

UNCTAD - 7th. Session of the IGE on Competition Law and Policy

Round Table Discussion on

The Relationship between Competition Authorities and Sector Regulators

The Experience of the Portuguese Competition Authority

31 October 2006

Competition and Regulation

Both Competition Authorities and Sector Regulators pursue common goals insofar as they seek to achieve broad objectives of public policy, namely economic efficiency, albeit through different actions:

- Sector Regulators usually address markets that underwent structural reforms, through liberalisation, privatisation and deregulation; markets where there may be a market failure and which aren't yet fully competitive;
- Competition Authorities tend to oversee all economic sectors without exception.

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Competition and Regulation

- Sector Regulators
 - have the technical expertise of the products and services regulated
 - follow and monitor closely the activities of the regulated companies;
 - enforce rules on access services and public services obligations, acting mostly "ex ante";
 - embrace specific disputes resolution mechanisms in order to speed up procedures,
- Competition Authorities often are exclusively competent to enforce Competition Law, therefore being experienced in looking into different sectors, products and services and tend to act "ex post" infringements (except in merger control).

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Competition and Regulation

An efficient Regulation requires:

- Specialized bodies;
- Independent bodies from both Governments and Regulated firms (danger of capture);
- Clear and precise mandate of both Competition Authority and Sector Regulators and/or a framework for cooperation between both in areas of common interest, in order to avoid overlaps and to ensure consistency.

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The experience in Portugal

The Portuguese Competition Authority (PCA) was created in early 2003 (DL 10/2003 - 18.01.2003), acting for 3 and a ½ years, and has been given horizontal competence on competition over all sectors of the economy, including the regulated sectors.

◊ Competences:

- ▶ enforcement powers: anti-competitive practices;
- ▶ supervision powers: merger control; studies and inquiries;
- ▶ regulatory powers: recommendations.

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The experience in Portugal

Both the PCA and sector regulators are legally bound to cooperate under the Portuguese Competition Law. Nevertheless, there is a clear division of tasks from a formal point of view:

- PCA - competition law and policy;
- Sector Regulators - technical and economic regulation;

There are several Sector Regulators, some of which were created on the wake of the increased liberalisation and privatisation of the Portuguese economy since the early 90s:

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Sector Regulators in Portugal

- The Bank of Portugal (BP)
- The Insurance and Pension Funds Supervisory Authority (ISP) - 1982
- The Securities Market Commission (CMVM) - 1991
- The Energy Services Regulator (ERSE) - 2002
- The Telecommunications and Postal Services Regulator (ICP - ANACOM)
- The Regulatory Institute for Water and Waste (IRAR) - 1997
- The Rail Transportation Regulator (INTF) - 1998
- The Civil Aviation Regulator (INAC) - 1998
- The Private and Public Works and Real Estate Regulator (MOPPI) - 1999
- Health Sector Regulator (ERS) - 2005
- Media Sector Regulator (ERC) - 2006

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PCA ↔ Sector Regulators

The Portuguese Competition legal framework seeks to ensure that the PCA and Sector Regulators work in close co-operation, through specific provisions in:

- Statutes of the PCA - Decree-Law 10/2003;
- The Competition Law - Law 18/2003;
- Sectoral Regulation Frameworks: for example, Electronic Communications Law - Law 5/2004;

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PCA ⇒ Sector Regulators

(a) Cooperation concerning investigation and punishment of anticompetitive practices:

- The PCA must inform the relevant Sector Regulator when it opens a case regarding a regulated market and needs to consult it before adopting a final decision.

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PCA ⇒ Sector Regulators

◊ Abuse of Dominant Position cases:

- examples:

- cases of refusal or delayed access to essential facilities (public utilities) by the incumbent company in spite of specific sector regulation obligations;
- discriminatory treatment of competitors
- or overpricing strategies, ignoring sector regulatory provisions;

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PCA ⇒ Sector Regulators

◊ Abuse of Dominant Position cases:

- Infringements of both Competition Law and specific Sector Regulation rules may be pursued by both PCA and Sector Regulator although there is a need to ensure convergence and to take into account injunctions and fines that may be imposed by both agencies;
- Compliance with specific Sector Regulation rules may yet prove to infringe Competition Law: the PCA is bound to investigate abusive behaviours by incumbent companies but may need to consult and cooperate with the Sector Regulator.

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PCA ⇒ Sector Regulators

◊ Abuse of Dominant Position cases:

- Several cases still pending in the telecoms, energy, banking services and water supply, but having taken into account information and the opinion of the Sector Regulator;
- A small number of final decisions, imposing fines in the media and ports markets, were supported by the Sector Regulators.

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PCA ⇒ Sector Regulators

(b) Merger Control

- After receiving a notification concerning a regulated sector, the PCA asks the relevant Sector Regulator to state its opinion on the operation;
- The opinions of Sector Regulators are not binding on the PCA, except for the Media Regulator when it opposes a merger operation on the grounds that it undermines free expression and pluralism of views, values that the Portuguese Constitution protects, as well as competition.

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PCA ⇒ Sector Regulators

(b) Merger Control cases

- The area of larger experience of the PCA, over 230 final decisions;
- Several decisions of approval, often with remedies involved, concerning the energy market, insurance services, road and rail transportation, with the support of Sector Regulators;
- Some cases still pending regarding telecom markets, banking services, public works, air transport have already involved the Sector Regulators.

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Sector Regulators ⇒ PCA

All direct, indirect or independent administrative services of the state, as well as independent administrative authorities, have the duty to inform the PCA if they become aware of facts which may be described as anticompetitive practices.

Each Sector Regulator has the specific duty to inform the PCA and supply information on the main facts whenever, within the scope of its attributions, officially or at the request of regulated bodies, it identifies issues that may constitute an infringement of the Competition Law.

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Sector Regulators ⇒ PCA

When the Sector Regulator appraises issues that may constitute an infringement of competition provisions,

before reaching a final decision, the Sector Regulator shall inform the PCA of its draft proposals,

in order that the PCA may state its opinion within a reasonable period of time prescribed by the Sector Regulator.

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Sector Regulators ⇒ PCA

Some Sector Regulations' framework provide that the PCA must issue an opinion about matters under the competence of Sector Regulators given the need to safeguard the objectives pursued by the Competition Law:

- e.g., Article 61 of the Law of Electronic Communications (Law 5/2004) states that the draft measures of the National Communications Authority as regards market analysis and determination of whether an undertaking holds or not significant market power are subject to the prior opinion of the PCA, which shall be issued within 30 days from the respective request.

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Sector Regulators ⇒ PCA

PCA's financing: the PCA receives annually 7,5% of the fees charged by 7 Sector Regulators (Insurance, Energy, Telecom, Water and Waste, Rail Transportation, Civil Aviation and Public and Private Works),

the rationale being to:

- Assure independent and regular funding for the PCA;
- Acknowledge that the PCA and Sector Regulators implement actions that complement each other, often cooperating in order to promote further competition.

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The relationship between the PCA and Sector Regulators in practice

The PCA and the Portuguese Sector Regulators have promoted a permanent and fruitful dialogue

Main goals:

- Improve compliance with mutual legal obligations;
- Promote a better understanding of each Institution's mission;
- Prevent and solve possible overlaps of action.

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The relationship between the PCA and Sector Regulators in practice

Key measures achieved:

- **Cooperation Protocols:**
 - In 2003, the PCA and the Telecoms Regulator signed a Protocol that sets procedural rules concerning mutual consultation, delays for answers and articulation of decisions; other draft Protocols are being discussed.
- **Consultation of the PCA on new sector regulations and other legislative initiatives, either by the Government or by Sector Regulators themselves;**
- **Exchange of best practices and procedures (e.g. CMVM)**

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The relationship between the PCA and Sector Regulators in practice

Key measures achieved:

- Appointment of a PCA's representative as a member of the consultative body of Sector Regulators (e.g. energy, telecoms, media);
- Joint Working Groups, comprising officials of both the PCA and Sector Regulators;
- Appointment of officials of the PCA, within the field of their expertise, to act as a permanent contact point for a specific Sector Regulator (Bank of Portugal).

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The relationship between the PCA and Sector Regulators in practice

The PCA shares the view that this is an important issue to discuss, regardless of the experience of each country

Topic discussed at

- I Lusophone Meeting on Competition (Rio, 2004)
- II Lusophone Meeting on Competition (Lisbon, 2006)

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Concluding remarks

A close relationship between Competition Authorities and Sector Regulators is very important to ensure consistency and to prevent possible problems:

- overlaps, specially when using sanctioning powers;
- forum shopping;
- contradictory positions.

A clear legal framework is essential to promote that co-ordination, but much can be achieved through continuous dialogue between the agencies.

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Thank you

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