

Unclassified

DAF/COMP/WD(2014)102

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

10-Dec-2014

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP/WD(2014)102
Unclassified

ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES

-- Note by Portugal --

17-18 December 2014

This document reproduces a written contribution from Portugal submitted for Item VIII of the 122nd meeting of the OECD Competition Committee on 17-18 December 2014.

More documents related to this discussion can be found at www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm

JT03368360

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

English - Or. English

1. The Portuguese model

1. The Portuguese Competition Authority (“PCA”) was created in 2003 with the mission of enforcing and promoting competition rules in Portugal¹.
2. The PCA replaced two separate bodies, both integrated within the Ministry of Economy: the Directorate-General for Trade and Competition (“Direção-Geral do Comércio e Concorrência”), with investigative powers, and the Council for Competition (“Conselho da Concorrência”), with decision-making powers.
3. The institutional change in 2003 aimed at creating a prestigious and independent authority that contributed to ensuring compliance with competition rules by economic agents and to creating a true culture of competition in Portugal, as stated in the recitals of the Decree-Law that created the PCA in 2003.
4. The separation of tasks between the Directorate-General for Trade and Competition and the Council for Competition was considered unclear and a source of inefficiency and divergence which could undermine the credibility of competition policy in Portugal.
5. Therefore, since 2003 a single administrative model is in place in Portugal, as the PCA is the only authority responsible for the enforcement of competition law.
6. The PCA is a single-purpose authority which was awarded administrative and financial autonomy and given sanctioning, supervisory and regulatory powers. Within the scope of its sanctioning powers, the PCA investigates and adopts enforcement decisions, including the imposition of administrative fines, fitting into the monist administrative model². Its decisions are of course subject to judicial review.
7. In 2014, new Bylaws of the PCA were approved, which did not change the Portuguese institutional model for the enforcement of competition law³.
8. The new Bylaws follow the publication of the Framework-Law for Regulatory Authorities in 2013⁴, one of the key structural reforms of the Economic Adjustment Programme⁵. The Framework Law is

¹ The PCA was created by the Decree-Law No. 10/2003, of 18 January 2003, which also approved its first Bylaws. In 2003, a new Competition Act was also enacted, Law No. 18/2003, of 11 June.

² The monist administrative model is the most common institutional model within the European Competition Network (ECN), according to the ECN Report on “Decision-Making Powers”, of 31 October 2012 (http://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf).

³ The new Bylaws were approved by Decree-Law No. 125/2014, of 18 August 2014 and entered into force in 1 September 2014.

⁴ Law No. 67/2013, of 28 August.

⁵ Information on the Economic Adjustment Programme is available on <http://www.portugal.gov.pt/pt/os-temas/memorandos.aspx>. Within the Economic Adjustment Programme, a reform of the overall Portuguese competition legal and institutional framework was carried out with the aim of strengthening the enforcement of competition law and enhancing the competitiveness of the Portuguese economy. As foreseen in the Economic Adjustment Programme, in 2012 a specialized Court for competition and regulation matters was created, the Competition, Regulation and Supervision Court, and a new Competition Act was enacted, Law No. 19/2012, of 8 May. These two important reforms aimed at improving the speed and effectiveness of the enforcement of competition law. The amendment of the Competition Act also increased legal certainty, strengthened the PCA’s investigation powers and provided for a greater alignment between Portuguese and European Union Law.

applicable to the Portuguese regulatory authorities, including the Sector Regulators (National Regulatory Authorities – “NRAs”) and the PCA.

9. The Framework Law is inspired by the fundamental principles of institutional design of regulatory authorities: independence, rigour and accountability.

10. It specifically aimed at strengthening the role of NRAs and the PCA, and at ensuring their independence, and financial, administrative and management autonomy, including adequate financial and human resources.

11. The new Bylaws of the PCA are structured in line with the Framework Law, as well as with the 2012 Competition Act, and will be described in further detail below.

2. The PCA as a single-purpose authority

12. A clear option was made in Portugal, in 2003 and 2013/2014, for a “single-purpose” (or “separation of responsibilities”) model, under which the powers to enforce and promote competition rules, to defend consumer’s interests as such, and to regulate markets are entrusted to different bodies: the PCA, the Directorate-General for Consumers and NRAs, respectively.

13. The sole task of the PCA is the enforcement and promotion of competition in all areas of economic activity, including those subject to sector regulation.

14. This situation has not been changed by the recent institutional and legal framework reform. The PCA keeps on focusing exclusively on competition matters, maintaining its specialised nature.

15. Indeed, the specialised nature of PCA’s powers has been deepened, since its powers on unfair trading practices were transferred to the Portuguese Economic and Food Safety Authority (ASAE), the authority responsible for ensuring that businesses comply with public health and trade practice norms in 2013⁶.

16. However, the specialization of the PCA and NRAs does not mean that synergies among their actions are not sought and reached, by means of the cooperation mechanisms in place. These cooperation mechanisms aim at ensuring an adequate coordination between the competition and sector regulation policies and enforcement, and were foreseen both in the 2003 and 2012 Competition Acts.

17. Regarding the enforcement of the 2012 Competition Act, specific cooperation mechanisms exist within the scope of prohibited practices proceedings, merger control, and sector inquiries. Moreover, general provisions of cooperation are foreseen in the 2012 Competition Act and in the PCA Bylaws.

18. With regard to antitrust proceedings, in broad terms, NRAs are informed about facts taking place within the regulated sector concerned which are likely to be deemed as prohibited practices, and may issue an opinion on them, as well as on the decision envisaged by the PCA.

19. On the other hand, NRAs shall inform the PCA whenever they make an assessment of issues concerning a possible breach of competition rules. The PCA shall issue an opinion before a final decision is taken by the NRA.

⁶ The transfer of powers from the PCA to ASAE was made by Decree-Law No. 166/2013, of 27th December.

20. Moreover, the PCA may stay its decision to initiate formal proceedings or stay an on-going proceeding for the period considered necessary. This ensures that a better coordination between the action of the PCA and NRAs may be achieved.

21. Since 2004, the PCA has initiated 3 formal antitrust investigations following communications from NRAs and asked for opinions of NRAs in 15 antitrust cases.

22. Likewise, whenever there is a merger in a market subject to economic regulation, the PCA requests the opinion of the NRA concerned before taking a final decision. Opinions of NRAs are not binding to the PCA, except for the case of negative opinions of the media regulatory authority regarding freedom of speech and the expression of differing opinions. Since 2004, the PCA has asked for opinions of NRAs in 152 merger cases.

23. Regarding inquiries or studies in regulated sectors, the PCA also has a legal duty to ask for a non-binding opinion of the relevant NRA before concluding its inquiry or study. The PCA shall inform NRAs about its conclusions on competition constraints in regulated markets and on recommended measures to address those constraints.

24. The PCA has also actively participated in public consultations promoted by NRAs. For instance, in the 1st semester of 2014, the PCA participated in two public consultations, one in the energy market and the other regarding the telecoms market. Moreover, the PCA received 3 requests for opinions by NRAs, in particular in the energy and telecoms markets.

25. Cooperation between the PCA and NRAs has been intense over the years, and has been working quite effectively. Current cooperation mechanisms ensure that authorities with clearly separate missions and powers may work closely together, mutually providing the necessary input to ensure consistent law enforcement, and contributing to greater legal certainty of market players and other stakeholders.

3. Independence and accountability

26. The PCA is, from the outset, an independent entity, acting with a high degree of autonomy. Some guarantees of independence have been, however, enhanced with the approval of the new Bylaws, following the Framework Law for Regulatory Authorities, which contains several requirements of administrative and financial independence for the PCA and NRAs.

27. The Framework Law foresees that the PCA and NRAs have administrative, financial and management autonomy, are organically, functionally and technically independent, and have its own bodies, services, staff and property. It also dictates that the PCA and NRAs have regulatory, regulation, monitoring, supervisory and sanctioning powers.

28. Moreover, the new Framework Law states that the PCA and NRAs are independent in the exercise of their function and are not subject to government supervision, even if it is explicitly stated that each authority is under the responsibility of a given ministry.

29. In line with the new Framework for Regulatory Authorities, also the new Bylaws of the PCA enhance its independence, also providing for further administrative and financial autonomy.

30. In parallel with the strengthening of the guarantees of independence, accountability requirements were also reinforced both in the Framework Law and in the new PCA's Bylaws. The PCA and NRAs are bound to perform their duties according to high standards of quality and economic efficiency. Transparency, accountability and duties to report to the Government were also reinforced.

3.1 Independence

3.1.1 Nature of the PCA

31. The PCA has the nature of an independent administrative entity which is endowed with administrative, financial and management autonomy, as well as with organic, functional and technical independence together with its own property (Article 1 of PCA's Bylaws).

3.1.2 Operational independence

32. The law expressly states that the PCA is independent in the performance of its duties (article 40(1) of the PCA's Bylaws).

33. The previous PCA's Bylaws of 2003 stated that the independence of the PCA in the performance of its duties was "without prejudice to the guidelines on competition policy set out by the Government (...) or to the acts subject to ministerial oversight" (article 4). The need to comply with Government competition guidelines could be perceived as lessening the PCA's independence.

34. This provision has now been removed from the Bylaws, which state instead that the PCA is not subject to governmental supervision and that the Government cannot make recommendations or issue directives to the Board on the priorities to be adopted by the PCA in carrying out its mission (Article 40(1) of the PCA's Bylaws). The law explicitly excludes, therefore, the possibility of external interferences with the PCA's activity.

35. Another sign of the reinforcement of the PCA's autonomy in the performance of its duties is its ability, introduced by the 2012 Competition Act, to determine its own enforcement priorities and to choose the cases it investigates and prosecutes. In fact, one of the main innovations of the 2012 Competition Act (Article 7) was the introduction of a priority-setting mechanism, with the aim of "rationalizing the conditions that determine the opening of investigations, allowing the competition authority to make an assessment of the relevance of the claims", as stated in the Memorandum of Understanding.

36. Therefore, the PCA is now able, in the exercise of its autonomy whilst based on the criterion of the promotion of public interest, to define priorities for its activity, both in terms of competition policy and in the context of its enforcement activity. Concerning the former aspect, the PCA annually defines its priorities of competition policy for the following year. Those priorities are published on the PCA's website. In relation to the latter point, the introduction of the principle of opportunity allows the PCA to determine the degree of priority to be applied to a matter brought to its notice.

37. An appeal to the member of Government responsible for the economy of a prohibition decision of the PCA issued within the scope of merger control is possible under the law (Article 41 of the Bylaws). This extraordinary appeal could be interpreted as weakening the PCA's independence. It is however worth mentioning that the exceptional authorization of the concentration of undertakings, which can be granted by the Council of Ministers following that extraordinary appeal, can only be based on the achievement of fundamental strategic interests of the national economy which specifically outweigh the disadvantages for competition. This means that different kind of assessments are made by the PCA and by the Council of Ministers, with no mutual interference. The Government does not intervene into the PCA's policy or activity, and the latter's autonomy cannot be deemed lessened by means of the extraordinary appeal provided for in the law.

3.1.3 Management and financial autonomy

38. As stated in the Framework Law for Regulatory Authorities and in its Bylaws, the PCA has management and financial independence. It has its own staff, defines its internal organization and manages its budget autonomously.

39. Some decisions concerning, for example, staff recruitment and career management, that were previously dependent on ministerial authorization, are now autonomously taken by the PCA and NRAs⁷.

40. Besides having the legal power to recruit its own staff and define its internal organization, however, it is important that the PCA can effectively obtain sufficient human and financial resources to perform its duties in an efficient manner, as “[t]he attribution of sufficient staff and budget to NCAs is a fundamental precondition for each authority to be able to effectively enforce the (...) competition rules”⁸. As underlined by the IMF, it is particularly important that the PCA may “safeguard adequate human and financial resources being able to attract and retain sufficiently qualified staff”⁹.

41. For that, it is of the utmost importance that the PCA can have at its disposal an appropriate budget.

42. The financing of the PCA is ensured by transfers from NRAs, as well as by fees charged within the scope of the PCA’s specific activity and other types of revenue, such as part of the fines imposed. Transfers from NRAs (which constitute, by far, the most important source of financing, accounting for around 81% since 2004) are now explicitly regulated in the PCA’s new Bylaws (Article 35), which sets a default rate of NRAs’ revenues to be transferred to the PCA, in case the annual ministerial order setting out that rate is not adopted. The new Bylaws thus foresee a range of contributions between 5.5% and 7.0% of the total amount of own revenues of NRAs, with a default rate of 6.25%. The new provisions regarding the transfers of the PCA thus aim at increasing predictability of financing.

43. This model constitutes an original solution to guarantee funding independent from the State budget.

44. However, even if the Bylaws aim at increasing predictability, the PCA’s financing model still raises some challenges. The European Commission recently expressed concerns “regarding the adequacy of the new model in ensuring stability of funding and adequate resources to fulfil the authority’s duties”¹⁰. It notes in particular that “the range and the basis of contributions may not be sufficiently robust to ensure the Authority’s growing needs in the medium term”, as the default contribution rate “is below the range of 6.75% and 8.45% estimated to cover the Authority’s expected costs in the medium term”. It concludes that the decrease of the accrual revenues of other regulators due to a reduction in regulatory fees may justify an

⁷ However, on a temporary basis in the context of the economic downturn, the PCA is subject to rules similar to those applicable to Public Administration in general, namely in the State budget, that impact on its autonomy in the management of human resources.

⁸ European Commission – Commission Staff Working Paper “Enhancing competition by the Member States’ competition authorities: institutional and procedural issues”, Accompanying the document “Communication from the Commission to the European Parliament and the Council “Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives”, p. 7.

⁹ IMF, “Portugal - Eleventh Review under the Extended Arrangement, and Request for Extension of the Arrangement and Waivers of Applicability of End-March Performance Criteria”, April 2014, p. 68.

¹⁰ European Commission – *European Economy, Occasional Papers 202: The Economic Adjustment Programme for Portugal 2011-2014*, October 2014, p. 67.

adjustment of the basis of contributions, which may require further amendments to the Bylaws in order “to ensure the effective functioning of the financing model”.

3.1.4 Guarantees of independence concerning the Board of Directors

45. Some novelties were introduced in the new Bylaws concerning the members of the PCA’s Board of Directors, with the aim of strengthening the guarantees of independence.

46. The PCA’s Board of Directors is a collegial body comprising a chair and up to three members.

47. Board members are now appointed for a non-renewable six years term and, as before, they may be removed only under exceptional circumstances, such as committing a criminal offence (Article 15).

48. As regards the appointment procedure, it now includes a hearing before the Parliament. The Board members are nominated by the Minister of Economy and appointed by the Council of Ministers, following a hearing before the Parliament.

49. Additionally, the Portuguese Agency for the Selection and Recruitment of Senior Administration Officers (CRESAP) must issue an opinion on the suitability of the members’ profile for the duties to be performed, including compliance with the applicable conflict of interest and impediments rules (Article 14).

3.2 Accountability

50. The new PCA’s Bylaws increase the accountability requirements, which is in line with the principle of transparency set forth in the Framework Law for Regulatory Authorities.

3.2.1 Economic and financial accountability

51. Along with the rules on the PCA’s autonomy as regards economic and financial management, rules were created to ensure an adequate degree of accountability on that matter.

52. In this regard, the PCA’s budget, multiyear plan and annual management report and accounts are subject to the approval of the members of Government responsible for finance and the economy. That approval may, however, only be withheld by a decision based on illegality or on damage to the aims of the PCA or to the public interest and a tacit approval is now possible (Article 40).

53. Also, the acceptance by the PCA of donations, legacies or bequests and the acquisition or disposal of real state require prior authorization by the members of the Government responsible for finance and the economy.

3.2.2 Transparency

54. The new PCA Bylaws require the approval or amendment by the PCA of Regulations with external binding effect to be submitted to public consultation, involving Government, businesses, other relevant stakeholders, user or consumer associations, and the general public (Article 7).

55. The new Bylaws also contain detailed publicity requirements, as stated by the Framework Law for Regulatory Bodies. The extensive list of information to be publicised at the PCA’s website includes legislation governing its activity, regulations, guidelines, recommendations and codes of conduct, the PCA’s competition policy priorities, its activity plans, activity reports and multiyear plans, budgets and management reports and accounts, information regarding the PCA’s supervision and sanctioning activity,

co-operation protocols or agreements and tenders for recruitment of staff. The PCA's website also provides information on the members of the Board, their biographical elements and remuneration, as well as on the staff, remuneration scale and career system (Article 46).

3.2.3 *Scrutiny*

56. The PCA annually submits to the relevant committee of the Parliament its plan of activities, programming and multiyear plan (Article 42(1) of the Bylaws).

57. The members of the Board appear before the relevant Parliament committee to provide information or clarification on the PCA's activities or on matters of competition policy, whenever requested (Article 42(3) of the Bylaws).

58. The member of the Government responsible for the economy may request information to the Board on the implementation of the PCA's annual and multiyear activity plans and on its budgets and multiyear plans (Article 42(4) of the Bylaws).

3.2.4 *Incompatibilities and impediments for members of the Board of Directors*

59. The new PCA's Bylaws contain several rules concerning incompatibilities and impediments for the members of the Board, enhancing the transparency of their activity and providing for strengthened guarantees of independence (Article 17).

60. The members of the Board perform their duties on the basis of exclusivity. In addition, they are not allowed, in the two years following the end of their term, to establish any contractual link or relationship (except as a customer) with companies involved in proceedings during the time in which they performed their duties.

4. **Concluding remarks**

61. Since 2003, competition law enforcement is entrusted to the PCA, as the single administrative authority with the mission of promoting and protecting competition.

62. The new PCA's Bylaws of 2014 have not changed the institutional model in Portugal for competition enforcement.

63. The PCA is also a single-purpose authority, dealing solely with competition law and policy. In Portugal, there is a clear separation of responsibilities, between the PCA, NRAs and the Directorate-General for Consumers, each dealing with different matters.

64. However, the specialized nature of the different public authorities does not mean that synergies among their actions are not ensured. Cooperation mechanisms between the PCA and NRAs are foreseen in the law, and the current practice of the PCA shows the intensity of their use.

65. Even if no fundamental institutional changes were introduced in the 2014 PCA's Bylaws, guarantees of independence, and autonomy of the management of financial and human resources were enhanced, following the Framework Law on Regulatory Authorities. These changes are yet too recent to allow for an assessment of their application in practice.