

## Competition - Portugal

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### Individual company commitments offered in drive to end anti-competitive proceedings

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In a speech made at the first Competition Law Conference between Portugal and Spain, the president of the Portuguese Competition Authority publicly proposed an amendment to the Portuguese Competition Law, regarding the authority's power to close proceedings concerning anti-competitive practices by imposing certain commitments.<sup>(1)</sup>

In contrast to the provisions on merger control procedures, the Competition Law does not specify whether the authority may terminate administrative penalty proceedings through the imposition of certain measures intended to remedy the effects of anti-competitive practices.

However, in some cases the lack of specific legal provisions on the imposition of commitments has not prevented the authority from accepting commitments offered by the companies enrolled in such proceedings and from closing the file, as in the context of investigations conducted by the European Commission pursuant to Article 9(1) of EU Regulation 1/2003.

The authority has accepted commitments at least in three cases, based on the view that the goals it pursues – that is the establishment, protection and promotion of competitive markets – would be fully achieved with the imposition of such commitments.

In the first case the authority decided to take no further action, with conditions attached, following a complaint presented by a wholesaler about the alleged existence of an anti-competitive clause in a draft agreement used for the distribution of various agro-chemical products.<sup>(2)</sup>

In the second case the authority dropped administrative proceedings against anti-competitive practices by imposing modifications to anti-competitive clauses included in four undertakings' draft agreements for coffee distribution to the so-called HORECA channel,<sup>(3)</sup> with particular focus on the fact that the contracts were for an indefinite term.<sup>(4)</sup>

Finally in the third case, a dominant undertaking operating in the tomato processing market submitted and implemented commitments to remove anti-competitive clauses included in agreements with growers of tomatoes for industrial uses – namely, an undertaking covenant not to oblige tomato growers to use a certain variety of seeds sold in Portugal by another undertaking belonging to the same group.<sup>(5)</sup>

The major difference between these decisions of the authority and those of the European Commission relates to the consequences of breach of such commitments. In the EU context, as this type of decision is foreseen in the law, the commission may impose penalties of up to 10% of the relevant turnover upon companies that breach a binding commitment, under Article 9 (Article 23(2)(c)) of EU Regulation 1/2003.

At the national level, and taking into account the principle that penalties should be pre-determined by law, if the authority acknowledges that a company has breached a binding commitment imposed by a decision that closed the proceedings, the authority is not allowed to apply penalties to the commitment violation itself. However, the authority may reopen the procedure and apply the proper penalty to the anti-competitive practice that prompted the initiation of proceedings.

Therefore, the stipulation of a similar provision such as Article 9(1) of EU Regulation 1/2003 would be a significant amendment to the Competition Law, bringing it into harmony with EU law and into accord with the authority's recent practice.

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### Endnotes

<sup>(1)</sup> The speech is available at [www.concorrencia.pt/download/2010-07-02\\_1a\\_Conferência\\_Luso-](http://www.concorrencia.pt/download/2010-07-02_1a_Conferência_Luso-)

Espanhola\_Discurso\_Presidente\_AdC.pdf.

(2) Press Release 16/2007, [www.concorrencia.pt/download/pressrelease2007\\_16.pdf](http://www.concorrencia.pt/download/pressrelease2007_16.pdf).

(3) Hotel, restaurant and cafe channel.

(4) Press Release 13/2008, [www.concorrencia.pt/download/pressrelease2008\\_13.pdf](http://www.concorrencia.pt/download/pressrelease2008_13.pdf).

(5) Press Release 20/2009, [www.concorrencia.pt/download/pressrelease2009\\_20.pdf](http://www.concorrencia.pt/download/pressrelease2009_20.pdf).

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