

COMPETITION POLICY PRIORITIES FOR 2013

20 December 2012

1. The purpose of this document is to set out the priorities of the Portuguese Competition Authority (PCA) for 2013, in accordance with the provisions of article 7, paragraph 3 of the new Competition Act (Law no. 19/2012, of 8 May), to wit: *“During the last quarter of each year, the Competition Authority shall publish on its Internet site the competition policy priorities for the following year, though making no sectoral reference where its sanctioning powers are concerned.”*

2. The activities of the PCA in 2013 will develop taking into account five institutional and legislative changes, some already put in place in 2012, the others to come in 2013. The five changes are:

- a) The new Competition, Regulation and Supervision Court, which started functioning in April 2012;
- b) The new Competition Act, Law no. 19/2012, which entered into force on 7 July 2012, along with the set of complementary regulations and guidelines which are the responsibility of the PCA;
- c) The new Framework-Law For Regulatory Agencies (in Portuguese, *Lei-Quadro das Entidades Reguladoras*), slated for approval in the first quarter of 2013, the aim of this being to bring in a legal framework for such agencies, among them the PCA;
- d) The new statutes of the PCA, which will be structured in line with the new Competition Act and the new Framework-Law For Regulatory Agencies; and
- e) The new legal framework for unfair trade practices, which will replace Decree Law no. 370/93, of 29 October 1993, with the amendments introduced through Decree Law no. 140/98, of 16 May 1998, this framework involving transfer of the PCA’s competencies in this issue to ASAE (in Portuguese, *Autoridade de Segurança Alimentar e Económica*, the authority responsible for ensuring that businesses comply with public health and trade practice norms).

3. Against this backdrop, the PCA’s priorities for 2013 will fall into three categories:

- A. Optimizing its work on competition enforcement and advocacy;
- B. Contributing to effective application of the new Competition Act; and
- C. Reinforcing the PCA’s capacity to act.

A. Optimizing the PCA's work on competition enforcement and advocacy

4. The focus of competition policy should be on contributing to ensure that markets operate in a competitive way, using an array of procedures geared to enforcing and advocating competition.

5. In those sectors which come within the scope of regulation, competition policy should take into account the markets which are regulated and those which are not, and should focus on obtaining a seamless interface between these markets in themselves and between them and the rest of the economy, specifically through (i) closer cooperation with sectoral regulators, and (ii) identification of public policies or state aid that have negative effects on competition.

6. Portugal finds itself in a difficult economic situation, with undertakings facing very adverse market conditions. Such circumstances justify a strengthened competition policy, enabling the markets to function competitively. Strong competition is one of the features essential for the adjustments that are in progress, and will contribute towards generating sustained growth in the economy and bringing a rise in the welfare of consumers.

7. The PCA has set out two priorities within its sanctioning powers, the focus being on fighting both the more serious prohibited practices and those that cause the most damage to the economy and to the welfare of consumers. These involve fighting:

- a) cartels, as these are defined in article 75 of the Competition Act: the PCA will act decisively, either through *ex officio* initiatives, or through a wider dissemination of and recourse to the new regime of immunity from fines or reduction of fines in cartel cases (leniency regime); and
- b) abuses of dominant positions: whatever the form they take, they impact on the competitive capacity of those undertakings that are not in a dominant position and, as a result, on market equilibria.

8. Within the scope of its supervisory powers, the PCA has set out three priorities. These focus on ensuring effective control of concentration operations and a better understanding of how relevant sectors of the economy work. In this way, the PCA will endeavour to identify behavioural or structural aspects of the economy that are in need of improvement and to spotlight possible infringements that need to be subject to a sanction.

- a) Control of concentration operations: if these could lead to significant impediments to effective competition in the domestic market or a substantial part of it, they demand rapid action from the PCA with a view to (i) authorising the mergers contingent on appropriate remedies, or (ii) if this is not possible, not authorizing them;
- b) Payment cards: the PCA will keep track of the upcoming regulatory framework, as set out by the European Commission, and, in conjunction with the central bank of Portugal (*Banco de Portugal*), will take the necessary action to bring domestic operations in line with the cross-border regulations

that the European Commission introduces, with any adjustments deemed to be justified specifically for Portugal;

- c) Three sectors with effects on the Portuguese economy across the board – energy, telecommunications and ports: those areas where competition comes into play will be analysed and monitored in all due detail.

B. Contributing to effective application of the new Competition Act

9. Given the fact that an appeal can be made against any decision taken by the PCA, the authority will continue to work in close collaboration with the Public Prosecutor's Office, given that the task of this body is to ensure prosecution during the court stage of the case, and with the new Competition, Regulation and Supervision Court, which, since April 2012, has become the court of first instance to rule on the appeals lodged against PCA decisions that involve sanctions.

10. By the same token, the PCA considers that one of its priorities is to do everything it can to support the training of judges in the specific domain of competition law.

11. The PCA decisions in matters of abuse of a dominant position have not been upheld by the courts in the cases that have been subject to appeal, due to the economic complexity of argumentation needed for the burden of proof required from the PCA. In the light of this, the PCA considers that it should reassess its approach to these cases, both in terms of obtaining the expert evidence that will stand up in court and of requesting cooperation from the European Commission as *amicus curiae*.

C. Reinforcing the PCA's capacity to act

12. Given that the PCA remit gives it the exclusive competence to enforce competition law in Portugal, it must be at the forefront of competition enforcement and advocacy through its sanctioning, supervisory and regulatory powers.

13. Reinforcing its capacity to act depends crucially on (i) its organisation, (ii) consolidation of its financing model, and (iii) rightsizing its human resources, both in quality and quantity. This last point is true above all for specialists in competition, both on the legal and the economic side.

14. The PCA has therefore set out its priorities as follows:

- a) It will adjust its organisation as necessary to ensure improved management of complaints received and of *ex officio* cases, in such a way that the principle of opportunity is followed, and that due concern is taken to follow the rules regarding the handling of complaints as per articles 7 and 8 of the new Competition Act;
- b) Within the scope of the administrative and financial autonomy to be set down in its new statutes and respecting the annual budget approved at ministerial level, the PCA will make every effort to retain, recruit and continue to train the human resources it needs to fulfil its mission;

- c) It will set about structuring career paths for its staff members, with the necessary elements relating to skills, internal mobility and pay scale that underpin the kind of motivation, performance and professional development that should be the hallmark of the staff of a strong, independent and pro-active regulator;
- d) The PCA is an independent regulator, but also it is both a Portuguese institution and a member of the European Union competition law enforcement system. Given this situation, it will *(i)* give priority to its activities in the European Competition Network (ECN) and in the International Competition Network (ICN), and *(ii)* it will foster bilateral relations with competition authorities in Portuguese-speaking countries;
- e) The PCA will move towards a more comprehensive approach to its Internet site, where it will publish both its decisions and the rulings of the courts in appeal cases, providing therefore a contribution towards greater transparency and closer scrutiny of its activities.