



## Portugal: Overview

Miguel Mendes Pereira

*Vieira de Almeida & Associados*

The Portuguese competition law environment has experienced a significant amount of activity over the past 12 months as regards legislative, institutional and case law developments.

On the legislative front, the main novelty was the entry into force in July 2012 of the new Competition Act, followed by the adoption of a number of Guidelines by the Competition Authority. As of June 2013, a draft bill on restrictive trade practices is also pending in Parliament and enactment is expected to occur soon.

On the institutional front, a new specialised court for competition, regulation and supervision matters was created in March 2012. The court is up and going, and the first judgments have been passed. Additionally, at the time of writing a draft bill on the framework of independent regulatory agencies is awaiting approval in Parliament. Last but not least, the mandate of the members of the Board of the Competition Authority ended in March 2013 and the appointment of new members is expected at any moment.

As regards case law, a number of cases dealing with cartels, vertical restrictions and decisions by associations of undertakings have been confirmed by the courts. For the first time, a fine was applied for failure to notify a merger.

At EU level, Portugal provided the European Commission with a set of major state aid files in the context of the recapitalisation of Portuguese banks.

Last but not least, a number of significant privatisations are taking place further to the Memorandum of Understanding concluded between Portugal, the IMF, the ECB and the European Commission.

## **Legislative developments**

### *The New Competition Act*

The 2012 Competition Act is not a revolutionary piece of legislation but it does include a number of novelties. It strengthens the investigation powers of the Competition Authority, brings the national regime closer to EU law and underlines the autonomy of competition proceedings in relation to criminal and misdemeanour investigations. It does not, however, touch upon the pillars of the existing substantive law.

#### Novelties in antitrust

One of the most notable features in the 2012 Act is the adoption of the principle of opportunity (prosecutorial discretion). The Competition Authority is now entitled to establish priorities in terms of competition policy and to assess complaints accordingly. The likelihood of proving the existence of an infringement and the extent of the necessary investigation measures are elements to be taken into consideration when deciding whether or not to investigate. This sidelines the principle of legality that had so far reigned in competition matters (and still rules in criminal investigations).

The investigation powers of the Authority have been strengthened with a new toolbox. It may now search the domiciles of partners, members of governing bodies or employees of the undertakings concerned, and use as evidence confidential information containing business secrets, as well as information and documents obtained in the exercise of its supervisory powers. The leniency programme is now part of the Competition Act and offers different degrees of immunity from fines to the first, second and subsequent undertakings that provide substantial evidence of an infringement.

Settlements come into play and defendants are now offered the opportunity to settle with the Competition Authority such as to close an investigation without or with reduced sanctions. The Authority, on the

other hand, may impose behavioural or structural remedies to put an end to the infringement or to its effects. It may also prevent a company from participating in public tenders for up to two years.

### Novelties in merger control

The main novelty in merger control is the adoption of the 'significant impediment to effective competition' substantive test along EU lines, but the most welcome change was probably the elimination of the seven-day post-transaction filing deadline, which was the source of recurrent headaches (and last minute acrobatics) by both Portuguese and foreign counsels.

Thresholds were adjusted, making concentrations with the following features subject to mandatory filing:

- the acquisition, creation or reinforcement of a market share of at least 50 per cent in the relevant national market;
- the acquisition, creation or reinforcement of a market share of at least 30 per cent but less than 50 per cent, in the relevant national market, provided that the individual turnover of at least two participating undertakings, registered in Portugal, in the preceding financial year, exceeds €5 million; and
- an aggregate turnover of the participating undertakings in Portugal, in the preceding financial year, of over €100 million, provided that the individual turnover in Portugal of at least two of the undertakings exceeds €5 million.

### *Guidelines*

Aware of the growing criticism among companies and lawyers as regards the lack of consistency in applying fines, the Competition Authority adopted in December 2012 Guidelines for the Setting of Fines. Although the Guidelines are quite general in nature, there is a perceived hope that the existence of a published document, together with the obligation to publish antitrust decisions deriving from the new Competition Act, may contribute towards a more consistent approach by the Authority.

In January 2013 the procedural regulation for leniency applications was published. In February the Authority launched a public consultation of draft Guidelines for the Economic Appraisal of Horizontal Concentrations and in March Guidelines for the Handling of Antitrust Cases were adopted.

### *The Restrictive Trade Practices Act*

Since 1983 Portugal has had legislation in place prohibiting so-called 'individual restrictive trade practices', which prohibits the sale of products at a loss, the discrimination between economic agents as well as the refusal to sell, and renders mandatory the existence of price catalogues displaying conditions and terms for every transaction. Also prohibited are classic unfair trade practices consisting of abusive conditions imposed by distributors on suppliers (eg, price, payment conditions, duration, etc).

The Act was changed in 1993 and revised in 1998 but the aim of attempting to regulate bargaining power and fairness has remained unchanged, as much as its dubious (some would argue contradictory) relationship with competition law rules coexisting within the same legal order. Over the past few years, tension has been growing between large retailers and their suppliers and public debate has sometimes been fierce. As a consequence, in May 2013 Parliament mandated the government to revise the Act.

The main purposes of the review are to dramatically increase the amount of fines, to allow for the adoption of interim measures and to provide for the application of periodic penalty payments in case of continued non-compliance. Infringements that were previously punished with fines of between €500 and €3,000 will now be punished with fines within a range of €2,500 to €2.5 million.

Unsurprisingly, a significant number of companies (mostly, but not exclusively, large retailers) have expressed their dismay at the government's proposal, all the more so given that liability is not at all dependent from holding a dominant position.

## **Institutional developments**

### *The Competition, Regulation and Supervision Court*

Until last year, appeals against decisions by the Competition Authority were heard at the Lisbon Commerce Court. The fact that this was a court more used to dealing with trade-related matters than the ordinary civil courts (although not specifically focused on competition matters) was generally considered a point in favour of a certain degree of specialisation. However, the growing complexity of competition cases, coupled with the growing number of cases emerging from sector-specific regulators as well as from supervisory action by the central bank, lead to the creation in 2012 of a court specialised in competition, regulation and supervision matters only.

The idea has won unanimous applause; its implementation, less so. For reasons linked to the location of the court in the city of Santarém (65 km from Lisbon) and to the relatively junior status afforded to candidate judges, none of the senior judges who had been dealing for 10 years with competition cases at Lisbon Commerce Court applied. Some precious know-how will unquestionably be lost but practitioners are betting that the appointed judges will quickly be able to master the intricacies of cartels and abuses of dominant position.

In May 2013 the court delivered its first judgment on a competition case (concerning vertical restrictions) but the judgment was appealed against to the Appeals Court. The young court will therefore now be put to the test.

### *Independent regulatory agencies*

As of June 2013 a draft bill on the framework of independent regulatory agencies is awaiting approval in Parliament. The stated intention is to cover both the Competition Authority and all the sector-specific regulators (with the exception of the central bank), and the aim is to carve into a single piece of legislation all features required to ensure the independence of these agencies.

## *The Competition Authority*

Transparency in the decision-making of the Competition Authority has been a long-sought goal for Portuguese competition lawyers.

Until last year, the Authority did not publish any of its antitrust decisions (as opposed to merger decisions) and even now only a few of them have been published. Lawyers are therefore sometimes led to scratch their heads trying to understand what the case law is. The 2012 Competition Act now compels the Authority to publish on its website the final decision in infringement proceedings, with reference to any pending appeals, as well as the courts' judgments resulting from such appeals. The sound of corks popping has been heard around the Portuguese bar.

As regards the effectiveness of enforcement, the president of the Authority has in the past referred to shortcomings in the law that substantially complicated the investigation of cases and rendered their survival in court particularly difficult. Considering that the new Competition Act originates in a draft prepared by the Competition Authority and that the Authority was closely involved throughout the whole process until formal adoption, it is reasonable to infer that the new Competition Act comes very close to fulfilling the Authority's wishes.

This means that the Authority has now been given all the means it considers necessary for an effective enforcement. Expectations are therefore running high and the Authority is now definitely under the spotlight. This places a serious responsibility on the shoulders of the coming members of the Board of Authority, given that the mandate of the current members terminated in March 2013.

A new Competition Act and a new mandate within the Authority will certainly provide two important ingredients to celebrate the 10th anniversary of the Competition Authority in 2013.

## **Case law**

### *Resale price maintenance*

On 24 May 2013, the new Competition, Regulation and Supervision Court passed its first judgment on competition matters, more particularly on a case concerning resale price maintenance. It upheld a €340,000 fine applied by the Competition Authority to Lactogal, a dairy producer.

The case concerned the imposition of minimum resale prices and the fixing of margins of Lactogal's distributors in the HORECA channel (hotels, restaurants and cafés) between 2003 and 2006. The Court confirmed this practice to be a vertical restriction prohibited by law.

### *Decisions by associations of undertakings*

Two cases involving associations of undertakings have been confirmed by the courts: the Court of Justice confirmed by means of a preliminary ruling the approach taken by the Competition Authority in respect of the Association of Chartered Accountants; and the Lisbon Appeals Court upheld a first instance judgment concerning the National Parking Association.

In the first case, the Competition Authority applied a €90,000 fine to the Chartered Accountants Association and declared its internal rules concerning professional training void. The Association reserved exclusively for itself the provision of one third of the mandatory training to which chartered accountants are subject to and had developed arbitrary criteria for the approval of external entities capable of providing training. The Court of Justice ruled that this type of rule infringes article 101 of the Treaty.

In the second case, the Competition Authority applied a €1.9 million fine to the National Parking Association in connection with a recommendation issued to its members advising them to increase prices by given percentages in response to changes to their fee system introduced by the government. The Parking Association considered that the recommendation did not intend to fix prices but rather address the need to accommodate the changes induced by law

within their business model and challenged the decision. The first instance court upheld the decision in substance but reduced the fine to €969,000. This judgment has now been confirmed by the Lisbon Appeals Court.

### *Cartels*

In December 2012 the Competition Authority applied €1.8 million in fines to undertakings in the printing sector. As a result of a leniency application by Copidata, its competitors Contiforme, Formato and Litho Formas were convicted for price fixing and market sharing.

In July 2012 the Lisbon Appeals Court upheld a first instance judgment denying the challenge to a decision by the Competition Authority that had applied €400,000 fines to Baxter-Médico Farmacêutica Lda and Glintt – Business Solutions Lda. The two pharmaceutical companies had been convicted for price fixing.

Also in July 2012 the Lisbon Commerce Court upheld the decision by the Competition Authority applying €300,000 fines to Conforlimpa (Tejo) – Multiserviços SA and Number One – Multi Services Lda, two companies operating in the professional cleaning services sector. The companies were convicted for bid rigging.

### **Failure to notify a concentration**

On 28 December 2012 the Competition Authority for the first time punished companies for failing to notify a concentration. The Authority considered that the National Pharmacy Association (NPA), Farminveste 3 and Farminveste failed to notify the acquisition of control of ParaRede/Glintt and opened an ex officio merger control procedure. The concentration was eventually approved but failure to notify lead to the application of €150,000 in fines, corresponding to 0.05 per cent of the turnover of NPA and Farminveste.

### **State aid**

Since June 2012, four major Portuguese banks have been recapitalised through state aid: BCP Millennium, BPI, Caixa Geral de Depósitos (state owned) and BANIF. BPI and Caixa have been



recapitalised under the Scheme for the Recapitalisation of Portuguese Credit Institutions approved in December 2011 and prolonged in December 2012. Caixa and BANIF have been recapitalised under individual notifications. At the time of editing all cases were pending final approval of the individual restructuring plans.

The total amount involved is €7.1 billion.

The fact that Portugal is under an Economic Adjustment Programme adopted further to the memorandum of understanding entered into between Portugal and the International Monetary Fund, the European Central Bank and the European Commission has increased the degree of scrutiny of state aid by the Commission. On the other hand, both the stringent austerity measures negotiated with Portugal's creditors and the privatisation processes provide ample opportunities for the Commission to investigate. For example, the privatisation of the Viana do Castelo shipyards stalled further to a formal investigation launched by the Commission.

## **Privatisations**

The number of mergers between national companies has suffered from the general economic downturn and from the particular harsh recession in Portugal. However, the tender offer for the outstanding shares of Brisa – the largest highway concessionaire in the country – and the privatisations carried out in accordance with the MoU entered into with the IMF, the ECB and the EC led to a number of high-profile concentrations.

After the sale of a controlling stake in EDP (Portugal's largest energy operator) at the end of 2011 to the Chinese group Three Gorges, the most significant privatisations in 2012 were ANA (airport management) and TAP Air Portugal, the airline. The privatisation of TAP aborted during the last steps of the transaction involving the controlling shareholder of AviancaTaca, the South American aviation group. In spite of the obvious link between both operations, the TAP incident did not affect the ANA deal and ANA was sold to the French group Vinci during the last days of December for €3 billion.

Expected privatisations during 2013 are CTT (mail services), Águas de Portugal (water distribution) and EGF (waste management).

**Vieira de Almeida & Associados**

---



**VIEIRA DE ALMEIDA**  
& Associados Sociedade de Advogados, R.L

Av. Duarte Pacheco, 26

1070-110 Lisboa

Portugal

Tel: +351 21 311 34 00

Fax: +351 21 357 00 09

Miguel Mendes Pereira

[mig@vda.pt](mailto:mig@vda.pt)

[www.vda.pt](http://www.vda.pt)

Established in 1976, our firm's innovative approach has been a stepping stone for our growth. We led some of the most important and groundbreaking transactions that took place in the financial and infrastructural sectors in recent decades. Our team of more than 160 lawyers provides high-quality services and advice on the following practice areas: banking & finance; competition & EU; litigation & arbitration; insolvency & restructuring, corporate & governance, tax, real estate & environment, employment & benefits; M&A, corporate finance; capital markets; public law; privacy & data protection; projects – infrastructure, energy & natural resources; intellectual property; life sciences; planning & tourism, telecoms & media; IT & outsourcing. As a result of the firm's continuous efforts, VdA has been awarded the IFLR 2012 Firm of the Year, NYSE EURONEXT considered VdA the most active law firm in 2012, and Who's Who Legal has considered VdA as Law Firm of the Year in 2012 and 2013

Through VdAtlas, the firm's international platform, we provide our clients with a professional network based on exclusive or preferential relations in the Portuguese speaking countries, Europe, South America, Asia and in the world's main financial centers, bringing together highly

specialised local support with a profound knowledge of the client's business. We have developed a particular expertise in Mozambique, Angola and Brazil, where VdA has been involved in some of the biggest transactions that have taken place in such markets.

**Source:** <http://globalcompetitionreview.com/reviews/53/sections/179/chapters/2110/portugal-overview/>