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Global Forum on Competition

THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

Contribution from Portugal

-- Session IV --

This contribution is submitted jointly by the Portuguese Competition Authority and the Portuguese Consumer Directorate-General under session IV of the Global Forum on Competition to be held on 21 and 22 February 2008.

Contact: H el ene CHADZYNSKA, Project Manager of the Global Forum on Competition [Tel: 33 1 45 24 91 05; email: helene.chadzynska@oecd.org].

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THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

-- Portugal --

1. General Remarks

In Portugal, the fundamental aim of competition policy is drawn directly from the Constitution of the Portuguese Republic, in which article 81, e) gives the State a primary duty *“to ensure the efficient operation of markets in such a way as to guarantee balanced competition between businesses, counter monopolistic forms of organisation and repress abuses of dominant positions and other practices that are harmful to the general interest”*. Likewise, article 81, i) of the Constitution also includes, among the primary economic and social duties of the State, *“To guarantee consumer rights and interests”*. Furthermore, consumer rights are enshrined in article 60 of the Constitution of the Portuguese Republic, which states that 1) *“Consumers shall be entitled to good quality of the goods and services consumed, to training and information, to the protection of health, safety and their economic interests, and to reparation for damages”*; 2) *“Advertising shall be regulated by law and all forms of concealed, indirect or fraudulent advertising shall be prohibited”*; and 3) *“Consumers’ associations and consumer cooperatives shall be entitled under the law to receive support from the State and to be heard in relation to consumer-protection issues, and shall possess legitimatio ad causam in defence of their members or of any collective or general interests”*.

The two aforementioned ‘Primary duties of the state’ are implemented through two diverse legislative frameworks and entrusted to two different Agencies. The Portuguese Competition Authority (PCA) was created to enforce the Competition Act, to promote compliance with competition law and policy, and to guarantee the respect for the principles of a market economy and free competition thus ensuring the functioning of efficient markets and taking into account consumer interests. Additionally, the substantive framework of the Portuguese Competition Act reflects the content of European Community competition rules and, to that extent, is a key instrument in fully implementing the internal market and giving Portuguese consumers access to the benefits of the Community-wide market.. The PCA is an independent and financially autonomous administrative body, with regulatory powers over all sectors of the economy, including the regulated sectors, the latter in cooperation with the relevant sector regulators. Portugal is a country in which a culture of competition still needs to become further ingrained – often starting with consumers themselves. In this sense, the Decree-Law No 10/2003, which set up the PCA and approved its statute, established the development of a Competition Culture as one of the Authority’s key goals.

The Consumer Directorate-General (Consumer DG) promotes and protects consumer rights, defines, creates and executes Portuguese Consumer Policy with the aim of ensuring a high level of consumer protection. It has the responsibility for promoting policies to safeguard consumer rights and for coordinating and implementing measures to protect, inform and educate consumers, as well as for supporting consumer organisations. In relation to advertising, the Consumer DG is the public body with a general responsibility for monitoring and for bringing proceedings for administrative irregularities. The Consumer Directorate-General is not, however, a regulatory body.

The first Portuguese law on consumer protection, dates from 1981 (Law 29/81), and started a new era of legislative and institutional framework in this field until today’s Law 24/96. Nevertheless, Portuguese

consumer protection still needs to be further enhanced in different areas. An example of that is the recent approval of an amendment to the Law on Services of General Economic Interest, which recognises specific rights to consumers, enlarging its scope of application.

Although different in nature, the interplay and complementary between competition regulation and consumers protection is reflected in that competition regulation fosters the welfare of society in general and of consumers in particular. Competition law enforcement ensures that both intermediate users and final consumers have a vast range of competitive options to choose from, both in terms of better value for money and the available supply.

Reciprocally, consumer rights enforcement allow for active and informed consumers which enhance competition and play a key role towards more competitive markets. In fact, today, consumers can no longer be regarded as mere buyers or users of goods and services, with a solely passive role, but rather as economic partners with duties and rights just as worthy of protection as those of producers or traders. Active participation by consumers in the economy implies that each consumer should act in a responsible and knowledgeable way when acquiring goods and services, because it is his or her decisions which make producers aware of the pressures and preferences of the market.

Therefore, information and education of consumers is essential to empower and allow them to act in a responsible and knowledgeable way.

Training and access to information by the consumer is vital if consumers are to act as an informed economic agent and obtain all the potential benefits available from the market.

However, many factors can impede consumers from making the right choice. The increasing complexity of the market, the aggressiveness of sales techniques and some types of advertising can unbalance relations between consumers and undertakings.

Furthermore, both competition and consumer policies allow consumers to seek and effectively obtain redress from damages caused by anticompetitive practices. In spite of the fact that the Portuguese legal system is generally well equipped to respond to these claims, consumers still have to go a long way in order to fully access to redress mechanisms.

In this regard, an efficient platform for communication with consumers, companies and economic agents is vital and has, accordingly, been implemented by both the PCA and the Consumer DG. For instance, the PCA's website is noteworthy, with a dedicated Consumer Portal (www.autoridadedaconcorrenca.pt/Consumidores.asp), displaying in a timely manner full details of proceedings, merger notifications, decisions, recommendations, legislative developments, conference programmes, seminars and public speeches.

The PCA has also launched initiatives to raise awareness, directed at target groups, and the role of the media as a vital channel for access to citizens/consumers is decisive in fostering the widespread dissemination of competition issues and increasing awareness of the benefits of competition.

In the area of raising awareness and consumer training and information, the Consumer DG has a consumer portal (www.consumidor.pt), through which it provides information on all topics covering a range of goods and services, up-to-date legislation, information on national and international bodies active in areas linked to consumer protection, and the publication of notifications and other relevant information. Consumers can file complaints and request clarification through this portal. Also, important advices to consumers are periodically released by this tool.

The outcome of the synergies between competition policy and consumers' protection can be illustrated by three concrete initiatives undertaken by the PCA on the sectors of (i) Mobile telecommunications, (ii) Fuel and (iii) Pharmacies. These cases underline the positive results of the interaction between the PCA and the Consumer DG and how competition advocacy may foster consumer welfare.

2. The interplay between Competition Authorities and Consumer Protection Agencies in practice

2.1. The presentation of mobile telecommunications prices

In 2005 the PCA adopted a Recommendation regarding the presentation of mobile telecommunication prices. This represented a successful example on how cooperation between competition agencies, consumer protection agencies and business associations can lead to concrete and efficient results, where consumers and competitors are the winners (See Box 1).

Box. 1: PCA Recommendation No. 2/2005, to the Government on presentation of mobile telecommunications prices¹

1. Background

a. The Consumer DG input

The contact established by the PCA with the Consumer DG emphasised the need to take action on tariff transparency in the mobile telecommunications sector, which corresponds, at the same time, to consumer protection and the promotion of competition in the market place.

It was the common view of both agencies that (i) mobile operators offer a huge number of tariff plans; (ii) this may limit the consumer's ability to make informed decisions; and (iii) the limited tariff transparency may remove the markets from the typical competitive equilibriums.

In concrete terms, mobile communication tariffs vary greatly. There is a wide range of minute-packages, post-paid plans (subscriptions) and prepaid plans (with or without a top-up requirement). Furthermore, comparing tariffs is a highly complex matter. It involves taking a vast number of variables into account, thus making comparability more difficult, as well as the choice of the most suitable tariff for each consumer. These variables include, in particular:

- the service type (with or without a subscription or top-up requirement);
- the number of minutes included in the tariff;
- the credits for calls received;
- the price of the first and additional minutes;
- the prices of each type of call (on-net and off-net for each of the other networks, off-peak times, weekends and peak times);
- the prices of calls for a pre-defined number of users;
- the prices of short message and multimedia messaging services.

b. The adequate tariff choice

A study published by DECO/PRO TESTE – a Portuguese consumer organisation – in February 2005 confirmed the difficulties that consumers face in choosing the most appropriate mobile phone tariff. It carried out a survey among 1800 associates, confirming that over 90% of subscribers do not use the tariff that minimises their mobile communication expenses.

¹ Direct link to the Recommendation and related documents in English:

http://www.autoridadedaconcorrenca.pt/Download/recommendation2_2005.pdf

The referred study revealed that, on average, consumers waste over 100 euros per year. Moreover, on average, even the consumers who said that they did not wish to change operator would save between €52 and €106 per year, depending on the operator. The figures mentioned above mean that, even without changing operator, consumers could save over 700 million euros a year if they used the most appropriate tariff for their consumption profile.

In addition, the advices of tariff plans to consumers, generally provided by the mobile operators' agents, are not necessarily impartial, even when a mixed agent (representing more than one mobile operator) intervenes. In fact, commissions and bonus schemes for these agents may influence the advice given regarding one or another operator, irrespective of that operator being the most advantageous for the consumer.

2. The recommendation

Taking into account, on the one hand, the input by the Consumer DG, by DECO, as well as the European Commission's understanding of the development of competition levels in the Portuguese Market, and, on the other hand, the comparison between tariffs in other European Union Member States and the developments of the wholesale prices charged by mobile operators, the PCA issued a Recommendation to the Government proposing a strategy and suggestions that were intended to offer an effective contribution to increase competition in the sector, where three players are active: TMN, Vodafone and Optimus.

It was deemed appropriate that mobile operators should provide simulators that determine the tariff plan best suited to the usage profiles described by each consumer at their websites as well at their agents. A minimum of data set to be included in the envisaged tariff simulators was established for the purpose of this recommendation, in order to ensure that the results of the simulation can be easily compared by the consumers.

3. Achievements

Following this Recommendation, APRITEL, the business association representing the Mobile Operators, working together with PCA, set up a Protocol between its associates, committing themselves to provide easy-to-use price plan simulators in their outlets by the 1st October 2006 and at their websites by the end of 2006. The simulators contain:

- (i) The price plan that minimises the consumer's costs for the user profile specified;
- (ii) Estimates of monthly expenses for the user profile.

This action has obvious advantages for competition and the consumers, who are now able to choose their operator and price plan on the basis of directly comparable and easily accessible data.

3. Competition Advocacy fosters Consumer Welfare

3.1 The removal of entry barriers for new operators and dissemination of information to consumers in the motor fuel market

The liberalisation of fuel price in Portugal is quite recent, dating from early 2004. Notwithstanding, the PCA found that it was necessary to further promote competition in the market. Acknowledging the crucial role played by consumers in choosing the most competitive offer, a broader effort to disseminate information on prices and other conditions of sale among consumers was deemed necessary. Furthermore, supermarkets, acting as non-vertically integrated fuel retailers, play a significant role in promoting competition in the market.

Consequently, the PCA addressed Recommendation No. 3/2004 to the Government concerning the removal of entry barriers for new operators and the dissemination of information at points of sales. Following the PCA's Recommendation, the Government has approved legislation that implements the proposals of the PCA.

This Recommendation from the PCA illustrates how a competition-driven measure aiming at promoting a well-functioning market can simultaneously pursue consumers' rights, in particular the right to information (See Box 2).

Box 2: PCA Recommendation No 3/2004, to the Government on the removal of entry barriers for new operators and dissemination of information to consumers in the motor fuel market²

The PCA presented a systematic set of recommended measures to the Government focusing on different aspects concerning legislation on motor fuel market.

1. Market access – structural measures

a. Access to essential logistical infrastructure

- Franchises and/or the assignment of the operation of port terminals used or capable of being used for the handling of fuel should always be carried out on the basis of open calls for tender, with a guarantee that their attribution neither creates nor strengthens a dominant position on the market;
- Selection should be based on a transparent and non-discriminatory process, with objective and easily demonstrable criteria;
- The transfer, under any form, of facilities (tanks or land) that are public propriety and that may be used for storing fuel should be carried out by means of a process open to all parties with a possible interest and on the basis of competitive criteria;
- In any of the situations referred to above, the period stipulated for the transfer should not be excessive and should be limited to the minimum that may be demanded for the underlying investments, so as to avoid that the restriction on competition inherent in the resulting closed market is disproportionate in relation to the objectives.

b. New transport infrastructure

- It is considered useful to set up a committee of representatives from public and private bodies to study and assess the situation and then present proposals that may improve the structural limitations in this area.

c. Installation of public filling stations – regulatory changes

- An amendment to legislation concerning the installation of petrol stations is proposed, in order to eliminate all the provisions restricting competition by preventing market access for certain undertakings, in particular, hypermarkets and supermarkets;
- The safety requirements laid down on the legislation for the installation of filling stations should be objective, universally applicable, non-discriminatory and transparent.

d. The installation of filling stations on motorways

- Franchise contracts for petrol stations in motorways should include the obligation of the franchisor to sublease the service areas on the basis of criteria promoting competition and thus avoid creating or strengthening individual or collective dominant positions on each of those roads;
- It should be ensured that the franchises for subsequent stations on the same motorway belong to operators with different brands.

2. Retail prices: display and transparency – new regulations

- The legislation should establish the obligation to display the retail prices in effect, in a way that is easily visible to drivers, in all petrol stations and for all the fuels on sale there;
- Price displays, in accordance with the preceding point, should consist of panels placed on the carriageway, outside the station, so as to allow consumers to make their fuel purchase choices before entering the station;
- For motorways, notices for the retail prices in the various stations along the route should consist of common panels placed at the main entry points and at distances to be defined by law.

² Direct link to the Recommendation and related documents in English:

http://www.autoridadedaconcorrenca.pt/Download/recomendation2004_03.pdf

3. Achievements

Following the PCA's Recommendation, the Government approved Decree-Law 170/2005, of 10 October imposing that fuel prices should be advertised outside filling stations. In the particular case of highways, signs shall be installed informing consumers about fuel prices offered in the next three service stations, as shown in the following picture:

Distance	diesel	fuel 95
2 km	0.000 €	0.000 €
00 km	0.000 €	0.000 €
00 km	0.000 €	0.000 €

3.2 *Measures to reform the regulatory framework applying to pharmacies, with a view to promoting competition in the sector*

In 2006, the PCA issued Recommendation No.1/2006 proposing to the Government concrete measures to promote competition in the pharmacies sector. Without prejudice of some sector-specific rules that safeguard ethical and social aspects of this activity, the Recommendation aimed at eliminating the main legal, administrative and structural constraints in the sector that prevent competition from operating, with serious repercussions on market efficiency and consumer welfare.

Before presenting the Recommendation to the Government, the PCA commissioned a study on the pharmacy sector to a group of consultants/experts, with the aim of identifying legal, administrative and structural barriers restricting competition and estimate their impact on efficiency and social welfare. The econometric model adopted by the study shows that, in a scenario allowing price discounts in medicines and liberalised entry in the pharmacy sector, significant gains could be achieved in consumer welfare. Calculated for the year 2002, these gains would represent around EUR 145 million per year, in addition to the gains arising from the reduction of around 13% in the average distance to a pharmacy (1.74 km to 1.52 km).

The Recommendation contained a set of concrete measures related to 3 areas: *(i)* liberalising market access; *(ii)* promoting a balanced and effective competition between enterprises; and *(iii)* creating a favourable environment for competition to develop. The recommended measures were based on the criterion of proportionality, taking into account, *inter alia*, social justice, access, service quality, transparency and the achievement of gains for general welfare, especially from a consumer perspective.

Most legal changes proposed by the PCA have been accepted by the Government, through a general reform of the legal framework of the pharmacy sector, as shown in Box 3.

Box 3: PCA Recommendation No 1/2006, to the Government proposing measures to reform the regulatory framework applying to pharmacies, with a view to promoting competition in the sector³	
Proposed Measures	Legislation
1 – Measures liberalising market access	
1.1 Elimination of public bid procedures (and respective geographic and demographic criteria) for the establishment of new pharmacies	No
1.2 New rules to promote medicine distribution through the pharmacies of social support organisations so as to uphold the principle of access to a pharmacy, in particular in deprived urban and rural areas	Decree-Law No. 235/2006, 6 December Decree-Law No. 307/2007, 31 August
1.3 The elimination of all restrictions on the transfer of premises or exploitation or the relocation of a pharmacy	Decree-Law No. 307/2007, 31 August
1.4 Liberalisation of pharmacy ownership (repeal of the legislation that reserves pharmacy ownership for pharmacy graduates and cancellation of the obligation that the technical control of the pharmacy is carried out by its owner)	Decree-Law No. 235/2006, 6 December Decree-Law No. 307/2007, 31 August
1.5 New specific rules regarding merger control at local and national level, on the basis, for example, of a defined maximum number of pharmacies under the same control at local level and a defined maximum share at national level	No (Decree-Law No. 307/2007, 31 August defines concentration limits)
1.6 Abolishment of the ban on pharmacy ownership by drug wholesalers, without prejudice of the applicability of Competition Act to any future transactions	No
1.7 New rules prohibiting pharmacy-owning enterprises and the respective sector associations from owning drug-producing enterprises, except where financial investments are involved	No
2 – Measures for the promotion of balanced and effective competition between enterprises	
2.1 Abolition of the ban on pharmacy discounts, the current system of retail marketing margins being allowed to function as an effective system of maximum marketing margins	Decree-Law No. 65/2007, 14 March
2.2 Revision of the retail sales pricing system for subsidised medicines and of the subsidy system procedures	New pricing system: Decree-Law No. 65/2007, 14 March Portaria No. 300-A/2007, 19 March
2.3 Authorisation for pharmacies to advertise their activity, on the basis of specific regulations	Decree-Law No. 307/2007, 31 August
2.4 Authorisation of distance selling by pharmacies (Internet and mail)	Decree-Law No. 307/2007, 31 August Portaria No. 1427/2007, 2 November
2.5 The elimination of self-regulation processes in the application of rules on pharmacy activities, in particular the definition of permanent-service	No

³ Direct link to the Recommendation and related documents in English:

<http://www.autoridadedaconcorrenca.pt/en/Content.asp?ID=750>.

3 – Measures aimed at creating a favourable environment for competition to develop	
3.1 Settlement of the present debt corresponding to the delayed subsidy payments to the pharmacies and substitution by public debt, with a debt-servicing charge substantially lower than at present	State Budget Law for 2006 (Law No. 53A/2006, de 29 December)
3.2 Termination of the agreement between the National Association of Pharmacies and the Ministry of Health on financial intermediation concerning the delayed subsidy payments to the pharmacies: instead, the payment should be made to each pharmacy directly, in line with the principles contained in the State Budget Law for 2006, and without any involvement of the sector associations in these payment procedures	Decree-Law No. 242-B/2006, 29 December Portaria No. 3B/2007, 2 January