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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

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

**-- July 1, 2005 through June 30, 2006 --**

*This note is submitted by the Portuguese Delegation to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 18-19 October 2006.*

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## **Executive summary**

1. Unless otherwise indicated, this report covers the period July 1<sup>st</sup>, 2005 to June 30<sup>th</sup>, 2006, the second full year of activity of the Portuguese Competition Authority (PCA).

2. A most important legislative development was the recent approval by Parliament of the Leniency law, in line with international best practice. This approval culminates a process initiated by PCA, as part of the implementation its anti-cartel strategy. The new law is expected to dissuade cartel formation, as it is to enhance investigative capability. Although it is too early to evaluate impact, results will be carefully monitored and evaluated thereof.

3. As to operational activity, the period under review was extremely active. Merger control dominated management attention, with the assessment of two major operations. The first one involves a € 11 billion unsolicited take-over bid of the incumbent telecom operator, which, if successful, may lead to a market-based restructuring of the telecom sector following competition concerns. The second one involves a € 4 billion unsolicited take-over bid which, if successful, will lead to a merger of two of the main Portuguese banks. Both operations are currently under Phase II evaluation with decisions expected in the months ahead. In this regard it is important to highlight two lessons learned so far by PCA: (i) past investment in market monitoring and in rigorous economic studies is paying off, particularly in the telecom sector; and (ii) merger control is providing an opportunity to tackle market dominance issues, often more difficult to achieve under anti-trust enforcement.

4. Despite the heavy work load imposed by the review of the above merger operations, other operational output during the period under review also experienced considerable increase. Overall, the total number of decisions on mergers increased by some 29 % with respect to 2004/05, whereas the number of anticompetitive practices decisions was kept at the same level. But, as the cumulative number of anti-trust decisions increases, so does the activity in following-up the downstream judicial appeals which, in most cases, are filed by the infringing parties. The portfolio of economic and market studies was also expanded, mostly in support of merger review activity. Moreover outreaching has reached new heights, with the pioneering hosting of several international competition policy events.

5. Regarding anticompetitive practices, 21 new investigations were launched during the period under review and six decisions were taken. Of these, five resulted in infringement decisions leading to combined fines of some € 26.5 million levied on 16 undertakings and on two professional associations, as compared to € 3.5 million in the previous reporting period. These decisions are being appealed to the Lisbon Commerce Court. Noteworthy the fact that the Court has recently substantially upheld three past infringement decisions taken by PCA related to price fixing by Professional Associations. Further Court decisions are soon to be expected.

6. As to merger operations, during the period under review 73 merger transactions were directly notified to PCA. During that period, 81 final merger review decisions were taken, of which seven under a Phase II review process. Of relevance the fact that, for the first time, three merger operations were not cleared, two in the transport sector and the other in the fuel distribution sector. Of these, one decision has been reversed by the Minister of Economy and Innovation on the basis of national public interest, under the exceptional review procedure allowed for in the Competition Law. Another decision has been appealed to the Lisbon Commerce Court. A further three merger decisions were cleared with commitments, two in the energy sector and the other in the cement concrete sector.

7. Advocacy efforts remained at the forefront of PCA activities during the period under review. Recommendations to Government covering the telecommunication, the pharmacies and the water sectors

were issued. They envisage improved competitive conditions through a better informed consumer selection, as well as the removal of regulatory barriers and/or a more effective application of existing regulations. Two recommendations have already had an impact. In telecommunications, an improved transparency of service prices was achieved through self-regulation. In pharmacies, the Government has initiated a comprehensive reform process which has already led to less restrictive regulations in ownership and location, as well as in pricing. Decisions, studies and other contents generated by PCA have continued to be regularly posted in the Web Site. The Site registered a monthly average of 10,600 visits throughout 2005. The monthly electronic newsletter, *e-concorrenca*, has currently some 1,500 subscribers spread over 30 countries. Moreover, PCA activity has continued to deserve wide media coverage during 2005, with 5,900 news published in the printed and the online presses and 363 broadcasted pieces in prime time. Furthermore, the PCA President has been interviewed 11 times in 2005.

8. Four major international competition policy events were also organised and hosted by PCA. The more visible was the First Lisbon Conference on Competition Law and Economics which was opened by the President of the Republic and the European Commissioner responsible for competition and attracted some 300 high-level participants. Three further events were packaged under the First Lisbon Competition Week, co-organised with the OECD and UNCTAD with the cooperation of the Brazilian CADE and of the Spanish TDC. These included the Second Lusophone Competition Meeting; the Workshop on Competition Policy for Ibero-American Countries; and the Annual Meeting of the Ibero-American Competition Forum. More targeted outreach activities included a First Forum of Antitrust Lawyers; a Workshop for Journalists on competition issues; and thematic Workshops on Notaries regulations, on competition promotion in water and sanitation, and on public procurement.

9. PCA continued its active participation in various international competition fora. Beyond its regular participation in the activities of the ICN, the ECN, and the OECD Competition Committee, PCA is also integrating the revolving Presidency of ECA. To this extent, PCA will organise the annual ECA Meeting scheduled for April 2007. Moreover, arrangements are underway for the European Competition Day, in the framework of the Portuguese Presidency of the EU. This event will take place back-to-back with the Second Lisbon Conference on Competition Law and Economics, scheduled for November 9-10, 2007.

10. On the institutional development front, and in line with the findings of the Pilot Project carried out with OECD, the internal review process was enhanced with the appointment of a Lead Legal Advisor. Formal internal procedures continued to be strengthened benefiting from the contributions of the Lead Economic and Lead Legal Advisors. The Legal Scientific Advisory Board, integrated by six University Professors, has also continued to meet regularly with PCA Board. International expertise continued to be called upon whenever required, mostly in support of high-level analytical advice. The Research Team has also been institutionalised and is attracting the contributions of renowned academics in industrial organisation. Research findings are regularly disseminated through internal seminars, participation in international conferences, and publication of papers in referred academic journals.

## **1. Changes to Competition Law and policies, proposed or adopted**

### ***1.1 Summary of relevant measures relating to the Competition Law –***

#### ***1.1.1 Leniency law: Law 39/2006***

11. The most significant legislative event in Portugal, during the period covered by the Report, was the approval of the Leniency law. To this extent, PCA has submitted a draft bill to Government which was approved by the Council of Ministers in April, being then submitted to, and approved by, Parliament.

12. According to the Law, total immunity is available for the first member of a cartel to come forward with evidence of an alleged cartel, before PCA has started an investigation. A reduction in penalty of at least 50 per cent is available when the undertaking is the first to come forward with information/evidence of an existent cartel, but does it after PCA has started an investigation and before issuing the statement of objections.

13. Moreover, a reduction in penalty of up to 50 per cent would be granted to the second member of the cartel that provides PCA with evidence of the alleged cartel which, in PCA's view, represents significant added value with the respect to the evidence in PCA's possession at the time of the application, and before issuing the statement of objections.

14. The Leniency law also provides an incentive for a cartel member to come forward with information related to any other cartel in which it may be involved with. As a matter of fact, under the Leniency Law if an undertaking that is already being investigated in connection with one cartel comes forward with information that enables it to be granted immunity in relation to a second cartel, then it may receive a reduction or an additional reduction in the penalty applied in connection with the first cartel.

15. In both cases (immunity and reduction of fines) the applicants must also cooperate fully and on a continuous basis from the time of their submission of an application with PCA until the conclusion of the case. This duty of cooperation includes, for example: (i) provide PCA promptly with all the relevant information and evidence that comes into the applicant possession and control; (ii) stand ready to reply promptly to any PCA request that may contribute to the establishment of the relevant facts; (iii) cease its involvement in the cartel from the time it comes forward with the information; and (iv) undisclosed the fact or the content of the application submitted to PCA to other cartel members.

#### *1.1.2 Implementation of the Council Regulation No 1/2003*

16. In order to insure an effective application of the Council Regulation (CE) No 1/2003, on the implementation of the rules on competition law laid down in Articles 81 and 82 of the Treaty, PCA, in cooperation with the Ministry of Justice - *Gabinete para as Relações Internacionais Europeias e de Cooperação*, has launched a Task Force towards identifying the rules needed to be created in that quest.

17. The work of the Task Force has led to the preparation of a draft bill to be submitted to the Government, establishing *inter alia* the procedure to be followed where PCA decides to reject the complaint or to suspend the proceedings of a case where a competition authority from other Member-State is acting against the same agreement, decision of an association or practice. It foresees as well the terms for cooperation between PCA and the national courts in the enforcement of competition law, notably the possibility for PCA to present written and oral comments on competition actions before the courts.

18. Moreover, the draft bill sets up the proceedings to comply with the obligation put forward in article 15, paragraph 2, of the Council Regulation, concerning the transmission to the Commission of a copy of any written judgement of national courts deciding on the application of article 81 and 82 of the Treaty.

## **2. Enforcement of competition law and policies**

### **2.1 *Anticompetitive practices cases***

#### *2.1.1 General Overview*

19. Between 1<sup>st</sup> July 2005 and 30<sup>th</sup> June 2006, PCA launched 21 new investigations and concluded six investigations proceedings, of which five resulted in infringement decisions and one in a non-

infringement decision. Of the infringement decisions, four were under Law 18/2003, and one was under both Law 18/2003 and article 81.º of EC Treaty. Overall, 16 undertakings and two professional associations were fined a total amount of around € 26.450.000,00.

20. Noteworthy, the decision concerning a case of collusive tendering in public procurement, covering public contracts for the supply of diabetes reagents to public hospitals, where PCA has imposed its higher fine ever, around € 16 million to five major pharmaceutical companies.

21. The cases currently under investigation involve markets in the areas of electronic communications, financial services, transport, energy, pharmaceuticals, liberal professions, and food industry.

22. During this period, the Lisbon Commerce Court substantially upheld three infringement decisions, relating to price fixing by professional associations. These Court decisions confirm the quality, rigour and effectiveness of PCA's enforcement activity.

### 2.1.2 *Summary of the cases decided*

#### Milling Sector

23. PCA concluded an investigation in the milling sector involving ten undertakings, as per the request of the Minister of Economy following an increase of roughly 30% in the price of bread as reported by the media. According to the news, the rise in the bread price was justified on the grounds of the “*rise in the price of wheat*” and/or of “*increased profit margins among manufacturers*”.

24. The investigation carried out by the Authority concluded that, between December 2000 and September 2004, increases in the flour price were uniform from the viewpoint of the amount, the date in which customers were notified of the new prices and the date in which the rises came into effect.

25. PCA found that the ten milling undertakings had infringed the Portuguese Competition Law by engaging in a concerted practice with the intention of uniformly establishing prices. It imposed fines totalling € 9 million. The decision was appealed to the Lisbon Commerce Court, and is still pending.

#### Collusive tendering in public procurement – public contracts for the supply of diabetes reagents to public hospitals

26. Following PCA's 2003 successful action against five major pharmaceutical companies relating to the tenders for supply contracts of diabetes reagents to a public hospital<sup>1</sup>, PCA launched a nationwide investigation and unearthed evidence of concerted practices involving the same pharmaceutical companies relating to 36 open calls for tender to supply 22 hospitals throughout the country with diabetes test strips.

27. The investigation concluded that Abbott Laboratórios, Bayer Diagnostics Europe, Johnson & Johnson, Menarini Diagnósticos and Roche Farmacêutica Química had submitted offers for diabetes reagents with the exact same price on the same public tenders. Two of the companies involved admitted their participation in the illegal practices.

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<sup>1</sup> See OECD – Directorate for Financial and Enterprise Affairs Competition Committee - Annual Report on Competition Policy Developments in Portugal – 1 July 2004-30 June 2005- DAF/COMP(2005)32/16.

28. The total combined fines amounted to some € 16 million, with individual fines ranging from a lowest € 360,000 to a highest € 6.8 million. The decision was appealed by three of the condemned companies. The appeal proceedings before the Lisbon Commerce Court are still pending.

#### Price fixing in shipping agency services

29. In December 30, 2005, the Portuguese Shipping Agents' Association (AGEPOR) was found guilty by PCA of price fixing by means of preparing and distributing a list of recommended maximum prices and was fined € 195,000. AGEPOR represents more than 80% of the shipping agents operating in the main Portuguese ports.

30. The investigation found that, between 2001 and 2004, AGEPOR approved and published maximum fees' schedules. It was also proved that the generality of shipping agents, members and non members of AGEPOR, followed the recommended fees, thus inhibiting the competitive interplay of prices in the market over a period of 4 years.

31. In addition to the fine, PCA decision required AGEPOR to immediately cease to issue price schedules and to inform all members of such cessation. The decision was appealed. The Lisbon Commerce Court upheld PCA decision, albeit with a reduction in the amount of the fine to €130,000.

#### Vertical restraints in coffee supply

32. Following a complaint from a restaurant in Lisbon, PCA launched an investigation into the contracts of Nestlé Portugal for supply of coffee to hotels, restaurants and cafés (the "HORECA" channel).

33. PCA concluded that, since at least 1999, Nestlé Portugal has been concluding supply contracts containing exclusive deal clauses with indefinite duration, determining the foreclosure of the market.

34. PCA imposed a fine of a € 1 million on Nestlé Portugal for infringement of the competition legislation and ruled that the company shall eliminate contractual clauses involving the obligation to make exclusive purchases for a period exceeding five years or the renewal of a contract beyond five years without the express and free consent of both parties. This was PCA's first decision condemning a vertical restriction agreement. An appeal against the Competition Authority's decision was lodged in the Lisbon Commerce Court, and is still pending.

#### Liberal Professions: Portuguese Medical Doctors Association

35. In the context its activities in the field of Professional Services<sup>2</sup>, PCA has launched an *ex officio* investigation concerning the practice of price fixing by the Medical Doctors Association. The investigation concluded that the Association, in 1993, had adopted a Deontological Code providing that it is a deontological fault to charge fees above or below those indicated in the schedule approved by the Association. The minimum and maximum fee schedule was meant to apply to every service provided in Portugal by any Medical Doctor in independent practice, including professionals from other Member-States.

36. While the present case was pending, the Association abolished the fee schedule provisions. This fact was taken into account for the purposes of calculating the fine. PCA considered that minimum and maximum price fixing by the Association infringed Law 18/2003 and article 81 of the EC Treaty and

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<sup>2</sup> See OECD - Directorate for Financial and Enterprise Affaires Competition Committee - Annual Report on Competition Policy Developments in Portugal – 1 July 2004-30 June 2005- DAF/COMP(2005)32/16.

imposed a fine of € 250,000. The decision was appealed. The appeal proceedings before the Lisbon Commerce Court are still ongoing.

#### FRESENIUS Medical Care – Blood lines

37. Following a complain referring that Fresenius was refusing to renew the supply contract of blood lines with the complainant, PCA launched an investigation to assess whether Fresenius has engaged in abuse of a dominant position in violation of Law 18/2003, for refusing to deal.

38. PCA investigation concluded that there was no abuse of dominant position and therefore no ground for action, considering that the refusal to deal followed the closure of a time-bound contract to supply between the parties and that there are other alternative suppliers in the market.

#### 2.1.3 *Prior Control of anticompetitive agreements*

39. One case was analysed pursuing article 5 (2) of Law 18/2003 and Ministerial Order 1097/93 of 29 October, concerning the agreement on financial assets management between *Banco Comercial Português*, S.A, Eureko B.V. and F.&C. Holding Limited. As the agreement could be covered by both National and European Competition Law, PCA did not deliver a decision in the case.

40. A new PCA Regulation establishing the procedure for Prior Control has entered into force in 2005 – Regulation 9/2005. PCA is currently analysing its first Prior Control case under the new Regulation, which concerns an agreement in the pharmaceutical wholesales market.

#### 2.1.4 *Non –notified Mergers*

41. Under article 9 of Law 18/2003, mergers between undertakings are subject to prior notification whenever the requirements established therein are met and shall be notified to the Authority within seven working days. The failure to comply with prior notification constitutes a misdemeanour punished with a fine that may not exceed 1% of the previous year's turnover for each of the undertakings. During this period there were no Non-notified merger cases analysed by PCA.

#### 2.1.5 *Other cases*

42. Under Article 43 (3) (b) of Law 18/2003 failure to provide or the provision of false, inaccurate or incomplete information in response to a request by PCA in the exercise of its powers of sanction or supervision is punishable with a fine that may not exceed 1% of the previous year turnover of each undertaking.

43. In this regard, a total fine of around € 264,238 was imposed to three undertakings acting in the flour market, e.g., Moagem Ceres – A. Figueiredo & Irmãos, S.A (€89,449); Germen - Moagem de Cereais, S.A (€94,850) and Granel – Moagens de Cereais, S.A (€79,939), in three cases relating to failure to provide information requested for a market study. The decisions were appealed. The appeal proceedings before the Lisbon Commerce Court and the Administrative Court are still ongoing.

#### 2.1.6 *Other initiatives*

The discussion of the Commission's Green Paper on Damages actions for the breach of EC antitrust rules

44. Following the publication of the Commission's Green Paper on Damages actions for the breach of EC antitrust rules, PCA launched an internal debate on this issue. In this quest a working group was

created to follow the European debate and to prepare a deep review of the national regime concerning the damages actions for the breach of antitrust rules.

45. The working group has prepared a document containing comments on the Green Paper and a stocktaking of the national rules on damages actions which will be the basis for a discussion with the Ministry of Justice on damages actions for breach of antitrust rules in Portugal.

## 2.2 *Mergers*

### 2.2.1 *Statistics*

Statistics regarding merger control from 1<sup>st</sup> July 2005 to 30<sup>th</sup> June 2006

**Table I: Merger decisions adopted since July 2005**

Notified merger operations	73
Total decisions	81
Pending	14
<b>Phase I</b>	
Non-notifiable transactions	7
Clearance	61
Clearance with commitments	1
To Initiate an in-depth investigation	5
<b>Phase II</b>	
Clearance	1
Clearance with commitments	2
Non Clearance	3
Withdrawn cases	1
Tacit approval	0
Referral to European Commission	0
<b>TOTAL FINAL DECISIONS ADOPTED (does not include Phase I decisions to proceed into Phase II)</b>	<b>76</b>

**Table II: Breakdown by nature of operation (Final Decisions)**

	Cases	%
HORIZONTAL	45	59.21
VERTICAL	2	2.63
CONGLOMERAL	29	38.16
<b>TOTAL</b>	<b>76</b>	<b>100.00</b>



**Table III: Breakdown by geographic scope of operation (Final Decisions)**

	<b>Cases</b>	<b>%</b>
Multi-jurisdictional filings (within EU)	6	7.89
Multi-jurisdictional filings (outside EU)	11	14.47
National with involvement of undertakings from other EU member states	13	17.11
National with involvement of undertakings from countries outside EU	0	0.00
Completely national	46	60.53
<b>TOTAL</b>	<b>76</b>	<b>100.00</b>

**Table IV: Breakdown by type of operation (Final Decisions)**

	<b>Cases</b>	<b>%</b>
Merger	0	0.00
Acquisition of majority shareholdings	47	61.84
Takeover bid	0	0.00
Acquisition of assets	20	26.32
Joint venture / control	9	11.84
<b>TOTAL</b>	<b>76</b>	<b>100.00</b>

46. On the 2<sup>nd</sup> Semester 2005 there were 41 notifications and 41 Phase I decisions, two of which to initiate an in-depth investigation, and four Phase II decisions, two of which prohibiting the mergers. On the 1<sup>st</sup> Semester 2006, there were 32 notifications, 33 Phase I decisions, three of which to initiate an in-depth investigation, and two Phase II final decisions: one prohibition decision and one clearance decision with commitments. As to the referrals under Art. 4(5) of Regulation 139/2004, from 1<sup>st</sup> July 2005 to 30<sup>th</sup> June 2006 PCA analysed 4 cases, never opposing to the referral.

47. Throughout this period, PCA continue to develop its economical analysis methodologies, making use of quantitative models to assess the real impact of mergers, specially the more complex ones. Moreover, PCA case experience during this time has also significantly contributed to the clarification and improvement of the legal framework.

48. On the 1<sup>st</sup> Semester 2006 it is worth mentioning the notification of two takeover bids, which are prone to have a strong impact on the Portuguese economy. The first refers to the acquisition of the incumbent in the telecommunications sector and the second concerns the merger of two of the main Portuguese banks. Both of these merger operations are still under investigation, under Phase II.

49. For the first time since it was established, PCA issued three prohibition decisions: one related to the rail and road public transport, another in the fuel market for harbour refilling stations, and still another in the highway toll roads sector.

2.2.2 *Summary of significant merger cases decided*

Arriva /Barraqueiro – Prohibition Decision

50. Barraqueiro, SGPS, S.A. – holding company active in the sector of both public road and rail transport of passengers – notified a transaction whereby it acquires joint control, with Arriva Investimentos, SGPS, S.A. – a holding company active in the sector of road transport of both passengers and freight - of Arriva Transportes da Margem Sul, S.A. (ATMS) – a company active in the regular transport of passengers in the region of the Setúbal Peninsula.

51. These two undertakings compete directly with each other in the public rail and road transport of passenger on the itinerary Setúbal/Lisbon over the bridge “*Ponte 25 de Abril*”. Through its subsidiary Fertagus, Barraqueiro has a dominant market share, immediately followed by an ATMS subsidiary, TST. The remaining, and very small, market share is accounted for by Carris, a third undertaking which could not be considered a real alternative to users as it only operates with very limited schedules.

52. Considering the severe entry barriers to this market, this operation would create a near-monopoly scenario where the new entity would have the ability to increase prices and downgrade the quality of service, thus, harming 70,000 daily commuters crossing the bridge.

53. The parties offered both behavioural and structural commitments. However, PCA found them insufficient to eliminate its competitive concerns, since the parties were unable to demonstrate that the proposed commitments effectively prevented the creation of dominance. PCA adopted a prohibition decision which has been appealed by the parties to the Lisbon Commerce Court. The appeal is still pending.

Petrogal / Esso – Prohibition Decision

54. This merger operation covers Petrogal’s acquisition of six coloured diesel fuel service stations held by Esso on the Portuguese ports of Matosinhos, Figueira da Foz, Peniche, Lisboa, Portimão and Olhão. The coloured diesel fuel is mainly used by fishing boats.

55. Petrogal is the main Portuguese operator in the import, refining, marketing and transportation of oil and other petroleum products. Being vertically integrated it supplies over 90% of the national needs for petroleum products. On the relevant market for coloured diesel services stations Petrogal already prices above its competitors and enjoys a considerable customer’s loyalty, given the commercial conditions it offers.

56. As a result of this operation: Petrogal would have achieved a market share above 50% reducing the number of competitors to two in four geographical relevant markets for the retail distribution of coloured diesel fuel. On the other two geographical relevant markets Petrogal would still have gained a market share above 40%.

57. On these grounds PCA concluded this merger might have created or strengthened a dominant position, which would have significantly restricted competition in the relevant markets for coloured diesel services station on the Portuguese ports of Matosinhos, Figueira da Foz, Peniche, Lisbon, Portimão and Olhão.

Brisa / Auto-Estradas do Atlântico – Prohibition Decision

58. This merger operation consists on Brisa’s acquisition of the joint control of the undertaking Auto-Estradas do Atlântico. Brisa group is active in the construction and maintenance of motorways and holds

the concession of the A1 motorway (between Lisbon and Porto). The group has also been awarded the concession for the section Leiria-Mira of the A8 motorway which is still under construction. Auto-Estradas do Atlântico, in turn, is also active in the construction and maintenance of motorways and holds the concession of the section Lisboa-Leiria of the A8 motorway. Both the A1 and A8 motorways run parallel to each other constituting an effective alternative for users.

59. The merger operation would lead to a 100% market share for the Lisbon-Leiria section of the A8 motorway and to a 75% share for the Lisbon-Porto section of the A1 motorway. It would directly or indirectly affect around 1.3 million vehicles per month on the A1 and around 570,000 on the A8 (2004 traffic levels).

60. The investigation also showed that this operation could result in losses for users resulting from the disappearance of, or reduction in, competitive pressure on: (i) road tolls; (ii) services provided over the itineraries indicated and the quality and safety of the carriageways; and (iii) long-term improvement of affected infrastructure, in particular road maintenance and widening.

61. PCA argued that since the A1 and A8 motorways constitute an alternative to users, there could be some competitive pressure between the two concessions. Hence in this particular case the mere existence of a concession contract did not exclude per immediate the application of Competition Law. Against the majority of cases concerning public service provision, in this case, it was argued, there was room for competition in the market over and above competition for the market.

62. Indeed, the two concessionaires might compete *inter-alia*: (i) on prices – by setting prices below the maximum price legally established; different prices according to different periods of use and vehicle type; and creating quantity discounts for the frequent users; and (ii) on quality – through better road pavements, better traffic signalling, and shorter periods of repair interruptions.

63. PCA concluded that this operation would create and strengthened a dominant position, which would have significantly restricted competition in the relevant markets and prohibited the merger. The parties appealed to the Minister of Economy under the exceptional review procedure<sup>3</sup>. The Minister allowed the merger operation on grounds of national public interest but imposed remedies.

#### Enernova/Ortiga\*Safra – Approval with commitments

64. This merger operation refers to the acquisition of Ortiga, Energia Eólica S.A and Safra-Energia Eólica, S.A. by Enernova Novas Energia, S.A a subsidiary of the incumbent EDP. All these undertakings are active in the production of electricity using wind energy.

65. Given that EDP already holds a dominant position in the production and distribution of electricity, this operation would strengthen its dominance. On that basis, PCA adopted a clearance decision subject to commitments which prevent the new entity from abusing its facilities in order to manipulate the outputs of wind energy. To monitor these commitments, the parties will periodically report to PCA.

<sup>3</sup> Besides the judicial review, it is possible to appeal a prohibition decision to the Minister of Economy, who then may approve it on the grounds that the operation is beneficial to the Portuguese economy, thereby undermining its anticompetitive effects - article 34 of the Competition Authority's Statutes, approved by Law No. 10/2003 of 18 January.

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

#### **3.1 Studies**

##### *3.1.1 Ongoing Studies and Market Monitoring*

###### Motor Fuel Markets

66. PCA has been monitoring the motor fuel market since early-2004, as a follow-up to pump price liberalisation, and regularly publishing its findings in a quarterly newsletter. The ongoing econometric study makes use of a fixed effects panel-based log-linear approach as applied to weekly price data on both Brent and diesel fuel prices and on final pump prices in Portugal, discriminated by outlet type and geographic location, ranging from January 2004 to June 2006. PCA investigated the speed of the adjustment of the national refined product prices to changes in international oil prices and has concluded that internal prices have a period of adjustment significantly higher than that of the majority of European countries. Since late 2005, the newsletter also covers developments in the market for bottled domestic gas.

###### Cereal milling for the bread industry

67. The Portuguese bread industry, whilst it is atomised over more than two thousand bread producers, faces a highly concentrated supply of wheat flour, the main raw material used in bread production. This power unbalance between millers and bread producers coupled with the recent strong increases in the price of bread raise a twofold issue: (i) the rent millers retrieve from bread producers; and (ii) the effect (or cost pass-through) that an increase on the price of flour has on the price of bread.

68. The aim of this study is to tackle this issue in the basis of an econometric approach using monthly data, ranging from January 2000 to May 2005, on the millers' import (CIF) prices of wheat and selling prices of flour and on price and cost data specific to the bread industry.

###### Follow-up of the study on large retailing groups in the Portuguese food sector

69. A previous econometric analysis of the Portuguese large retailing food sector revealed that purchasing pools and vertical agreements trigger the buyer power of large retailing groups and that these groups tend, in general, to pass-through the rents they retrieve from their suppliers to final consumers.

70. Yet, purchasing pools and vertical agreements are not the only means through which large retailing groups can increase their buyer power. Since the market has two sides, buyer power of a large retailing group is also likely to increase the more this group is able to attract final consumers or to increase its downstream market share.

71. An extended analysis of this sector, covering its dynamics over the period 2002-2005, reveals a tendency to a closing of the gap between the shares of large retailing groups, notably the five largest, on both the upstream and the downstream sides of the market. This has, in turn, led to a substantial decline in these groups' concentration on both sides of the market, to values below the threshold of the Herfindahl-Hirschmann concentration index above which a market can be considered concentrated. Moreover, in parallel with the previous findings on pass-through, results further reveal that large retailing groups contribute, in general, to lower inflation, with their selling prices increasing less than the general food consumer price index.

### Follow-up of the study on the pulpwood industry

72. Pulp milling consists in the transformation of wood, mostly eucalyptus and pines, into pulp, the main raw material used in the paper industry. Depending on the nature of the wood, pulp milling can be disentangled between two sectors: the white sector which produces the eucalyptus white pulp, used in the production of high quality fine papers (e.g. for graphical uses), and the brown sector which produces pine pulp for lower quality papers (e.g. bag paper and pasteboard).

73. Whilst pine is used by several industries other than pulp millers (e.g. agglomerated chips and furniture), the eucalyptus is used almost exclusively by white pulp millers. For this reason, the analysis of the Portuguese sector focuses on the relation between eucalyptus producers and white pulp millers.

74. A previous econometric study reveals that the Portuguese white pulp milling is characterised by an oligopsonistic structure. Purchases of national eucalyptus are dominantly accounted for by the three milling groups operating in Portugal, with the balance being mostly accounted for by millers operating in Spain. A residual amount is purchased by industries other than pulpwood milling.

75. A more recent analysis of the sector, on the rents white pulp millers retrieve from eucalyptus producers, reveals that the oligopsonistic power of white pulp millers may have led to a progressive margin squeezing of most eucalyptus producers. The competition policy evaluation of these results is ongoing.

#### 3.1.2 *New Studies*

##### Pharmacy sector

76. The PCA commissioned a study to an independent scientific body (CEGEA – Centro de Estudos de Gestão e Economia Aplicada da Universidade Católica Portuguesa – CRP) in order to identify the legal, administrative and structural barriers and constraints restricting competition, and assess the costs and benefits from removing regulations that hamper competition. Results of the study, which was submitted to public discussion, are available in PCA website.

##### Notaries

77. PCA also commissioned a detailed study of existing regulatory restrictions affecting the Notaries profession to the *Centro de Estudos de Direito Público e Regulação* (CEDIPRE)- Universidade de Coimbra), towards a future recommendation to Government with proposals to remove or amend some of the restrictions identified in this profession.

##### Research Program

78. PCA has a comprehensive economic research program in industrial organisation, emphasizing a rigorous application of the scientific method through a structural-empiricist approach to competition issues, namely in the network industries. Another line of research is the use of econometric techniques aiming at early detection of anti-competitive conduct. To date, and since PCA start working in 2003, a total of 11 Working-papers have been produced by PCA research staff, as available in the Web Site ([www.autoridadedaconcorrenca.pt](http://www.autoridadedaconcorrenca.pt)); a book on *Merger and Acquisitions: The Industrial Organization Perspective*, authored by two PCA Research Associates, has recently been published by Kluwer Law International (*International Competition Law Series*); and a total of six papers authored and/or co-authored by PCA research economists have been already published, or accepted for publication, by major international referred journals.

79. A stand-alone research project covers the use of artificial intelligence techniques to assist Web Site users in detecting anticompetitive conduct. The first stage of this project will be completed in late-2006. In addition, PCA also runs a regular series of international seminars (one every three weeks) which has attracted worldwide scholars and Chief Economists from leading Competition Authorities. Moreover, Memoranda of Understanding (MoUs) have been signed with national Universities towards fostering advanced teaching and research in competition law and economics.

### **3.2 Recommendations**

PCA recommends measures to improve transparency of prices of mobile communications services, facilitating tariff choice by consumers - *Recomendação 2/2005*

80. In June 2005, PCA recommended that mobile operators be legally required to make available - in their websites and at sales agents – simulators that would enable consumers to determine the price plan (and its respective cost) that is best adjusted to the consumption profile defined by each customer-*Recomendação 2/2005*.

81. Faced with delays in the legislative process, PCA initiated negotiations with the mobile operators, via their trade association, that led to the signing of a voluntary agreement by the three national operators in June 2006, whereby they committed to implement a comparable tariff simulator in their stores by October 1, 2006 and on their websites by year-end, at the latest. This agreement confirmed, in PCA's view, the value of working directly with market participants to improve competitive conditions, once the issue has been given visibility through the recommendation process.

Recommendation regarding the Pharmacy Sector - *Recomendação 1/2006*

82. On the basis of the conclusions presented in the study on the Pharmacies' sector, PCA presented a Recommendation including a set of concrete measures intended to promote the liberalisation of market access and the elimination of unjustifiable restrictions and distortions affecting competition and thus contribute to the reform of the present regulatory framework applying to pharmacies.

83. The recommendation includes measures, such as the:

- Elimination of public bidding procedures for the establishment of new pharmacies and of the respective quantitative criteria (geographic and demographic);
- Creation of specific regulations 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;
- Elimination of all restrictions on the transfer of premises or exploitation or the relocation of a pharmacy;
- Repeal of the legislation that reserves pharmacy ownership for pharmacy graduates and, under a resolutive condition, pharmacy students, with the implicit abolishment of the non-assignability of the licence and cancellation of the obligation that the technical control of the pharmacy is carried out by its owner;
- Creation of specific provisions regarding concentration 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;

- Abolishment of the ban on pharmacy ownership by drug wholesalers, without prejudice to the applicability of Law No. 18/2003 of 11 June to any future transactions;
- Formulation of rules prohibiting pharmacy-owning enterprises and the respective sector associations from owning drug-producing enterprises, except where financial investments are involved.

84. Further recommended measures for the promotion of balanced and effective competition between enterprises included the abolition of the ban on pharmacy discounts, with the present system being allowed to function as an effective system of maximum marketing margins; the review of current retail sales pricing system for subsidised medicines and of the subsidy system procedures, also aiming to reduce public expenditure on medicines; the authorisation for pharmacies to advertise their activity, on the basis of specific regulations; the authorisation of distance selling by pharmacies, on the basis of specific regulations and while protecting public health and the quality and safety of the supply; the elimination of self-regulation processes in the application of rules on pharmacy activities, in particular the definition of permanent-service shifts. Finally, measures fostering a more competitive environment were also suggested, namely relating to the payment system to pharmacies.

Authority proposes measures to increase competition in the water sector - *Recomendação 2/2006*

85. In April 2006, PCA presented a Recommendation on the Water Supply and Waste Water Treatment Sectors for the government's consideration, which aims to introduce or strengthen competition in the sector. This recommendation fundamentally involves (i) the municipal system concessions, (ii) the management of municipal systems by companies with a mainly public capital structure and (iii) the subcontracting of operating, maintenance and upkeep services for water treatment plants and waste water treatment plants to the entities managing multi-municipal systems.

86. Specifically, PCA recommended a set of measures aimed at introducing greater competition in the awarding of concessions, the implementation of management through municipal companies and the subcontracting of services.

87. With regard to the municipal system concessions sponsored by local councils, it was recommended, namely (i) the criteria for awarding contracts should be objective, (ii) the initial periods for concessions should not be subject to extension, (iii) a review of the statutes of IRAR (the Regulatory Institute for Water and Sewage) with effective powers to monitor the awarding of contracts, and (iv) that specialist skills, in the form of technical, financial and economic assistance be made available to municipalities throughout the tendering process.

88. With regard to the management of systems by municipal companies, it was recommended that public calls for tender become obligatory for the choice of private partners.

89. With regard to the subcontracting of operating, maintenance and upkeep services for water treatment plants and waste water treatment plants, it was recommended that AdP Group companies do not participate in calls for tender by the entities managing multi-municipal systems (entities also controlled by the AdP Group).

### 3.3 *Conferences and Workshops*

#### Forum for Antitrust Lawyers

90. In September 2005, PCA organised the First Forum for Antitrust Lawyers. This one day event addressed the major developments in Competition law and practice regarding mergers, abuse of dominant position and cartels under national and European Law. The Forum was open to law practitioners active in competition law.

#### Forum for Journalists on Competition Issues

91. In October 2005, PCA organised a one-day workshop for journalists, concerning Competition Law and Economics issues with relevance to media professionals. The programme included some specific and case-based panels focused on mergers, cartels, abuse of dominant position, under national and European legislation. It also included one panel on the interface between competition and journalism. The speakers were all from PCA and included a special session with the President. 25 specialised economic journalists from the most important newspapers, radio and TV chains, attended the workshop, as well as some directors and editors. A special press kit, with relevant documents, legislation and case studies, was delivered to participants.

#### Workshop - Notaries Regulation

92. While preparing the recommendation to be addressed to the Government with proposals to remove or amend some of the restrictions affecting this profession, PCA undertook the initiative to organise a Workshop with the regulators, notaries and other legal professions and academics, to discuss the objectives and possible content of that document.

93. The overall conclusion was that the regulation of this profession in Portugal was excessively restrictive, due to barriers to entry, price fixing, advertising prohibitions and business structure restrictions. The overall conclusion was that many of these restrictions were often disproportionate, unjustified and unnecessary to protect and pursue public interest.

#### Workshop - Promotion of Competition Water and Sanitation

94. In preparation for Recommendation n.º 2/2006, PCA organised a closed workshop to listen to the views of main stakeholders - Ministry of Environment, Spatial Planning and Regional Development, Ministry of Economy and Innovation, Ministry of Finance, Group Águas de Portugal (AdP), Regulatory Institute for Water and Waste (IRAR), National Association of Portuguese Municipalities (ANMP), Portuguese Association of Distribution and Water Drainage (APDA) and Association of the Firms for the Environment Sector (AEPISA). In addition, the sector regulator – IRAR – was requested to issue an opinion, under Article 9 of the Competition Authority's statutes.

#### Workshop - Promotion of Competition on the Public Works Markets

95. Following the efforts that are being carried out concerning the prevention and detection of cartels, PCA was instrumental in the creation of a Task Force for the “Promotion of Competition in the Public Works Markets”. The Task Force, created in 2005, comprises representatives from the main stakeholders: *Procuradoria-Geral da República*, *Tribunal de Contas*, *Inspecção-Geral de Finanças*, *Inspecção-Geral de Obras Públicas* and *Instituto dos Mercados de Obras Públicas e Particulares e do Imobiliário*. So far, the activity developed has essentially focused on the: (i) typical forms of collusion in public works; and (ii) instruments and methods for the detection of cartels in public tenders.



96. In the context of this Task Force, PCA prepared a “check-list” of twenty indicators that may point to the presence of a standard behaviour of companies who cooperate in an illicit manner to ensure the award of a public contract. This “check-list”, which reflects international best practice, may equally be applicable to other acquisitions of goods and services by public entities.

97. The effort undertaken has culminated, in early-2006, with a closed *workshop* on the “Promotion of Competition in the Public Works Market”, where representatives of the State, regional and local authorities and other public bodies were (i) informed of the Task Force activities; (ii) made aware of the harmful effect of cartels; and (iii) trained on how to use the “check-list” while cooperating with PCA.

#### First Lisbon Conference on Competition Law and Economics

98. PCA is, under its statutes fully committed to pursue research in competition policy and to foster a competition culture. In this quest, PCA organised the First Lisbon Conference on Competition Law and Economics that was held November 3<sup>rd</sup> 4, 2005. The opening ceremony was chaired by His Excellency the President of the Portuguese Republic, Dr. Jorge Sampaio, and by the European Competition Commissionaire, Ms. Neelie Kroes. Over 312 high-level participants attended the Conference. Conference materials are available at:

[http://www.autoridadedaconcorrenca.pt/aConcorrenca\\_C14.aspx?cat=Cat\\_Menu\\_seminarios](http://www.autoridadedaconcorrenca.pt/aConcorrenca_C14.aspx?cat=Cat_Menu_seminarios)

99. The Conference was intended as a *fora* to debate current issues related to Competition Law and Economics, where leading experts from Europe and North America were invited to address the following six topics: (i) antitrust enforcement and procedural rules under the modernisation package; (ii) competition, regulatory costs, market imperfections and competitiveness in the European Union; (iii) competition and regulatory costs: the case of Portugal; (iv) the new merger regulation and judicial control; (v) modernisation of article 82 of the EC Treaty and the abuse of dominant position and (vi) competition and regulation.

### **3.4 Co-operation**

#### *3.4.1 ECN - European Competition Network -*

100. Under EC Regulation 1/2003, the new regulation for implementation of articles 81 and 82 of the EC Treaty, PCA opened five new cases. Under the efforts of ECN members with regard to an enhanced convergence practice of consumer protection in competition enforcement, PCA and the Portuguese Consumer Institute prepared a joint report on "*Synergies and interaction between policy setting and enforcement of competition rules and of consumer protection rules*". This report is deemed to contribute to improved co-ordination between consumer protection and competition policy.

#### *3.4.2 ECA – European Competition Authorities*

101. PCA was appointed for the Presidency of ECA for a mandate of three years, during the Nice meeting held May 18-19, 2006. The leadership of ECA is formed by a group of three countries, the chairing country, the country that hold previously the chair, and the future chair. In this context, PCA will be responsible for organising the next Annual ECA meeting which will be held in Portugal, April 2007.

102. In what concerns its participation in the ECA’s Merger subgroup, during the period covered by the report, PCA managed the information relating to mergers’ multiple notifications in 20 cases, all of which had a direct impact in the territory of Portugal and were notified to the Network by the national Authority.

### 3.4.3 *Bilateral Cooperation*

#### The 2<sup>nd</sup> Lusophone Competition Meeting

103. In May 2006, as part of the *I Lisbon Competition Week*, the 2<sup>nd</sup> Lusophone Competition Meeting was held with the participation of representatives from Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe), in addition to Brazil and Timor. PCA's initiative followed on the 1<sup>st</sup> Lusophone Competition Meeting held in Brazil in 2004. The Meeting was co-financed by UNCTAD, and benefited from the cooperation of Brazil's CADE (Administrative Council for Economic Defence).

104. The delegations reported progress since the first Meeting and then mentioned the latest legal and institutional developments, while the debate, moderated by UNCTAD, allowed for an in-depth examination of public concessions, government intervention in the market, and the specific problems of small economies highly-dependent on the exterior. "Competition in Economic Development", "Reducing the Burden of Regulation" and "Competition and Institutional Development" were the main topics discussed.

105. PCA presented a paper on competition policy in the European Union, as an example of the implementation of competition rules within the framework of a regional organisation. Particular emphasis was given to the role of competition policy in the pursuit of economic development and, also, on the importance of cooperation and support for capacity-building in the Lusophone countries. Angola volunteered to host the 3<sup>rd</sup> Lusophone Competition Meeting, to be held in 2008.

#### The Workshop on Competition Policy for Ibero-American Countries

106. The "Workshop on Competition Policy for Ibero-American Countries" was held with the participation of various Latin American countries, Portugal, and Spain in addition to the representatives from the OECD and UNCTAD. The proceedings covered topics such as "Competition and regulation in telecommunications", "Mergers between Undertakings" referring to various case studies from Brazil, Portugal and Mexico and "Abuse of a dominant position", where Argentina, Mexico and Spain also shared their experiences. This was basically a case-study focussed outreach event.

107. At the Annual Meeting of the Ibero-American Competition Forum, NCA Presidents addressed the legal framework of unilateral conduct, namely the reform of Article 82 of the EC Treaty. Projects to implement an information network and a knowledge network within the framework of the Ibero-American Forum were also discussed. The Mexican Comisión Federal de Competencia (Federal Competition Commission) expressed their willingness to organise the next Annual Meeting of the Ibero-American Competition Forum, thus assuming the Rotating Secretariat of the Forum.

### 3.4.4 *Cooperation with the Centre for the Judicial Studies*

108. Bringing together their areas of expertise, PCA and the Centre for Judicial Studies of the Portuguese Ministry of Justice have signed a Memorandum of Understanding (MoU) towards enabling the exchange of knowledge in competition law and investigative techniques. A joint training program has also been agreed under the MoU. The Center is responsible for the advanced training of judges.

## 4. Resources of competition authorities

### 4.1 Resources overall

#### 4.1.1 Annual Budget

109. On a cash basis, annual budgetary commitments amounted to € 7.1 million, as compared to € 5.8 million in the previous year. The registered 22% increase was mainly accounted for by expenses with additional staff which came on board in mid-late 2004. The sources of funds continue to be largely dominated by revenues directly transferred by seven Sector Regulators, in an amount of up to 6.3% of charges levied on regulated undertakings. Additional funding was provided by fees on merger control; by 40% of the value of collected fines amounting to less than 0.8 million, with the balance accruing to the Treasury; and by marginal transfers from the Government capital investment budget.

### 4.2 Number of employees

110. As of end-2005, 77 staff were on board, 57% of which with an academic background equal or above Masters level. These values are at the same level as in end-2004. After the 50% increase in high-level staff registered in 2004, outside recruitment undertaken during 2005 was essentially targeted at replacing seconded civil servants who took over new assignments. The number of employees falling into each category is indicated in the table below.

• Board	3
• Management	6
• Economists and Market Specialists	24
• Lawyers	22
• Other Professional Staff	4
• Support Staff <sup>1</sup>	8
• Total	77

### 4.3 Human resources allocation

111. Of the total management and staff above, 52 were working on competition enforcement. Of these, 30 officials were primarily working on enforcement against anticompetitive practices; 12 on merger review and enforcement; six on economic and legal advice; and four on competition advocacy. The matrix structure of the Authority further allowed for a reallocation of human resources to meet a shifting work load during 2005, notably in support of the review of major merger operations. Overall, and compared to December 31, 2004, a greater proportion of competition staff time was allocated to quality enhancement of legal and economic work, in line with the findings of the OECD Pilot Project for the Institutional Assessment of the Portuguese Competition Authority (DAF/COMP/WD(2005)30, 20-May-2005).

### 4.4 Period covered by the above information

112. Budgetary information for 2005 and for 2004 covers the period January 1-December 31. Unless otherwise indicated, human resources information is reported as of December 31, 2005.