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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by Portugal --

15-17 June 2016

This document reproduces a written contribution from Portugal submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm*

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PORTUGAL

1. The power to adopt commitment decisions under the Portuguese Competition Act

1. Since July 2012, with the entry into force of the new Competition Act¹, the Portuguese Competition Authority (PCA) explicitly has the power to adopt commitment decisions to close its antitrust investigations. Before this, the PCA had, on occasion, already terminated proceedings upon the adoption of certain remedies by the parties (“informal commitments”). However, this practice lacked the transparency, the legal certainty, and the punitive means in case of non-compliance that the new powers bring.

2. The PCA can adopt a commitment decision when it concludes that the remedies offered by the parties involved are adequate to eliminate the competition concerns identified². In practice, the PCA assesses, on a case by case basis, the benefits of an earlier elimination of competition concerns against the benefits of an infringement decision.

3. Although the PCA has the power to adopt a commitment decision after the issuance of a statement of objections³, it has never used it to date. The benefits of such commitment decision may be harder to demonstrate, in particular with regard to procedural efficiencies.

4. Generally, after a preliminary assessment, the PCA will communicate its concerns to the parties involved⁴ who may, on a voluntary basis, submit commitments. The decision to initiate commitment negotiations, either *ex officio* or following a request by the parties involved, belongs to the PCA, but either the PCA or the parties involved can stop these discussions⁵. In such case, the PCA will resume its investigation⁶.

5. When commitments are submitted, the PCA proceeds to market test them, giving third parties an opportunity to submit observations⁷. Based on the results of this market test, further discussions with the parties might be needed.

6. When the PCA concludes that the proposed commitments address the identified competition concerns, it will adopt a decision that renders those commitments legally binding on the parties and terminates the proceedings⁸.

7. Within two years from the adoption of the commitment decision, the PCA can reopen proceedings in case: (i) there has been a material change in any of the facts (upon which the decision

¹ Law No. 1972012, of 8 May 2012.

² Article 23 (1) of the Portuguese Competition Act.

³ Articles 28 and 29 (3) *c*) of the Competition Act.

⁴ Article 23 (2) of the Competition Act.

⁵ Article 23 (3) of the Competition Act.

⁶ *Idem*

⁷ Article 23(4) of the Competition Act.

⁸ Article 23 (6) of the Competition Act.

was taken); (ii) the parties do not comply with the commitments; and (iii) the decision was based on incomplete, incorrect or misleading information provided by the parties⁹.

8. The PCA has also the power to impose a fine up to 10% of the companies' turnover, where the parties act contrary to the commitments¹⁰. This sanction is however only possible where the commitment decision was adopted after the issuance of a statement of objections, which restricts considerably its practical effect.

2. The PCA's experience in commitment decisions

9. Since 2012, the PCA has adopted five commitment decisions in the media (1) and motor vehicles (4) sectors. In May 2016, the PCA has closed a public consultation on remedies submitted in the grocery retail sector.

10. Thus far, the PCA has adopted commitment decisions in vertical restraints and abuse of dominance cases. In its guidelines, the PCA has stated that a cartel case is not suitable for a commitment decision¹¹.

11. Commitments accepted so far have been behavioural, which may be due to the type of competition concerns identified and the adequate way of addressing them. The PCA can also accept structural remedies, if it finds them appropriate.

12. In a case concerning the acquisition of football broadcasting rights, where all premier and second league football clubs were selling individually their rights, under exclusive terms, to the same company - Controlinvest group -, the PCA considered there was a risk of market foreclosure. Controlinvest group committed to grant football clubs (i) a right to terminate their contracts without any penalty and (ii) a right to opt-out from a suspension mechanism that had the effect of prolonging the duration of their agreement. Controlinvest group also undertook (iii) to waive its right of first refusal in relation to future contracts. Lastly, Controlinvest group committed (iv) not to include exclusive clauses longer than three years, nor any other measure, such as a first refusal right or a suspension mechanism, that could extend the duration of the contract beyond the three years limit¹².

13. In several cases related to motor vehicles distribution¹³, the PCA had concerns that the manufacturer's warranty *vis-à-vis* the buyer was made conditional on the buyer having repair and maintenance work (not covered by the warranty) carried out only within the authorised repair network. Car manufacturers including Peugeot, Ford, Fiat and Volkswagen/Audi/Skoda committed to change contracts and any other official documents sent to customers, making clear that they would not lose their warranty rights if they decided to take their cars to independent repair shops.

14. In an on-going groceries retail case¹⁴, the PCA had concerns the franchisor was *de facto* establishing the resale price of its franchisees. The franchisor - DIA Portugal - offered the commitment to send a "circular letter" to its franchisees making clear that it only recommends resale

⁹ Article 23 (7) of the Competition Act.

¹⁰ Article 68 (1) c) of the Competition Act.

¹¹ PCA's Guidelines on the proceedings concerning articles 9, 11 and 12 of the Competition Act, footnote 149, available on www.concorrenca.pt.

¹² Case no. PRC/2013/2 – Liga. The decision is available on www.concorrenca.pt.

¹³ Case no. PRC/2013/5 – Peugeot; case no. PRC/2015/1 – Ford; case n. PRC/2015/2 – Fiat; case n. 2015/5 – SIVA (Volkswagen group's representative in Portugal). All decisions are available on www.concorrenca.pt.

¹⁴ Case no. PRC/2014/3 – DIA. V. Press Release 7/2016 "DIA Portugal offers commitments to the PCA" available on www.concorrenca.pt.

prices or determines maximum resale prices and that franchisees are free to set lower prices. The Franchisor also offered the commitment not to include in future contracts any clause that would limit the autonomy of the franchisee to set its own resale price, except for the possibility of the Franchisor to set a maximum resale price or to recommend a resale price.

15. All these remedies were market tested. Once commitments are submitted by the investigated party, the PCA publishes a summary of the case and of the proposed commitments, in order to give third parties an opportunity to submit observations within a fixed time limit of no less than 20 working days.

16. Upon request, third parties can also have access to a non-confidential version of the file, before submitting their observations. The law does not restrict the notion of third party to any specific group. Any legal person, be it a competitor, supplier, distributor, customer or even an employee can submit observations within the time frame. The PCA is not obliged to take into consideration observations submitted after the deadline.

17. Where the practices under scrutiny take place in regulated markets, the PCA will send to the relevant sector regulator a draft of the commitment decision for comments. The opinion of the sector regulator is, however, not binding on the PCA.

18. A complainant will also have the opportunity to submit observations on the draft commitment decision, irrespective of its participation in the market test.

19. As regards monitoring compliance with the commitments, the PCA has included in its decision obligations to submit evidence that commitments are being implemented. Monitoring has been relatively straightforward thus far. The PCA takes into consideration the monitoring costs when it accepts behavioural remedies. To date, monitoring implied the review of new and reformed contracts, as well as the letters sent to the counterparties and customers explaining the new conduct on the market. So far, there has not been a case of breach of binding commitments.

3. Judicial reviews of commitment decisions and interplay with private enforcement

20. The Portuguese Competition Act states, as a general rule, that commitment decisions are not subject to judicial review, except for commitment decisions issued by the PCA in proceedings initiated following a complaint, under Articles 84(2)¹⁵ and 24 (5) of the Portuguese Competition Act. To date, no judicial appeals of commitment decisions have been filed.

21. To the PCA's knowledge, there has not been any follow-on damages actions based on commitment decisions, which may be explained by the fact that these decisions do not find an infringement and tend to be brief on the description of the facts.

4. Concluding remarks

22. From its experience, the PCA can already single out a few successes and challenges when adopting commitment decisions.

23. The duration of commitment procedures is indeed shorter than that of infringement decisions.

24. Moreover, the public consultations on commitments bring more visibility to the PCA's work and have resulted in an increase of complaints (although not all substantiated) regarding the provision of products and services related to those under scrutiny.

¹⁵ Article 84(2) explicitly states that no appeal is possible against filing decisions, with or without remedies.

25. On the impact of commitments decisions on deterrence, the PCA has had a positive experience in the motor vehicles cases. When the first commitment decisions became public, Seat - a car manufacturer that was also under investigation - immediately proceeded to change its contracts and alert both customers and its authorised repairers that its warranty was not conditional to having repairs and maintenance work done within its authorised repair network. The PCA closed the investigation into Seat conduct with no need to impose commitments¹⁶. Other car manufacturers voluntarily changed their behaviour and the PCA did not open proceedings against them.

26. A challenge faced by the PCA is the low turnout in market tests. Although the announcements of the public consultations have had significant coverage in the press, the PCA has not received many observations from third parties, which may also be explained by the straightforward nature of cases dealt so far.

27. The PCA's overall experience with the commitment procedure has been positive, as it has allowed the PCA to address concerns swiftly and with a quicker and efficient impact on the market, bringing immediate results in the benefit of consumers.

¹⁶ Case no. PRC/2015/3. The decision is available on www.concorrencia.pt.