The importance of coherence between competition policies and government policies

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This essay discusses a topical subject that relates so closely to what competition authorities do, can do, and cannot do. It will aim to shed light on the reason why there is so much "tension", to use Eleanor Fox's words, on reconciling competition policies with a number of other government policies; or why it is so difficult to reconcile the public interest of competition with other public interests, whether in the European Union or in developing economies.

In the following I will touch on three topics and provide brief conclusion. First, I will go through the difference between competition policy on the one hand and competition enforcement and advocacy on the other, as well as covering who is – or should be – responsible for each one. Second, I will present key competition and regulation measures of the Memorandum of Understanding (MoU) recently agreed upon between Portugal and the European Commission, the European Central Bank and the International Monetary Fund: this clearly illustrates the role of policies in setting up the right competition environment. Third, I will focus on the role of the Portuguese Competition Authority (PCA). Finally, I will draw some conclusions.

1. COMPETITION POLICY VERSUS COMPETITION ENFORCEMENT AND ADVOCACY

Let me start by introducing what I think is a key conceptual difference, not between "Competition Policy" and "Government Policies," but between "Competition Policy" on one hand and "Competition Enforcement and Advocacy" on the other.

Competition policy, like other government policies, is the responsibility of the government; competition enforcement and advocacy is the responsibility of the competition authority.

It is true that in any country we need to raise productivity, competitiveness and growth, and promote the reduction of social inequalities. None of this will be achieved by simply reducing the budget deficit. Instead, a host of economic policies and structural reforms are required, all aimed at removing all types of impediments to growth, namely restrictions to competition generated by a number of government policies.

Competition authorities, through their advocacy role, can contribute to raising awareness and put forward suggestions concerning the need to promote competition-friendly economic policies. In turn, they can also contribute to avoiding "apparently" pro-competitive policies and practices, which may very well be popular but are fundamentally wrong from an economic point of view.

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A clear example is provided by the years of credit expansion that preceded the 2008 financial crisis, with risk premia far below what was required. They were fostered by various kinds of economic policies and were never curbed by decisive action from banking supervisors and regulators.

In their advocacy role or in their enforcement capacity, competition authorities are fundamentally constrained by two realities:

- On one hand, the economic policies and the legal and regulatory framework of the country in which they operate, which can be more or it can be less competition-friendly; and

- On the other hand, the judicial system, and this in the end will uphold or not the competition authority's decisions after any appeal; and it will tend to let appeals reach the statute of limitation or not.

It is obvious that these constraints on the work of a competition authority will be less and less hampering as all economic agents in the economy, and the government, understand that the rule of law and a market environment that together promote competitive outcomes are to be complied with.

It is very curious that in several instances the same policy-makers and legislators that set market price regimes, rather than regulated prices, are the ones who criticise competition authorities for not intervening when prices of tradable goods are high and volatile; or that those setting non-competitive policies and regulations are the ones who convey the idea that it is up to the competition authorities to solve problems that such policies and regulations created in the first place.

2. THE MEMORANDUM OF UNDERSTANDING (MoU)

Let me move now to the competition and regulation issues stemming from the MoU agreed in May 2011 between Portugal and three multilateral institutions – the European Commission (EC), the European Central Bank (ECB) and the International Monetary Fund (IMF), commonly referred to as the "troika".

Similar memoranda of understanding had already been agreed between these three institutions and Greece, and thereafter Ireland. They all attempt to find a response to a challenge that has never had to be faced before: how to draw up a program for countries without their own currency, where the traditional monetary and exchange rate policy instruments are not available. It is for this reason that everything has to be thought out, not only in terms of budget variables, but also in structural terms, where competition and market regulation play a decisive role.

In my opinion, the greatest achievement of the MoU that Portugal signed with the EC, the ECB and the IMF, as did Greece and Ireland before it, is precisely to contribute decisively to moving the country in the direction of a more competition-friendly economy.

In this context, the MoU with Portugal is based on a two-pronged stance:

- Firstly, it is grounded on a philosophy of fostering and buttressing competition across the economy, including those sectors that are still regulated, involving a raft of structural reforms with very demanding deadlines; and

- Secondly, an array of measures, also with tight deadlines, aimed at improving the country's competition and regulation legal framework, following best international practices. This will pave the way to more efficient and speedier action by the authorities in charge of ensuring that the rules of competition are upheld and infringements punished. These authorities are the PCA and the courts which decide on appeals against PCA decisions.

The analyses and recommendations of the PCA in relevant sectors were scrutinised by the "troika", and it is very gratifying to see that the MoU flags up certain points that have also been identified by the PCA. Some of its measures also concur with conclusions reached and recommendations made by the PCA in such important sectors as telecommunications and energy.

In matters of competition and regulation, the MoU proposes measures in five areas:

i. The creation of a specialist court for competition issues, to be set up by the 1st quarter of 2012;
ii. Revision of the Portuguese Competition Law, to be carried out by the 4th quarter of 2011;
iii. Measures that ensure financing for the PCA that is *sufficient and stable*, to be enacted also by the 4th quarter of 2011;
iv. Measures that guarantee the country's regulators the independence and the funds they need to fulfil their missions, to be in place by the 1st quarter of 2012; and
v. The end of golden shares in the telecom and energy sectors, to be carried out by end-July 2011.

i. *The specialist court*

We heard yesterday the pros and cons of specialised competition courts. I will not go through these arguments again. I will simply say that in my country, given the judicial system we have, the creation of a specialist court to handle competition issues will go a long way towards bringing about fairer solutions and speedier procedures whenever there is an appeal against a PCA decision. The new court, which will hear competition, regulation and supervision appeals, has just been created, and it will likely be operational even before the deadline set out in the MoU.

ii. *Competition Law*

The current Portuguese Competition Law dates from 2003, and a revision of various aspects of it can be justified at this point in time as already pointed out by the PCA, given the experience that has been garnered in the meantime, through its investigations, its decisions, its appeals and its handling of cases in court. In addition, there have been developments in the national and community jurisprudence framework.

The PCA has contributed to this measure by concluding the internal review work of the current Competition Law that was started very early on in the present Board's mandate. In finalising this internal review work, there was the concern to provide a better response to what has been set out in the MoU. The PCA has no power to legislate or to take legislative initiatives, but its in-house assessment could be very useful, since the work carried out fully addresses the following MoU considerations:

a. Possible reformulation of the current Competition Law, with a comprehensive and coherent overhaul;
b. Introduction of the principle of opportunity to rationalise the conditions that determine the opening of investigations, which is a breakthrough vis-à-vis the Portuguese legal tradition;
c. Greater autonomy from other Portuguese legislation to which it is currently subordinate (the Administrative Procedure Code, the Administrative Sanctions Code and the Penal Code);
d. Increased convergence with EU legislation and jurisprudence, specifically through abandoning the criteria of market share for merger notification; and
e. Enhancing the appeals process against PCA decisions and the resulting procedures in the courts *to increase fairness and efficiency in terms of due process and timeliness of proceedings.*

The in-house reappraisal at the PCA will go further than just a reformulation of the Competition Law because it will also include a complete reformulation of the leniency regime to bring it more into line with European law and jurisprudence. On this point also, it is our opinion that there is no justification for approving the new regime through a mere change to the existing law; rather should there be a completely new law. In the light of this, the PCA has presented to the Government a comprehensive document covering a new legal framework for competition and leniency.

In line with best practice at the European Commission, the proposal that the Government adopts would benefit from a public consultation process before being submitted to Parliament for appreciation. If the Government decides to go ahead with such a public consultation, the PCA will give any assistance that is required. This is the usual procedure followed by the PCA before any new regulation or guideline of its own comes into being. These documents depend only on the PCA and have been made available for public consultation. The aims are threefold: to make the PCA more transparent and more accountable to its stakeholders; to enhance efficiency and the speed of investigations and cases; and to bolster the judicial quality of the cases we are responsible for taking to the courts.

iii. *Financing the PCA*

The PCA's budget outturn since 2008, in the framework of its existing financing model, has been exemplary. The model was set out in Decree Law no. 30/2004, of 6 February 2004, and is essentially made up of two components: the first, representing about 3/4 of the PCA revenue, comes from contributions made by seven sectoral regulators; and the second, representing almost ¼, comes from 40% of the sanctions imposed by the PCA, as and when the money is collected. It should be noted here, however, that under normal circumstances, collection is only ensured several years after a PCA decision, following

all the appeals procedures allowed in law, and the final amount depends on what the judge decides.

This financing model has two major virtues: it was construed as an integrated national system for competition and regulation; and it is able to ensure *sufficient and stable financing*, as long as no *ad hoc* changes make it very difficult to pursue a responsible and efficient management of the institution.

It is of course incumbent on the Government to choose a different financing model, guaranteeing *sufficient and stable financing*, bearing in mind also the capacity of the PCA to carry out its remit; or to maintain the current model, but with enough safeguards that also allows the institution to reach the same goals.

The ability of the PCA to carry out its remit in the future is critical. It is the essential point of reference for ensuring this *sufficient and stable financing.* The exemplary PCA budget outturns since 2008 have demanded intelligent budget control over every item and they do not in any way call our work into question, though there has been a sacrifice and that is in the recruitment of new staff. For an institution such as ours, this means we have had to cut into what is most essential for the future.

It is for this reason that I think the issue must be revisited, preferably this year, in the same way, in fact, as was allowed for the Competition Authority in Greece, the only public institution in that country authorised to increase staff in the current crisis. The PCA, as I set out for the first time to a parliamentary committee, needs 10 new specialists, half of them economists and the other half legal experts, besides the replacement of all those that have left the institution in the last two years. Serious attention to this issue is warranted by the extra work that can be expected as a result of the measures set out in the MoU covering the liberalisation of certain sectors of the economy and substantial adjustments to the regulatory scope of others.

iv. *Regulatory institutional framework*

In terms of the country's regulators, the MoU proposes that:

- by the 4th quarter of 2011, there should be an independent report by renowned international specialists to put forward a benchmark of Portuguese regulators with the best international practices. This should cover the appointment of boards, competencies, independence and available funds and, in the case of sectoral regulators, the scope of their work, their powers to intervene and the mechanisms for coordination with the PCA; and

- also by the 1st quarter of 2012, based on this report, to present a proposal that brings on board the best international practices in such as way as to bolster the independence of the regulators where necessary, and dovetail fully with EU legislation.

3. THE ROLE OF THE PCA

As I mentioned before, the MoU is grounded on a philosophy of fostering and buttressing competition across the economy. The PCA will have a pivotal role to play

here, with the addition of a new interface with the judicial system, now in the form of a new competition, regulation and supervision court, which must perforce be markedly speedier.

This role has a further cornerstone: the PCA is a member of the European competition system, and this provides at one and the same time:

- a European Union legal framework to act as reference, one which takes precedence over the Portuguese legal framework; and

- a guarantee that the work of the PCA must be on a par with the demands of an institution that is not merely national but also European, subject to the scrutiny of its peers in the European Competition Network, specifically the European Commission's General Directorate for Competition.

Along with this European scrutiny, the PCA is also subject to international assessments, and these define the benchmarks that allow for an appraisal of its performance, not just from an exclusively domestic viewpoint, but also through international comparisons. There have been recent assessments of the PCA, one through the *Global Merger Control Index* (GMCI) of the *Centre for European Law and Economics,* and the other on *overall competition enforcement* carried out by the *Global Competition Review*. These assessments are important and we need to pay attention to them, draw the right conclusions and improve the institution accordingly.

4. CONCLUSION

Portugal, as well as Greece and Ireland, is living through times of change. These changes are throwing up challenges, creating opportunities, and highlighting questions. They will test the adequacy of economic policies and the quality of institutions.
Concerning economic policies, those which come through the test will play a decisive part in bringing about a more competitive landscape in their economies. And the work of competition authorities will have to be more effective, because all economic actors, including the State, will have to develop their activity in an environment increasingly dominated by a culture of competition and market rules.

In terms of institutions, such as competition authorities, those which come through the test will be strong on continuity and innovation; strong on rigour and flexibility; strong on resilience and a willingness to look outside the box; and stronger still in the way they work to the highest professional standards.

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