

Competition Law Challenges in the Next Decade

Sofia Oliveira Pais (ed.)



Competition law: achievements and challenges

António Ferreira GOMES¹

I would first like to thank Católica Porto Law School for the kind invitation to participate in the opening session of this Conference and to congratulate its organizers for the excellent program.

This Conference is a testament to the growing awareness regarding the importance of competition among the legal community. Competition generates benefits for everyone – consumers, businesses, government and the overall economy – and should be seen as an engine of economic growth. Competition is vital to ensure a dynamic, competitive and robust economy by promoting and rewarding merit.

When competition is eliminated or restricted, companies lose incentives to innovate and to reduce costs, becoming less efficient. This is harmful to consumers, but also to the companies themselves, as they become less prepared to face new challenges.

In a context of crisis, when citizens and taxpayers are already in a vulnerable situation, a prohibited practice, such as a cartel, is particularly detrimental to consumers, as it forces them to pay higher prices for products or services. The same applies to companies which need inputs from other companies themselves, and to the State as a buyer of goods and services.

It is therefore important to be aware of the benefits of competition, but also of the detrimental effects of violations to competition law. The Portuguese Competition Authority is committed to combine both dimensions, acting as a proactive advocate for competition and a vigorous enforcer of competition law in Portugal.

The growing awareness of the benefits of competition and of the consequences of infringing competition law is leading to an increasing importance of private enforcement of competition law.

More and more, we see parties in civil actions grounding their claims on competition law, which poses an additional challenge for national Courts in general to deal with this area of law.

¹ President of the Portuguese Competition Authority.

This expansion in the application of competition law, beyond public enforcement, has recently been reinforced in Europe with the approval of the Directive on “private enforcement” in December 2014. The Directive aims at ensuring that any citizen or business has a *right to full and effective compensation* for the harm caused by an infringement of the competition rules. The Directive will be implemented in each Member State until December 2016, and the Portuguese Competition Authority is actively participating in that process at national level.

Private enforcement in Portugal will most certainly primarily develop in the form of civil actions following PCA’s decisions – the so-called “follow-on actions”. Recent developments in Portugal confirm this, as civil actions are being brought in national Courts following the PCA’s decision against an abuse of a dominant position by Sport TV, a premium sports channel provider. These are important developments that illustrate the advantages for private enforcement deriving from vigorous and solid public enforcement by the PCA.

When applying competition law, national Courts may benefit from cooperation between Courts and also from cooperation with competition authorities.

First, national Courts may submit a reference for a preliminary ruling to the Court of Justice to assist them in the interpretation of EU law. In Portugal, there is a recent example of a preliminary ruling submitted by the Lisbon Court of Appeal to the Court of Justice regarding an appeal against a decision taken by the Portuguese Competition Authority. The case concerned the Association of chartered accountants and rules relating to a system of compulsory training for chartered accountants. In February 2013, the Court of Justice confirmed that those rules could amount to a restriction on competition prohibited by Article 101 TFEU. This clarification of the scope of application of EU law then led to the confirmation, by national Courts, of the PCA’s sanctioning decision.

In addition, under Regulation (EC) No. 1/2003, national Courts may ask the European Commission to give its opinion on questions regarding the application of the EU competition rules. Moreover, both the Commission and national competition authorities may intervene in the Court’s procedures as *amicus curiae* by submitting observations to the Court.

The cooperation mechanisms between Courts, as well as between Courts and Competition Authorities, are crucial to ensure a consistent and effective enforcement of competition law. I would like to stress that the PCA is committed in the development of a close and constructive institutional dialogue with national Courts.

The fact that competition law is more widely applicable in Courts today makes it more important that the legal community is aware of some specific characteristics of this area of law.

Two important and challenging characteristics may be highlighted: the fundamental link with European Union law and the interplay with economics.

The connection between national law and EU law in the field of competition is particularly strong. The provisions on competition of the EU Treaties are directly applicable at national level and are enforceable by the Competition Authorities and by National Courts in parallel with national law. This means that the case-law developed by the Court of Justice of the European Union is also applicable in all Member States.

Moreover, the large degree of convergence between national and EU competition law strengthens the relevance of EU case-law even in a purely national case in order to ensure consistency in the interpretation of law.

As recently pointed out in a Judgement by the Portuguese Competition, Regulation and Supervision Court, “given the profound convergence between national and EU competition law, the joint application of both does not cause difficulties in the majority of the cases”.² However, this implies an additional effort in the interpretation of competition law, and a need for constant updating on the most recent decisions of the EU Court of Justice.

Regarding the interplay with economics, it is important that competition law practitioners and enforcers understand the economics underlying the various types of infringements to competition law. The complexity of economic analysis in competition cases has increased over the years, as we have moved into less formal approaches to competition law enforcement. This is particularly true for cases of abuse of dominance, which will be the focus of this morning’s first panel.

The interplay between law and economics poses a challenge to competition authorities, in particular in the way they present complex economic analysis, not only in their decisions but also before the Courts.

I would like to mention a recent good example where discussion on complex economic issues took place before the Courts in Portugal: the recent appeal before the Portuguese Competition Court of the PCA’s decision imposing a fine on Sport TV for an abuse of its dominant position.

The case was heavily supported in economic evidence and the Competition Court took a novel approach during the hearings by using

² Judgement of 04.06.2014, case 204/13.6YUSTR.

economic experts as advisers. The appealing party and the PCA also had their own economic advisers.

This was a pragmatic solution, used for the first time in appeals of the PCA's decisions, which ensured that the Court was well-advised by experts and could ultimately reach a solid decision in terms of economics. I am pleased to say that the Competition Court upheld the PCA's decision and its economic reasoning. This was the first ever judicial confirmation of a PCA's decision concerning an abuse of a dominant position, thus representing a major step in competition enforcement in Portugal.

Therefore, the link between law and economics in the area of competition challenges enforcers to ground their decisions in economic reasoning, seeking the necessary expertise to ensure sound decisions but also to explain economic reasoning in a clear way.

There are two topical issues, which fully illustrate the points that I have just raised: Exclusionary Abuses and State Aid Rules. In both these areas, the Portuguese Competition Authority has a particular role to play. And so do the Courts.

Regarding abuses of dominance, the PCA's experience has had positive developments recently. The Sport TV case that I have just mentioned was confirmed just this week by the Lisbon Court of Appeal, a decision which we naturally welcome. This is the first time that a decision on abuse of dominance was confirmed by Portuguese Courts on 1st and 2nd instances.

One of the reasons for the lack of confirmation by Courts of previous decisions by the PCA was the statute of limitation. Abuse of dominance cases are usually lengthy, as they typically involve large volumes of evidence and complex economic analysis, which makes them more prone to becoming time-barred.

This was acknowledged in the recent legislative reform of the Portuguese Competition Act in 2012, which now foresees that the limitation period is suspended up to three years during the judicial appeals. This legal amendment will hopefully allow Courts more time to assess these complex cases. In any case, the PCA will continuously seek to shorten the time of its investigations on restrictive practices to avoid that violations of competition law may end up unpunished due to the statute of limitation.

Turning now to the topic of State Aid, I would like to highlight that, in this area, the PCA has the power to issue recommendations regarding public aid aimed at eliminating any negative impact on competition and to monitor the implementation of its recommendations by the public bodies. However, these recommendations are not binding.

The PCA has recently used this advocacy power with regards to State aid in the energy sector. In November 2013, the PCA issued a Recommendation to the Government regarding compensations to power generators in order to avoid overcompensation.

In April 2014, the Government published a set of corrective measures in order to address the PCA's recommendation, which include an Audit to calculate the amount of past overcompensations to be returned to consumers. This is a successful example of advocacy in the field of State aid.

National Courts play a relevant role in the field of State aid. National Courts may apply the EU Treaty provisions on State aid law, namely in actions by parties seeking compensation, or the imposition of injunctive or interim measures in cases of implementation of unlawful State aid, namely in breach of the "standstill obligation". To this end, national Courts are entitled to interpret the notion of State aid even if they do not have the power to declare a State aid measure compatible with the Treaty. The enforcement powers of the Courts in this area are thus key in ensuring a level playing field for all market players.

I would like to conclude by wishing all participants a productive Conference. I am confident that this initiative will strengthen the awareness on the importance of protecting and promoting competition to reinforce competitiveness and economic growth.