the cases and the issuance of the respective decisions. In fact, the AdC has very recently launched a public consultation of its Guidelines on conducting restrictive practices procedures. We may expect an amendment to the Competition Act (as we have since 2008) with effects on the enforcement of competition law, notably cartels.

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 sanctions 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 abuse of economic dependence (Article 7). Abuse of economic dependence occurs when one or more undertakings engage in the abusive exploitation of any supplier or client 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 against the abuse of dominant position.

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

In this context it is important to mention Decree-Law No. 370/93 of 29 October, which was 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 AdC's task to enforce it. The most significant practices that are prohibited by such Decree-Law are price and other commercial conditions discrimination, resale at a loss (i.e., under 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 (aiming 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' compared to other distributors, meaning that they are not proportional to the volume of purchases or to the value of the services rendered at the supplier's request).

The sanction for breaches of Decree-Law 370/93 is a fine between approximately €250 and €15,000.

i Significant cases

Electronic communications

This has probably been one of the most high-profile rulings concerning competition law from the Lisbon Commerce Court ever.

In 2007, the AdC had adopted its first abuse of a dominant position decision fining PT Comunicações, the Portuguese electronic communications incumbent, €38 million. The undertaking appealed and on 2 March 2010, the Lisbon Commerce Court entirely reversed the AdC's decision.⁷ This time, the grounds were a matter of substantive assessment.

The Lisbon Commerce Court considered that the AdC did not show enough proof that PT held an essential facility to the construction of a network in order for its competitors to be able to supply pay-TV, broadband internet and fixed-line telephone services to its customers. Although recognising that a duplication of the entire ducts network was not possible, the court considered that, at a local level, there were alternatives to it (e.g., sewage, gas and electricity networks). Thus, the court deemed that the refusal of access to the ducts at stake was not proved to be unjustified or discriminatory, or both, nor was it proven that such refusal had prevented competitor operators of constructing and expanding their own networks.

The AdC unsuccessfully appealed to the Lisbon Appeal Court that upheld the Lisbon Commerce Court's ruling entirely on 20 December 2010.

This outcome has been a severe loss for the AdC, especially in a year where the AdC has shown to be more active in the telecoms sector. From this judgment we must draw the conclusion the courts demand a high standard of proof to demonstrate competition law offences.

myZONcard campaign

On 6 January 2009, with effect as of 9 January 2009, the AdC issued, for the first time, an urgent interim measures decision against one of the largest Portuguese communications groups – ZON Multimédia – Serviços de Telecomunicações e Multimédia, SGPS, SA ('ZON Multimédia').⁸

ZON Multimédia is the largest pay-TV operator in Portugal, as well as the largest cinema exhibitor, providing also other services. This group created a promotional campaign ('myZONcard') where its pay-TV clients could receive free cinema tickets to ZON Multimédia Group's multiplexes.

The AdC suspected 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 occurrence of anti-competitive effects, pursuant to Article 6 of the Competition Act (abuse of a dominant position).

7 Case 1065/07.0TYLSB.

8 AdC press release 1/2009, available www.concorrenca.pt.

The AdC has therefore imposed on ZON Multimédia the obligation to suspend the referred campaign.

More than one-and-a-half years later, the AdC discharged ZON Multimédia. This is a case that evidences the AdC's lack of ability of swiftly responding to market movements.

ii Trends, developments, strategies and outlook

The recently launched public consultation of AdC's Guidelines on conducting restrictive practices procedures show that the Authority is still looking forward to discharging cases subject to the acceptance of certain commitments by the undertakings at stake and thus reducing litigation.

As far as national competition law is concerned, it should be highlighted that there is no specific provision for the acceptance of commitments in exchange of not pursuing the cases or not imposing a fine. It has been the 'creative' interpretation that has permitted this outcome.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Article 6 of AdC's By-laws relies on this entity to enforce competition law and promote a competition culture, *inter alia*. Article 7 provides the AdC 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 AdC, 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 of the respective sectoral regulatory authority.

Furthermore, the Competition Act provides for rules regarding the co-ordination 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 AdC and a sectoral regulatory authority.

i Significant cases

During 2010 the AdC, under its supervision powers, has published a number of sectoral reports and studies.

Large food distribution chains

In October 2010, the AdC published its report on Commercial Relationships between Large Food Distribution Chains and its Suppliers. The report was the end of a study initiated by the AdC in 2009.

The AdC considered that large food retail chains acted as gatekeepers for the branded goods industry in the access to final consumers. Despite this, large food chains were not considered to be essential infrastructures. Also, in spite of the large degree of concentration and the existence of some buyer power, the AdC found that lower prices

gained in the negotiations tended to be passed on to consumers. Therefore, the AdC concluded that the sector is not anti-competitive in itself.

Nevertheless, the AdC identified a number of concerns arising from a certain negotiation imbalance between food retail chains and its suppliers, such as the imposition of unilateral conditions by using model contracts based on the retailers' general sales conditions, rebates and other benefits granted to food retailers, penalties for breach of contract only on the suppliers' side and payment terms.

Therefore, the AdC issued its recommendations to the sector, of which the most relevant were: (1) to promote a competition culture, specifically by the adoption of codes of conduct, to clear the concerns arising from the negotiating imbalance; and (2) to create a price-monitoring entity that would be responsible for the collection, treatment and dissemination of statistical information on price evolution in the food supply chain.

Postal services sector

AdC's report 'Liberalisation of the Postal Sector – Main Competition Issues' was released in July 2010. The AdC came to the conclusion that the postal services sector is characterised by the existence of a leading company (CTT) and strong barriers to entry and expansion; these are notably, but not exclusively, legal barriers. With the liberalisation of the postal services sector, the AdC fears that anti-competitive behaviour is a potential threat. Examples of abusive behaviour would be price discrimination, excessive or predatory prices, access refusals, etc.

In this regard, the AdC recommends some changes, such as public tendering for postal services in the regions where it is possible, transparency in selecting the universal services provider, non-discrimination in the access to information on the incumbent's network and in taxation.

ii Trends, developments, strategies and outlook

The AdC has also released its usual reports on the accompaniment of liquid fuels and electronic communications sectors.

In line with what we have been observing in the AdC's activity, as well as public declarations by its board members, the AdC will give a special focus to the electronic communications sector, in particular, the triple play services provided by players, which for competition investigation purposes shall be considered a relevant market.⁹

V STATE AID

Pursuant to Article 13(1) of the Competition Act, 'Aid 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 AdC may analyse any aid or projected aid and address the government recommendations that it shall deem necessary to eliminate its negative effects.

9 Speech from the President of the board of the AdC on 14 January 2011.

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

i Significant cases

A significant case is the initiation by the European Commission of a formal investigation procedure against the Portuguese state. On 13 March 2009, the Commission approved a state guarantee underwriting a €450 million loan granted to a Portuguese Bank (BPP) by six Portuguese banks. The measure was authorised for a period of six months, subject *inter alia*, to the submission of the respective restructuring plan, according to the Commission's guidelines on the matter. After having known that the state guarantee had been extended for a further period of six months, without having received the restructuring plan, the Commission decided to initiate this procedure.¹⁰

ii Trends, developments, strategies and outlook

Similarly 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.

VI CONCLUSIONS AND OUTLOOK

The AdC, through its representatives, has been stating the necessity of a full review of the Competition Act. The most important changes that we may expect regarding antitrust are closely related with the need for more transparent and objective rules.¹¹

First, we should expect more harmonisation with EU rules, notably the inclusion of a specific breach of Article 101 and Article 102 of the TFEU in the Competition Act, so that the AdC may fully exert its competence attributed by Regulation 1/2003.

Second, the reviewed Competition Act should reduce the need to rely on subsidiary applicable procedural rules. Therefore, those provisions should be included in the Competition Act, after suffering a specific adaptation to the competition law reality.

Third, a revised Competition Act should include the possibility of the AdC discharging antitrust cases subject to commitments.

With regard to the fines, the AdC proposes the inclusion of the possibility of the AdC to 'innovate' with regard to the fines (notably, reducing its maximum limit) when the perpetrator waives its right to an appeal after receiving the statement of objections.

Finally, the AdC has been claiming the need to diminish litigation incentives of its decisions and suggests that appeal courts should be given the possibility of *reformatio in pejus* and that undertakings should pay interest on the fine in cases where the appeal courts totally or partially confirm the AdC's decision.

10 C 33/2009, Portugal – Restructuring of the BPP.

11 Speech of the President of the board of the AdC on 2 July 2010, available at www.concorrenca.pt.

Additionally, it should be highlighted that according to the AdC's Activity Plan for 2010, the authority is committed to improving the quality of case analysis, especially with regard to the time spent by the AdC on each case and the years taken to issue a decision. This trend is shown by the recent launch of its guidelines on conducting restrictive practices procedures.

Appendix 1

ABOUT THE AUTHORS

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Frederico Coutinho obtained his law degree from the University of Lisbon Law School in 1987 and was admitted to the Portuguese Bar in the same year. He has been a partner at the firm since 1996. Mr Coutinho was a lecturer in international private law at the University of Lisbon Law School between 1988 and 1989 and a legal adviser to the Portuguese Tourism Fund between 1987 and 1990.

One of Mr Coutinho's main areas of practice is competition law where he gives advice on a number of high-profile mergers and joint ventures, litigation, companies' commercial practices from the point of view of competition and European law, distribution systems and antitrust litigation. He also gives advice on several aspects of competition with special emphasis in merger control, anti-competitive practices, competition compliance, due diligence, state aid, dawn raids and leniency. Mr Coutinho is also active in several other practice industries, such as the automobile industry, pharmaceuticals, energy, telecommunications, sport, banking and insurance, and aviation.

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Rita Vasconcelos obtained her law degree from the Portuguese Catholic University of Porto in 1998, her Master of Law in European Law from the University of Lisbon and her Diploma of Specialisation in Competition Policy both in 2004. Ms Vasconcelos earned a postgraduate degree in Economics in Competition Law in 2007 and a Master of Arts in Economics in Competition Law in 2009, both from King's College University of London.

She was Deputy of the Secretary of State of the Presidency of the Council of Ministers in 2002, lecturer at the University of Lisbon between 2001 and 2006 and cooperated with the same university on the postgraduate course in energy law.

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