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**LATIN AMERICAN COMPETITION FORUM**

**Session III - Advocacy: Mainstreaming competition policy into the overall economic policy and government actions in Latin American and the Caribbean**

**-- Contribution from Portugal --**

**16-17 September 2014, Montevideo, Uruguay**

*The attached document from Portugal is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 16-17 September 2014 in Uruguay.*

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# LATIN AMERICAN COMPETITION FORUM



16-17 September 2014 • Montevideo • Uruguay

## Session III - Advocacy: Mainstreaming competition policy into the overall economic policy and government actions in Latin American and the Caribbean

### -- CONTRIBUTION FROM PORTUGAL --

#### 1. The role of competition advocacy in the Portuguese Competition Act

1. In accordance with the Statute of the Portuguese Competition Authority (hereinafter, PCA), approved by Decree-Law no. 10/2003, of January 18, the PCA is responsible for promoting the adoption of practices that promote competition and for the dissemination of a competition culture among economic agents and the public at large, as well as tasked with contributing to the improvement of the Portuguese legal system in all areas that may affect free competition, on its own initiative or as requested by the Portuguese Government.

2. In pursuance of its legally set goals, the PCA has the power to issue recommendations. This is an instrument that has been used since the creation of the PCA, in areas such as pharmacies, rules on the opening of petrol stations, public tenders in the telecommunications sector, among others.<sup>1</sup>

3. The new Portuguese Competition Act of 2012 (Law no. 19/2012, of May 8) grants the PCA power to conduct market studies and enquiries on economic sectors and categories of agreements that are deemed necessary to ascertain circumstances that provide indications of distortions or restraints of competition, following which the PCA may address the Government or other entities recommendations regarding behavioural or structural measures that are appropriate to re-establish or ensure competition on the market at issue.

4. The PCA has established as one of its priorities for the year 2014, the development of internal capacities for the implementation of a Competition Impact Assessment program to perform an *ex-ante* and *ex-post* evaluation of Portuguese public policies.<sup>2</sup>

<sup>1</sup> Recommendations issued by the PCA are available on its website in Portuguese: [http://www.concorrenca.pt/vPT/Estudos\\_e\\_Publicacoes/Recomendacoes\\_e\\_Pareceres/Paginas/Recomendacoes-e-Pareceres.aspx](http://www.concorrenca.pt/vPT/Estudos_e_Publicacoes/Recomendacoes_e_Pareceres/Paginas/Recomendacoes-e-Pareceres.aspx).

<sup>2</sup> See [http://www.concorrenca.pt/vPT/A\\_AdC/Instrumentos\\_de\\_gestao/Prioridades/Documents/AdC\\_Prioridades\\_2014.pdf](http://www.concorrenca.pt/vPT/A_AdC/Instrumentos_de_gestao/Prioridades/Documents/AdC_Prioridades_2014.pdf).

5. Within the context of a recent reorganization of its internal structure, the PCA has created a Special Unit for Competition Assessment of Public Policies.

6. This Special Unit is entrusted with the mission of implementing a competition impact assessment procedure of public legislative and regulatory activities, within the PCA, thus contributing to a more pro-competitive approach to market regulation.

7. With the creation of this Special Unit, the PCA recognizes that its role in Competition Policy is not limited to enforcement but also involves competition advocacy and the promotion of more efficient practices in the markets and in the regulation of those markets.

8. In the internal structure of the PCA, the following responsibilities were assigned to the Special Unit:

- To promote the competition impact assessment of public policies;
- To follow legislative initiatives of the Parliament or the Government with an impact on competition;
- To address recommendations to the Government, sector regulatory authorities and other public entities on measures with an impact on competition;
- To contribute to the diffusion of a culture of continuous competitive impact assessment of public policies;
- To establish relations with national and international institutions under the topic of competition impact assessment.

9. The PCA intends to conduct a number of initiatives that will contribute to the creation of competition impact assessment capacities within the authority and to raise public and private awareness of the benefits of a pro-competitive public intervention on markets.

10. Considering the expected positive impact on efficiency and the competitiveness of the Portuguese economy of pro-competitive regulation, the PCA wants to turn this initiative into a national project involving governmental institutions at all levels (central, regional and local) as well as sector regulators.

11. In order to attain the described objectives we have defined a plan consisting of the following stages to be implemented in parallel:

- **Policy formulation:** this will encompass:
  - a. Drafting Competition Assessment Guidelines, drawing on the OECD Toolkit and on the experience of other EU competition authorities as well as the experience reflected in the ongoing work at the ICN Advocacy Group.
  - b. Internal capacity building at the PCA with the setting up of the internal unit for competition assessment.
- **Advocacy:** establishing the basis for communicating effectively with stakeholders:
  - a. Institutional: promoting awareness of competition assessment as part of a more efficient regulation and as a means of enhancing public policies impact on economic efficiency, which may also involve capacity building on competition assessment in Government and Parliament as well as other specific public institutions, such as sector regulators.

- b.Private stakeholders: involving business associations and consumer organizations to promote awareness of competition assessment and develop partnerships in identifying possible areas of interest for analysis/intervention;
- c.Internal: building on the knowledge of different sectors in the context of antitrust and merger enforcement and creating internal communication channels to identify possible areas of intervention.
- d.Submitting draft guidelines to public consultation, so as to raise awareness in public opinion and to obtain input from relevant stakeholders.
- **Intervention:** at this stage, intervention will focus on the development of institutional capabilities for competition assessment both in knowledge, skills and human resources; this will be achieved through:
  - a.Intervention in specific instances: a small number of appropriate cases will be selected to illustrate the use of competition assessment in the Portuguese context, taking into account the likely impact on competitive conditions;
  - b.Ex post intervention by conducting competition assessment analysis of the regulatory framework in two selected sectors.

Both these stages will be instrumental in the development of guidelines and the formation of the internal unit, providing hands-on experience for testing and demonstrating the advantages of the competitive assessment procedure

- **Strategic Planning:** the development of the project will form a team with substantial experience in competition assessment that will be able to continue carrying out these functions on an on-going basis, conducting competition impact assessment on both existing legislation and draft legislation.

## 2. Recent advocacy initiatives

12. In pursuance of its plan, the PCA has recently concluded some analyses that may illustrate the benefits of competition impact assessment, and that may also be of interest to other countries considering the adoption or development of similar plans or strategies.

### 2.1 *Waste management privatization*

13. The Portuguese Government is currently in the process of privatizing the state-owned waste management company, EGF - *Empresa Geral do Fomento, S.A.*<sup>3</sup>, which is *Águas de Portugal*<sup>4</sup> Group's sub-holding company responsible for guaranteeing the treatment and recovery of waste.

14. The EGF waste treatment and recovery systems are carried out by 11 concessionary companies created in partnership with the Municipalities. These companies process around 3.7 million tons of municipal solid waste (MSW) a year, serving about 60% of the Portuguese population living in 174 Municipalities.

15. Within the context of the privatization process, the Portuguese Government implemented changes to the legal framework under which the subsidiaries of EGF operate. These subsidiaries hold public

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<sup>3</sup> <http://www.egf.pt/?lang=en>

<sup>4</sup> <http://www.adp.pt/>

concessions for waste management of multimunicipal systems and each operates in a given geographical area. As each subsidiary has an exclusive right within the area of its concession, there is no geographical overlap of their activities.

16. Before the new legislative proposals were adopted by the Portuguese Government, the Ministry for the Economy requested the PCA's advice on the draft bills regarding the overall legal framework, as well as each of the 11 decree-laws governing each public concession contract.

17. In the context of this *ex ante* competition impact assessment, the PCA's opinion addressed the following main issues:

- **Modalities of privatization:** the PCA noted that there were other alternatives to the privatization of the holding company EGF together with its 11 subsidiaries, such as the structural separation of the subsidiaries in different regions, thus enhancing competition for the market. This possibility would require the termination of current concession contracts and a possible loss of economic value, with costs that should be weighed against the benefits of greater competition in future tenders when the concessions contracts expire (at which point each regional player, arising from the breakup of EGF, would not be able to compete for other concessions) and of providing a regulatory benchmark. Although the Government's advisors acknowledged the importance of the PCA's remarks, the option for the privatization of EGF as a single entity was maintained on the grounds that it safeguarded the best financial interests of the Portuguese State.
- **Extending the activities of the public concession subsidiaries to neighbouring and complementary markets:** Under the draft legislation, the extension to non-exclusive activities outside the scope of the concession would require governmental authorization following a non-binding opinion by the sector regulator and by the PCA. The PCA recommended that the legal framework ensured a level-playing field vis-à-vis other competitors in those neighbouring markets by requiring evidence that such complementary activities are economically self-sustained, thus preventing cross-subsidization and other exclusionary practices. This recommendation was reflected in the final version of the legislation in question.
- **Duration of the concession contract:** The draft legislation would set the duration of the concession contract at 20 years, with the possibility of extensions, in specific circumstances, to a maximum of 50 years. According to the PCA, given that these are activities subject to an exclusive right, the best way to ensure the benefits of competition is to limit the duration of such rights so that there may be competition for the market at closer intervals i.e., as frequently as possible, given the need to recoup investments, where the concessionaire has an obligation to invest. In other words, the duration of such exclusive rights has to be balanced by taking into account the time necessary to recoup the investments in normal profitability conditions. Since the PCA did not have access to the envisaged investment plans, it could not assess whether the 20-year period was necessary. The final version of the legislation at issue maintained the 20-year period, whilst recognizing that this was a decision that considered the timeframe for the recoupment of investments by the concessionaires.

18. In sum, the PCA's recommendations in its advisory opinion were given adequate weight in the final version of the legislation at issue. Moreover, it consolidated the PCA's new power to issue non-binding opinions before undertakings holding a public concession contract for a multimunicipal waste management system can enter a neighbouring market.

19. It should be noted that this is without prejudice to the ability of the PCA to intervene in the privatization process under its merger control powers.

## **2.2 Public contracts and equality of opportunities**

20. The PCA has also been active in assessing the competitive impact of tendering procedures for public contracts. Two recent initiatives deserve special mention.

21. The first follows a recommendation issued by the PCA in 2004, regarding the provision of telecommunication services. With the recent trend of telecom operators to integrate fixed and mobile communications, notably to residential consumers (triple and quadruple play), the public agency in charge of centralized public purchases intended to create a single contract for a set of fixed and mobile services.

22. In the PCA's view, given the higher concentration of integrated operators in Portugal (three operators) and the need to foster competition in the fixed communications business, that represents a larger portion of services purchased by public entities, operators should be required to submit separate bids for each segment.

23. The second case is one where a public purchasing entity chose to use a pre-qualification procedure, in conformity with the Portuguese law, and then imposed a requirement of curricular experience that may favour the incumbent supplier.

24. The PCA is currently in the process of drafting a recommendation based on a competition impact assessment of the imposition of such extra requirement and of its adequacy, necessity and proportionality given the public goal being pursued.

## **2.3 The third sector (cooperatives and other social sector entities) and COMPETITION POLICY**

25. The Portuguese Constitution acknowledges and protects three sectors of economic activity: the private sector, the public sector, and the third sector, encompassing cooperatives, mutual societies and other similar non-profit organizations.

26. Under EU and Portuguese competition law principles, "the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".<sup>5</sup> Thus, even non-profit entities are subject to competition rules, provided they are engaged in an economic activity.

27. The case law of the European Court of Justice in the field of social security distinguishes between economic schemes and schemes based on the principle of solidarity.<sup>6</sup>

28. In recent years, with the decline in state funding for third sector entities, some of these entities have entered or are considering entry into areas where there is already a well-established market.

29. The PCA is currently assessing two cases involving funeral services and veterinary services, where the entry of third sector entities raises concerns as to the extent to which they should be exempted from some or all the rules applying to private sector undertakings and how to distinguish between activities that meet the requirements of the solidarity principle and market-based activities.

30. This is a new domain that will require a careful appraisal of competitive issues but also of the social values at stake.

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<sup>5</sup> Judgment of the European Court of Justice in case C-41/90, Höfner e Elser c. Macroton GmbH, ECR 1991, I-1979, paragraph 21.

<sup>6</sup> For a summary of the case law, see Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, p. 4, paragraphs 17-20.