



**COMPETITION COMMITTEE**

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS  
IN PORTUGAL**

**2003**

## Executive summary

### I. Changes to competition laws and policies, proposed or adopted

#### *New Competition Law: Law 18/2003 of 11 June -*

1. The most significant event of the year 2003 was the coming into force of the new legal framework for competition. Such a need was increasingly apparent for a real culture of competition to take root in Portugal, that is, the kind of competition culture that is essential for the modernisation and competitiveness of national economic life to advance.

2. The institutional aspects of this reform were covered by Decree-Law 10/2003 of 18 January, which created the Competition Authority and approved its statutes. Thus the existence of an independent authority was assured, with the intent of guaranteeing the economic operators' compliance with the competition rules. This gave a great impetus to the effective creation of a competition culture in Portugal.

3. For their part, the substantive and procedural aspects are laid down in the Legal Framework for Competition, approved by Law 18/2003 of 11 June, which replaced the earlier arrangements set forth in Decree-Law 371/93 of 29 October.

#### A. *Anticompetitive Practices – cartels, abuse of market power*

4. With regard to anti-competitive practices, this new legislation has introduced amendments to their classification and the penalty framework. With reference to the classification, there have been amendments to the terms of the prohibition of collusive practices (whether agreements, concerted practices between companies or decisions of associations of undertakings) and to the definition of the illegality of economic power abuses.

5. Concerning collusive practices, Law 18/2003 now demands as a requirement for prohibition that their adoption results in the *appreciable affection of competition*. It thus allows so-called “cases of lesser importance” to be disregarded, in the wake of the interpretation adopted by the European Commission and the Court of Justice in relation to Article 81 of the EC Treaty (the *de minimis* rule). With regard to collusive practices it is also to be stressed that a positive economic balance, as the grounds for excluding the illegality of such practices, is considered on a case by case basis. It should be stressed, furthermore, that automatic justification is now being sanctioned for agreements between undertakings that, although having no effect on trade between Member States, fulfil the other requirements for the application of EU regulations on block exemption of agreements.

6. On the issue of the abuse of a dominant position, the new law eliminates the presumption of a dominant position which the earlier law contained and introduced a principle expressly identifying the abuse of a dominant position as the refusal to provide, against appropriate payment, access to a network or other essential infrastructure, in the case that the conditions defined there exist.

7. In relation to the abuse of economic dependency – the other form of abusing economic power provided for in the competition legislation – Law 18/2003 specifically set forth that this only constitutes an anti-competitive practice if it has an effect on the functioning of the market or the structure of competition. It was also explicit about the concept of the “lack of an equivalent alternative”, as a basic element in determining if a state of “economic dependency” exists.

8. In the framework of sanctions for anti-competitive practices, there were significant changes. The amount of a fine is now set as a percentage of the annual turnover of the undertakings involved, with provision also being made for the possible application of periodic penalty payments.

9. From the procedural point of view, Law 18/2003 also introduced important modifications to the legal framework in force, notably clarification of the conditions for the application of EU competition rules by the Competition Authority. In effect, the above law states that the rules it contains on violations of national competition rules are equally applicable, with the necessary adaptations, to cases for infringement of Articles 81 and 82 of EC Treaty.

10. Furthermore, with regard to the processing of administrative offence cases for anti-competitive practices, the inquiry and case-preparation phases were specifically made independent, with greater clarification of the rights and duties attached to those questioned and the defendants, in each phase.

#### B. *Merger Control*

11. As regards merger control, the New Competition Law introduces several changes to the previous legal regime - including a Notification Form to be completed by the notifying parties - which may be divided into substantive and procedural rules.

12. Furthermore, the new legal framework also modifies the decision making procedure, taking into account that only one administrative body – the Portuguese Competition Authority (PCA) - will be involved in the decision making.

#### Decision making

13. Under the previous Competition Law the competent body to conduct the appropriate proceedings of merger control was the *Direcção Geral do Comércio e Concorrência* (hence “DGCC”). Should such proceedings reveal a likely negative effect on competition, then the Competition Council (*Conselho da Concorrência*) would issue an opinion. In all cases, the final decision would be taken by the Minister responsible for competition policy (under the economic affairs).

14. On the other hand, the Statutes of the PCA, approved by Decree-Law 10/2003, provides that the Council of the Competition Authority (the Council) is the sole body competent to take decisions under the merger control rules provided under the New Competition Law.

15. In exceptional cases, when “the fundamental interests of the national economy” are deemed to be at stake, merger prohibition decisions adopted by the PCA may be appealed to the Minister responsible for trade and economic affairs. This extraordinary appeal has not been used yet.

#### Substantive rules

16. Substantive changes have also been introduced by the new legal framework, although the legal test for merger control was not altered and an operation may only be prohibited should it “*create or strengthen a dominant position which may result in significant barriers to effective competition in the Portuguese market or in a substantial part of it*”.

##### (i) Concept of a Merger

17. The New Competition Law (Article 8) has extended the application of merger control rules and the concept of a merger to financial institutions as well as to insurance companies – sectors previously specifically excluded from competition law merger control, but then subject to mere prudential analysis undertaken by the Bank of Portugal and Portuguese Insurance Institute, respectively.

18. The concept of a merger set out under the New Competition Law does, however, still provide for specific rules for operations whereby credit institutions acquire more than 25% of shares in a non-financial

company to be sold within a three year period – in such cases such operations are not deemed to fall within the concept of a merger.

(ii) Prior-notification obligation

19. Modifications have also been introduced as regards the obligation to notify merger transaction changes, namely a change in the thresholds for notification, and when the notification should be made.

Thresholds for notification

20. The New Competition Law (Art. 9) continues to provide two alternative thresholds that trigger an obligation to notify merger operations. These are:

- a market share threshold - the creation or strengthening of a 30% market share, and
- an aggregate turnover in Portugal by the participating undertakings that exceeds 150 million euros (net of taxes).

21. However, a further hurdle to the aggregate turnover threshold has been added, so that to comply with this threshold at least two of the participating undertakings must have had a turnover in the previous financial year above two million euros. In practice, this has resulted in certain merger operations involving a large undertaking - that does not need to comply with the market share threshold - acquiring an insignificant undertaking not covered by the notification requirement.

The moment of notification

22. The time allowed for notification is now within a seven day period following the conclusion of the merger agreement, the announcement of the public bid, or the acquisition of a controlling interest. Under the previous merger control rules such a notification would have had to be filed before any such agreements were made, which resulted in practical difficulties in many cases.

(iii) Appraisal of merger operations

23. The New Competition Law no longer provides that notified mergers may be cleared solely on the basis of the “*significant enhancement of the international competitiveness of the participating undertakings in the concentration operation*” (Article 10 (2) of the previous Competition Law).

24. This enhancement of international competitiveness is now included as one of the criteria for appraising such operations that the PCA must take into account when proceeding to the merger analysis. So far, this criterion has not been argued in any cases analysed.

25. As mentioned above, the only test that the Competition Authority must undertake under the New Competition Law is to evaluate whether the operation leads to the creation or strengthening of a dominant position, which may result in significant barriers to effective competition in the national market or a substantial part thereof.

## Procedural changes -

26. Firstly, it should be noted that the new procedure for the appraisal of mergers is divided into two phases, the first phase named the “evidence-taking” phase (“instrução”), and the second the “in-depth investigation” phase (“investigação aprofundada”). The second phase shall only be initiated should the Council conclude that the case involves the creation or strengthening of a dominant position that may result in significant barriers to effective competition in the national market or a substantial part thereof.

27. Decisions in both phases are always taken by the Council. This is clearly different from the previous scenario where both phases were accompanied by different bodies (first the DGCC and then the Competition Council by request of the Minister in charge of competition policy).

28. Furthermore, under the previous Competition Law, the first phase could be longer than the second, which is the opposite of what is now set out in the new legal framework.

## Possible decisions

29. As regards the possible decisions that may be taken under the New Competition Law, a few significant changes have been introduced. As mentioned above, the new legal framework provides that the Council must take all decisions regarding merger control, selecting one of the following options:

- During the *evidence-taking phase* (“Phase I”): (i) a decision stating that the operation is not subject to the prior notification obligation, (ii) a decision giving clearance to the merger (possibly subject to conditions or obligations), or (iii) a decision to proceed to the in-depth investigation phase:
- During the *in-depth investigation phase* (“Phase II”): (i) a decision giving clearance (possibly subject to conditions or obligations) or (ii) a veto.

30. In short, during Phase I of the procedure there are no vetoes. Such a decision may only be taken to conclude a Phase II investigation.

## Procedural time limits

31. As regards the procedural deadlines, these have been significantly revamped by the New Competition Law.

32. Thus, the new rules state that Phase I must not exceed a 30 day time-limit (Art. 34) (and not 50 days as set out in the previous legal framework) from the day the notification is considered complete. This 30 day time-limit may be suspended should the PCA consider it necessary to request additional information from the notifying parties –information requests to third parties do not suspend this 30 day period.

33. Phase II, on the other hand, provides for a maximum of 90 days (and not 45 days as set out in the previous legal framework), from the day of the decision taken by the Council to proceed to the Phase II investigation. The same rules on the suspension of time limits apply.

34. The time limits referred to under the New Competition Law all refer to working days, and are thus suspended on Saturdays, Sundays and national holidays.

## Public Disclosure

35. Another change of considerable importance, given the effect on the possibility of third parties participating actively in the decision making process, is set out in Art. 33 of the New Competition Law.

36. This article provides that the Competition Authority must publish a summary of all the essential elements of a complete notification in two national newspapers within 5 working days. The information thus published must be sufficient to allow third parties to submit observations, within a time frame that must be set out in the publication and may not be less than 10 working days.

#### Ex-officio procedures

37. The New Competition Law also establishes a significant innovation as it empowers the Competition Authority (Art. 40) to initiate proceedings *ex-officio* when it has obtained information that a notifiable concentration operation has not been duly notified.

#### Penalties

38. As regards the application of penalties for infringements of merger control rules, on the one hand, these have been significantly increased and now have a direct correlation with the turnover of the relevant undertakings, whilst, on the other hand, a new penalty is now provided - periodic penalty payments.

39. This periodic penalty payment, of up to 5% of the average daily turnover in the last year, for each day of delay, is calculated from the date of a decision declaring:

- non-compliance with a decision of the Authority imposing a penalty or ordering the application of certain measures;
- failure to notify a concentration subject to prior notification according to Art. 9 of the new law; and
- failure to supply information or the supply of misleading information in the prior notification of a concentration. It is intended to coerce the obligor into executing the main order.

#### Appeals

40. As regards the decisions of the Competition Authority taken under the merger control rules, the New Competition Law provides that the competent court to review such decisions is now the Lisbon Commercial Court (“Tribunal de Comércio de Lisboa”), and no longer the Administrative Supreme Court.

41. The review decisions taken by the Lisbon Commercial Court may be appealed to the Lisbon Appeals Court (“Tribunal da Relação de Lisboa”) – and then to the Supreme Court of Justice (“Supremo Tribunal de Justiça”), in this latter case appeals only being permitted with regard to matters of law.

42. Therefore, whilst on the one hand a three level juridical review is provided for the decisions of the Competition Authority, on the other the exclusive jurisdiction of the administrative courts no longer exists.

#### C) *Other issues*

43. The coming into force of the new competition framework raised various questions that needed to be investigated. They were connected, on the one hand, with the framework’s application from a temporal perspective (which prompted an analysis of the issue of how one law would succeed the other in time, a especially relevant matter given the lack of transitional provisions) and, on the other, with the interpretation of various new provisions.

## II. Enforcement of competition laws and policies

### I. *Anticompetitive practices cases*

44. With respect to **anticompetitive** practices, decisions are still pending in 3 cases which were brought under Decree-Law 371/93 of 29 October and were forwarded from the DGCC (Directorate General for Trade and Competition).

45. In pursuance of Law 18/2003, 7 inquiries were opened in 2003 and 15 in the first half of 2004. Among the cases pending, 2 concern concerted practices, 4 prohibited agreements, 2 decisions by associations of undertakings, 16 abuses of a dominant position and 1 abuse of economic dependency and a dominant position.

46. The cases relating to concerted practices involve the markets covering medical diagnosis methods and flour-milling. The cases relating to prohibited agreements involve the markets covering up-market cosmetics and perfumes, cold drinks, pay-tv and liquid fuels. Those relating to decisions by associations of undertakings involve the markets covering port services provided by the Navigation Agents and air ticket sales services provided by travel agents.

47. The cases relating to the abuse of a dominant position involve markets covering the generalist daily press, pay-tv (or cable television), broadband ADSL Internet access services, the leasing of electronic communications circuits, access to the basic electronic communications network, the publishing of telephone directories and other telephone information services, mains gas distribution services, payment cards, international road passenger transport and, finally, the retail market for fixed telephone services.

48. The case brought for alleged abuse of economic dependency and a dominant position concerns the consumables market for haemodialysis.

49. Among the cases pending, 5 were communicated to the ECN (European Competition Network), as they involved practices that may affect trade between Member States, thus provoking application of Articles 81 or 82 of the EC **Treaty**. The cases concern the markets for liquid fuels, air ticket sales services by travel agencies, pay-tv services, broadband ADSL Internet services and the retail market for fixed telephone services.

#### Prior control

50. Under Article 5 (2) of Law 18/2003 and Ministerial Order 1097/93 of 29 October, decisions were delivered on 5 prior control cases, involving the markets for electrical material, petroleum products, beer and cold drink distribution and marketing, and liquid fuels.

#### Non –notified Mergers

51. Decisions were handed down in 3 cases of non-notified mergers and acquisitions, identified in the markets covering cement and concrete, information and consultancy systems in the technological areas of management and organization, and the operation of public road-passenger routes. In all the cases, despite the sanctions for non-notification of the mergers and acquisitions in question, under Article 43 (3) a) of Law 18/2003, they were all approved under Article 12.

52. There is still a non-notified merger case pending in connection with the market for outside advertising.

## Others

53. A certain amount of work was also carried out on the subject of the liberal professions. Responses were drawn up for some DG Competition questionnaires connected with the creation within the ECN of a working group for this sector.

54. A survey was also carried out on the national regulation of the liberal professions (lawyers, architects, accountants, engineers, chemists and notaries), covering such aspects as the setting of fees, advertising restrictions and access to the profession.

## 2. Mergers

### Statistics

Statistics regarding merger control from 24<sup>th</sup> March 2003 to 30<sup>th</sup> June 2004

**Table I**

|                                 |           |
|---------------------------------|-----------|
| Notified merger operations      | <b>76</b> |
| Total decisions                 | <b>71</b> |
| Pending                         | <b>10</b> |
| <b>Phase I</b>                  |           |
| Non-notifiable transactions     | <b>14</b> |
| Clearance                       | <b>44</b> |
| Clearance with commitments      | <b>2</b>  |
| In-depth investigation required | <b>5</b>  |
| <b>Phase II</b>                 |           |
| Clearance                       | <b>0</b>  |
| Clearance with commitments      | <b>2</b>  |
| Prohibition                     | <b>0</b>  |
|                                 |           |
| Tacit approval                  | <b>3</b>  |
| Referral to European Commission | <b>1</b>  |

**Table II: Breakdown by nature of operation**

|                    |           |            |
|--------------------|-----------|------------|
| <b>HORIZONTAL</b>  | <b>55</b> | <b>78</b>  |
| <b>VERTICAL</b>    | <b>1</b>  | <b>2</b>   |
| <b>CONGLOMERAL</b> | <b>14</b> | <b>20</b>  |
| <b>TOTAL</b>       | <b>70</b> | <b>100</b> |

**Table III: Breakdown by geographic scope of operation**

|  |           |            |
|--|-----------|------------|
| <b>Multi-jurisdictional filings (within EU)</b>                              | <b>10</b> | <b>14</b>  |
| <b>Multi-jurisdictional filings (outside EU)</b>                             | <b>13</b> | <b>19</b>  |
| <b>National with involvement of undertakings from other EU member states</b> | <b>10</b> | <b>14</b>  |
| <b>National with involvement of undertakings from countries outside EU</b>   | <b>2</b>  | <b>3</b>   |
| <b>Completely national</b>   | <b>35</b> | <b>50</b>  |
| <b>TOTAL</b>   | <b>70</b> | <b>100</b> |

**Table IV: Breakdown by type of operation**

|  |           |           |
|--|-----------|-----------|
| <b>Merger</b>                                | <b>1</b>  | <b>1</b>  |
| <b>Acquisition of majority shareholdings</b> | <b>57</b> | <b>81</b> |
| <b>Takeover bid</b>                          | <b>2</b>  | <b>3</b>  |
| <b>Acquisition of assets</b>                 | <b>6</b>  | <b>9</b>  |
| <b>Joint venture / control</b>               | <b>4</b>  | <b>6</b>  |
| <b>TOTAL</b>                                 | <b>70</b> | <b>10</b> |

55. The statistics set out in the table above refer to the period from 24<sup>th</sup> March 2003 - the date on which the Competition Authority initiated its activity - to 30<sup>th</sup> June 2004.

56. During the period up to 31<sup>st</sup> December 2003, 45 merger transactions were reviewed with 54 transactions notified during that period – one of the decisions referred being a decision to proceed to Phase II. This also led to the first decision laying down conditions and obligations.

57. Up to 30<sup>th</sup> June 2004, 22 transactions were filed under the merger control rules with 24 Phase I decisions and 2 Phase II decisions taken. Of the pending cases, 3 decisions are to be taken within the scope of Phase II investigations.

58. It should be noted that the coming into force of EC Regulation 139/2004 on the 1<sup>st</sup> May 2004 has increased the number of transactions that may be due for analysis by the Portuguese Competition Authority as a result of case allocation between the European Commission and Member States. In effect, 2 cases involving Art. 4(5) of the Regulation were referred to the European Commission by the PCA after 1<sup>st</sup> May 2004.

59. It should be noted that several of the cases notified were of particular relevance in the context of the Portuguese economy. The PCA has indeed taken an active role in the complete overhaul of the Portuguese energy sector, which was determined by the Portuguese Government, analysing several merger operations at national level and cooperating closely with the European Commission in one case with a community dimension.

Summary of significant merger cases decided

60. Given the new legal framework, the merger cases included herein aim to give an illustration of the application of the new rules, both from a substantive as well as a procedural viewpoint. Also included are other relevant decisions, given the importance of the sectors involved.

61. These are, for example, the 2 Phase II decisions, a decision interpreting the market-share thresholds for notification, a merger decision subject to litigation, and a decision to refer a case to the Commission under Article 22 of the EC Merger Regulation.

i) *Dräger Medical / Hillenbrand* :

62. The Operation notified referred to the medical equipment sector, whereby Dräger Medical acquired certain assets representing the neonatal warming therapy products of Air Shields, a business of Hill-Rom, Inc, a subsidiary of Hillenbrand Industries, Inc.

63. On 5th April 2004, the Competition Authority took the first decision, under the new legal framework, to proceed to a 2nd Phase Investigation. This was also the first concentration operation cleared subject to conditions and obligations by the Portuguese Competition Authority.

64. In effect, the operation would lead to an extremely high market share as the first player in the Portuguese market was being acquired by the second player (Dräger), which it was considered could foreclose the distribution of the relevant products. This, therefore, raised serious questions about the reinforcement of a dominant position that could lead to a significant effect on competition.

65. The investigation revealed that competition could be maintained by the acceptance of commitments that would avoid such a foreclosure effect, so the operation was finally cleared with the imposition of a number of conditions (including monitoring obligations).

ii) *PPTV/PT Conteúdos / Sport TV*

66. This concentration transaction involved football broadcasting rights for television and other broadcasting means.

67. Notified on 2<sup>nd</sup> December 2003, the operation consisted of the acquisition of joint control by PPTV – Publicidade de Portugal e Televisão, SA, and PT Conteúdos, SGPS, SA, of SPORT TV Portugal, SA together with the purchase of the exclusive rights to broadcast the “Galp Energia Super League” football matches (top-level Portuguese football league) for the 2004/2005 to 2007/2008 seasons.

68. The operation had an impact on the television broadcasting rights for the full games and highlights of top-level national matches, on the distribution of sports channels on pay television and on the use of such rights as multimedia content for Internet and mobile communications.

69. A final decision was taken during the Phase II investigation on April 8, 2004. It determined that, with the imposition of a number of conditions and obligations, the competition concerns that had been identified during the investigation (mainly relating to consumer choice at the downstream broadcasting distribution level) would be resolved.

iii) *Otto Sauer Achsenfabrik / Deutsche Beteiligungs*

70. The operation notified on [INSERIR] referred to the auto parts equipment sector, whereby Otto Sauer Achsenfabrik Keilberg GMB & CO. KG (“SAF”), a company producing and selling axles for trailers

and semi-trailers was to be acquired by Deutsche Beteiligungs, AG (“DBAG”), a German investment bank with interests in the auto parts sector.

71. Although SAF’s market share was above 30% in the relevant product market in Portugal, the acquirer DBAG was not present in the relevant product market. The issue therefore arose as to whether the creation or reinforcement of the 30% market share threshold for notification set out in the Portuguese Competition Law was considered to have effects in such cases.

72. The significance of this case arises from the fact that in such cases even though there is a mere transfer of market share from one entity to another, the afore-mentioned threshold is met and therefore subject to a notification requirement. The rationale for this decision is that it might not be indifferent, from a competition law point of view, if the operator holds the above-mentioned market share.

*iv) Lusomundo / Ocasão and Anuncipress*

73. On January 12, 2004, the proposed transaction was notified and consisted of the acquisition of exclusive control by Lusomundo Media, SGPS, S.A., a large Portuguese media group with diverse interests in this sector, in particular the press sector, of the undertakings Ocasão – Edições Periódicas, Lda. and Anuncipress – Edições Periódicas e Anúncios, Sociedade Unipessoal, Lda., both with activity in the media sector and, in particular, in the classified advertisements segment.

74. On April 19, 2004, the Council of the Competition Authority decided to adopt a Phase I decision, with the imposition of conditions and obligations aimed at maintaining effective competition.

75. This decision is currently subject to appeal in the Lisbon Commercial Court. The appeal was lodged by a third party (a competitor to the notifying party) and raises several issues, such as the concepts of a dominant position and significant impediments to competition, barriers to entry, and use of HHI as a measure of concentration in a relevant market.

76. The significance of this case arises from the fact that it is the first appeal against a decision taken under the new legal framework, lodged not by the notifying party but a competitor. It not only reveals a much higher involvement in the decision making process by undertakings that can be affected, but also shows that competition concepts are still under discussion. Therefore, it is of great importance to have the Competition Authority’s decisions ratified by a higher court, from the point of view of clarifying concepts and their enforcement, as well as contributing to their internalization by Portuguese undertakings.

*v) GE /Agfa*

77. On March 28, 2003, the proposed transaction was notified and consisted of the acquisition by GENERAL ELECTRIC COMPANY of AGFA GEVAERT NV’s non-destructive testing business.

78. After an assessment of the notification, the Portuguese Competition Authority considered that the criteria set out in Article 22 of the Regulation No. 4064/89 (the previous EC Merger Regulation) were met. It thus decided (together with a number of other Member States) to refer the case to the European Commission, pursuant to Article 22(3) of the said regulation.

*C) The ECA Network*

79. The network of the ECA - European Competition Authorities was created in 2001 by the National Competition Authorities in the European Economic Area. **Under the Merger subgroup in 2003 and 2004, the Portuguese Competition Authority managed the information relating to**

**concentrations with multiple notifications in 400 cases. 22 of these, which had a direct impact in the territory of Portugal, were notified to the Network by the national Authority.**

**III. The role of competition authorities in the formulation and implementation of other policies (e.g. regulatory reform, trade and industrial policies)**

80. In the period in question the Competition Authority was involved in other important activities, especially the drafting of various studies and recommendations:

*1. Studies*

*a) Telecommunications*

81. The PCA commissioned a study on the telecommunications sector. The objective of the study, which is still underway, is to assess the level of competition in the sector, identify problems and propose corrective measures. The particular aim is to quantify the losses in social well-being that stem from a possible lack of competition in the sector.

82. The study consists of an econometric evaluation of the situation in the sector and a structural evaluation of the telecommunications sector, adapting its premises and conclusions to the Portuguese situation.

*b) Electricity and gas markets in Portugal*

83. This study was carried out by Cambridge Economic Policy Associates Ltd. It was commissioned by the PCA in connection with the restructuring of the energy sector proposed by the government, according to which the natural gas business, formerly part of the GALP Energia group, would be controlled by the Portuguese electricity concerns REN and EDP and the energy multinational ENI.

84. The objective of the study was to analyze the electricity and natural gas markets in Portugal and the proposed restructuring and to propose measures that would allow the mitigation of any foreseeable harmful effects of the restructuring on competition.

85. The study concluded that neither the electricity nor the natural gas market in Portugal is competitive at the moment. All the segments of the natural gas market are dominated by GALP Energia, whereas EDP dominates electricity production, distribution and supply. However, certain initiatives are in progress to increase competition in both markets, particularly, in the long run, by making all customers free to choose their own energy suppliers. In the field of electrical power, a time-schedule has already been set up and the first steps taken to create MIBEL – the Iberian Electricity Market.

86. Long-term electricity production contracts are complicating the transition to a competitive market among Iberian producers. The study proposes that these be replaced by contracts for difference instead of those proposed – contracts maintaining contractual equilibrium. The study also concludes that the transfer of the natural gas importation, distribution and supply business to an EDP-led undertaking raises competition issues: it eliminates a potential major competitor for electricity production and an existing competitor in the supply of energy for industrial and domestic purposes.

87. The study proposes certain remedies to lessen the anti-competitive effects of the proposed restructuring:

- (i) An amendment to the restructuring terms so that gas assets and contracts will not pass to an undertaking comprised of EDP (51%) and ENI (49%) but, rather, will be distributed between 2 distinct undertakings, to be transferred separately to EDP and ENI;
- (ii) Sale of EDP's gas and electricity supply business;
- (iii) Sale of natural gas import and interconnectivity contracts to third parties;
- (iv) Limits on the building of new production capacity by the dominant undertakings;
- (v) Stricter regulation of natural gas distribution undertakings to preclude the existence of incentives, at the level of the dominant energy supplier, to distort decisions on investment in gas distribution infrastructure; and
- (vi) A guarantee that the natural gas storage infrastructure and the LNG reception terminal will be retained by the regulated transport undertaking, REN.

*Ongoing studies and market monitoring*

c) Wholesale and retail sale of liquid auto fuels

88. The study, made jointly with the market monitoring unit, investigates the possible existence, at the wholesale and retail levels of diesel and gasoline distribution, of two types of restrictive practices that are likely to affect competition on the Portuguese market, namely:

- (i) Illicit collusion in the setting of these products' final consumer prices, both at the local and national levels, possibly induced, on the one hand, by the strong concentration of more than 90% of sales on brand-specific fuels (supplied by major oil companies) and, on the other hand, by the potentially restrictive nature of retail sale contracts through which oil companies may be able to set the final consumer prices at each retailer of their brands. This possibility reduces the number of market participants, from more than 90% of all the different sellers in Portugal (more than 2500) to only 8 oil companies, thus increasing the likelihood of an illicit agreement between the main market participants;
- (ii) A possible "abuse of dominant position" from the single vertically integrated firm, Galp, which may be in a position to increase its selling prices to retailers who are the most likely lower price setters, such as supermarkets for instance, thereby The study also analyses the impact on final consumer prices, at local and national level, that may be expected from the abolition of anti-competitive clauses in contracts. A recent Federal Trade Commission (FTC) study claims, for instance, that, contrary to what the theory might suggest, the vertical control of oil companies over the sellers of their brands is likely to induce lower selling prices than those that would prevail in an environment where sellers could set their own prices (*vide* "Economics in Antitrust: A US Perspective", Luke M. Froeb, FTC, March 2004).

d) Milling sector for the bread industry

89. The Portuguese milling sector is characterized by a strongly concentrated oligopolistic structure, with 6 firms controlling about 80% of the market and the 20% remaining being disseminated among small firms, mostly using traditional techniques.

90. The milling uses range from the bread industry to mixtures for animal feed and the retail sales of some vertically integrated milling firms. Given the great importance of bread as a good of final consumption, this study tackles the relationship between the Portuguese milling sector, notably for wheat flour, and the bread industry. The wheat required for the sector is mostly (if not entirely) imported through

trading firms, notably from France and Germany, given the rules imposed by the E.U. Common Agricultural Policy.

91. The proposed study seeks to assess whether and, if so, how, the sector's concentration and dependency on foreign undertakings may facilitate illicit agreements on selling conditions and prices among the main milling firms, agreements that condition their relationship with small and segmented clients, such as the bread makers. From a market monitoring perspective, the aim is to ascertain if there is any evidence of excessive price increases, when compared to "normal" market behaviour, either at the wholesale level, from the milling firms to the bread industry, or downstream in the retail relations between bread makers and the final consumers.

e) Vertical relations between suppliers and large retailing groups

92. This study analyses the increasing buyer power (oligopsony power) of large retailing groups over their suppliers, stemming from the increasing concentration of retail activity in a few such groups in Portugal, with special focus on the foodstuffs sector. The study aims at determining if, and to what extent, such concentration can distort the negotiating power between buyers and sellers, possibly permitting behaviour that is incompatible with competition legislation.

93. For this purpose, an econometric methodology is being developed to quantify oligopsony power, measured by supply – price elasticities that large retailing groups have over their own suppliers, notably those which are smaller and more segmented, such as those that typically characterize the food and perishable product sectors.

f) Oligopsony power in the Portuguese pulpwood market

94. This report conducts an econometric analysis of the Portuguese pulp and paper industry in its relationship with the Portuguese domestic pulpwood industry in order to determine whether the pulp mills coordinated action to set pulpwood prices excessively low and thus benefit abusively from a position of market power.

95. The report analyses the nature of the distortion and the price externalities that appear when the demand for a particular product is concentrated in the hands of a few buyers. In addition, by adopting a conjectural variations approach, it discusses how to differentiate between what is a normal, non-collusive, mark down of pulpwood prices and what might be excessive, collusive price-fixing, at low levels, of this essential input for the pulp and paper industry.

96. It concludes that for three out of four firms (including the largest), the indicator of market power is around or below the level consistent with a non-cooperative Cournot oligopsony. Thus, it is not possible to conclude, for these three firms, that they abused a dominant position to set pulpwood prices excessively low.

## **2. Market monitoring (other than energy, liquid auto fuels and the bread industry)**

### *Automobile market*

97. The Commission's new Block Exemption Regulation 1400/02, which is applicable to motor vehicle distribution and services in the European Union, came fully into effect on 1 October 2003.

98. The new system should create conditions for change in the competition environment involving distribution and, as a reaction, in the stimulation of the automobile market, by introducing new

mechanisms to increase flexibility, especially with regard to sales via new trading methods that can open up opportunities, mainly for those who can innovate and take the risk of blazing new trails.

99. **Since the new** regulation requires a certain number of adjustments by the manufacturers and the distributors, it is necessary to monitor its implementation on an **EU level**, and at the domestic level, by confirming the compatibility of new contracts with the objectives laid down for the new legislation: the customer's ability to choose the distributor that offers the best and most reliable service at the best price.

### 3. *Recommendations*

100. To stimulate the adoption of legislative and administrative measures, the **PCA** drafts and issues recommendations with a view to informing the economic agents and political powers of the guidelines considered important if the conditions for competition in the marketplace are to be improved.

101. In the period covered by this report, it drafted the following recommendations, among others:

102. Recommendation 1/2003, addressed to the Minister of Science and Higher Education following a study and survey of higher educational establishments' activities outside their natural areas of education, science and technology. These consist of services that compete with other public and private establishments.

103. The recommendation transmitted to the government proposes that these services be supplied in conformity with the principles of free and healthy competition, which will be more successfully attained if higher education establishments: (i) separate the accounts for these services from those of other services provided; (ii) link prices to the real costs of exercising this activity; and (iii) do not allow prices to reflect any tax benefit or exemption or any state aid from which they benefit.

104. Another recommendation (No. 2/2003), addressed to the Minister of the Economy, concerns the regulations for installing and/or modifying large-scale trading units. The Authority considers that the removal of entry barriers arising from quantitative limitations on access to the activity is indispensable.

105. In the Competition Authority's opinion, state intervention in this matter should simply aim at guaranteeing compliance with environmental requirements and those involving land use planning and town planning policy. The access criteria for this market, via prior authorization of the unit, should be objective and transparent and should exclude any quantitative criterion for limiting the freedom to create the supply that these units represent.

106. In Recommendation 4/2003, the Competition Authority advised the government that, directly or through the public bodies involved, it should adopt public and transparent processes when granting concessions for public cereal storage and drying infrastructure belonging to the *Instituto Nacional de Intervenção e Garantia Agrícola*. This will guarantee access to the infrastructure on equal terms, at both the cereal production and marketing levels.

107. In a recommendation addressed to the Minister of State and of Finance (No. 1/2004) regarding the procurement of communication services by the Central State Administration, the Competition Authority underlined the role that the Administration can play as a large purchaser of communication services and recommended that the government alter the procedures for these acquisitions. Such alterations should include:

- (i) the updating of the legal arrangements governing the procurement of communication services by the state;

- (ii) the obligation to hold a public invitation to tender at regular intervals;
- (iii) a reduction in the period for which the contracts are signed, so as to guarantee competition;
- (iv) decentralization of procurement and separation of the types of service being acquired, as well as separation of procurement on the basis of geographical region;
- (v) Appropriate structuring of tender documents and the efficient and transparent assessment of tenders.

108. It is the Competition Authority's opinion that, with the above recommendations, the Central State Administration can contribute to better and more transparent structuring of the market, fostering increased competition and enhancing the economic efficiency and competitiveness of the national economy.

109. A draft Recommendation on Fuels is in the public consultation phase. It proposes that measures should be adopted to encourage and stimulate competition in the fuels sector.

110. Among those measures, the following are of particular note Market access – structural measures, such as:

#### Access to essential logistical infrastructures

111. Concessions for, or the cession of, the operation of port terminals used or capable of being used for the movement of fuels should always be granted on the basis of a public invitation to tender, with the guarantee that such an assignment does not create or strengthen a dominant position on the market.

112. Selection should be based on a transparent, non-discriminatory procedure with objective criteria that can be easily verified.

113. Similarly, any transfer whatsoever of publicly-owned facilities (tanks or land) that may be used for fuel storage must be carried out on the basis of competitive criteria and of procedures open to all potentially interested parties.

114. In any of the above-mentioned situations, the period granted should not be excessive. It should be limited to the minimum that the underlying investment requires, so that the restriction on competition inherent in the consequent closing of the market will not be out of proportion in relation to the objectives.

#### New transport infrastructure

115. The Authority considers that it would be useful to set up of a Commission, composed of representatives from public and private bodies, to assess and study the situation and present proposals to improve the present structural limitations in this area.

#### Installation of fuel stations for the public – Alterations to the regulations

116. It is proposed that the exclusion from the market of certain categories of operators, specifically large-scale commercial units, should be eliminated.

#### Installation of fuel stations on motorways

117. Concession contracts for motorways or SCUTs (toll-free motorways) should include the obligation that the concessionaire subcontract service areas on the basis of competitive criteria, to prevent the creation or strengthening of individual or collective dominant positions on each of those routes.

118. There should be a guarantee that successive stations on the same motorway or SCUT should be operated by different concessionaires.

#### The posting and transparency of retail prices – new regulations

119. It is recommended that the law should require the retail prices in force to be posted in a visible way, for drivers to see them easily, at all public fuel stations and for all types of fuel on sale in them.

120. Under the point above, prices should be posted on panels placed on the roadway, outside the station, to permit consumers to make their choice before entering the station.

121. On motorways and SCUTs, the retail prices of the different stations should be posted on uniform panels placed at the main entrances and at distances to be laid down by the law.

#### Co-operation

122. In this area, requests were made to the Portuguese Competition Authority relating to international co-operation in the field of competition. Also worthy of note are the Authority's own initiatives regarding co-operation protocols with Portuguese universities and the organization of national training programmes for judges, in co-operation with the hierarchy of the judiciary.

123. In the year 2004, the Authority is to co-operate with Turkey on two projects to be carried out in Lisbon and Ankara in September and October respectively.

124. Also in 2004, in co-operation with the Upper Council of the Judiciary, the Portuguese Competition Authority applied to the Commission for Community co-financing of a training course in Community law for Portuguese judges. In line with one of the Authority's major objectives, of spreading a competition culture among selected target groups, the objective of the course in question will be to inform a wide number of judges and Public Prosecution Service delegates of the essential concepts involved in Community law and the case-law of Community courts, in Commission practice and in the analytical methodologies for competition that underlie Regulation (CE) No. 1/2003 of 16.12.2002.

#### Bilateral Meetings

125. In May 2004, in conjunction with the Spanish authorities, the Competition Authority organized the I Iberian Meeting on Competition, which included the Competition Tribunal and the Directorate General of Competition among its participating organizations. The discussion included the application of Regulation No. 1/2003 and its implications for national competition authorities and the functioning of the Internal Energy Market, in particular MIBEL. It was established that in future meetings would be held twice a year.

126. The Portuguese-speaking Competition Network was created within the scope of the I Portuguese-speaking Meeting on Competition. It was jointly organized by the Competition Authority and CADE (Administrative Council for the Defence of the Economy), from Brazil, and included representatives from Portuguese-speaking countries among its participants (28 and 29 June, 2004).

127. This initiative seeks to reinforce institutional co-operation and the exchange of experience between participating countries and to guarantee an integrated relationship with other regional and multi-lateral organizations, such as UNCTAD. In future, meetings will be held twice a year to discuss topics of common interest and to engage in specific action in the field of co-operation.

**IV. Resources of competition authorities**

**1. Resources overall**

*a) Annual Budget*

128. 2.354.749 euros, 1.525.494 euros coming from the State Budget and 792.924 euros of the PCA's revenue, coming from Merger fees and 40% of fines imposed.

*b) Number of employees*

|                            |           |
|----------------------------|-----------|
| <b>Economists</b>          | <b>17</b> |
| <b>Lawyers</b>             | <b>13</b> |
| <b>Other professionals</b> | <b>6</b>  |
| <b>Support staff</b>       | <b>17</b> |
| <b>All staff combined</b>  | <b>53</b> |

**2. Human resources**

- Enforcement against anticompetitive practices: 12 officials.
- Merger review and enforcement: 9 officials.
- Advocacy efforts: 9 officials.

**3. Period covered by the above information**

129. 2003 : since 24<sup>th</sup>. March 2003, when the Portuguese Competition Authority started work until 31<sup>st</sup>-. December 2003.

**V. Summary of or references to new reports and studies on competition policy issues**