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Competition - Portugal

Court quashes Competition Authority decision on discriminatory pricing

Contributed by **Morais Leitão, Galvão Teles, Soares da Silva & Associados**

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The Lisbon Commercial Court recently annulled a decision issued by the Competition Authority in September 2008 against Portugal Telecom, whereby the authority had imposed a €2.1 million fine for alleged abuse of a dominant position in the wholesale market for leased lines. The procedure was subsequently declared extinct under the statute of limitations.

Facts

Leased lines or circuits provide a permanent physical connection between two points for the user's exclusive voice or data traffic requirements. Wholesale clients use them to ensure interconnection between their fixed and mobile networks and to provide other telecommunications services in the retail markets (eg, dedicated lines to large end users). In 2003 and 2004 Portugal Telecom was found to have a dominant position in the wholesale leased lines markets. It was the only provider of wholesale access to analogue transit and terminal sections of leased lines and had a market share of over 86% on the market for wholesale access to digital transit sections.

Portugal Telecom's 2003 pricing policy for wholesale access to leased lines consisted of a standardised discount scheme based on monthly invoiced sales, comprising eight thresholds with discount rates of between 4% and 32%. Portugal Telecom also offered an additional 10% discount on high-capacity circuits to clients with annual purchases above €25 million, as well as a further 'loyalty premium' of 2% to 10% for lines which remained installed and unchanged for between one and five years.

Authority's decision

In the disputed decision the authority found that Portugal Telecom, the former telecommunications incumbent, had abused its dominant position in the wholesale markets for leased lines between March 2003 and March 2004 by applying a pricing policy which discriminated against the competitors of its downstream operations (for further details please see "[Competition Authority fines Portugal Telecom for discriminatory pricing](#)").

The authority stated that the pricing policy was discriminatory and was not economically justified, since the eight thresholds evolved in a non-linear fashion and resulted in different treatment for clients in similar conditions by applying the same discount rate to the aggregate monthly charges of each client. For instance, clients with monthly purchases of up to €99.76 received a discount of 4%, whereas clients with higher sales volumes enjoyed a higher rate for the same value of purchases.

The decision also stated that the higher thresholds benefited only companies in the Portugal Telecom group, which consequently received average discount rates that were far higher than those of their competitors. These companies were also less affected than their competitors by reductions in discounts relative to the previous pricing policy. Moreover, the authority ruled that the loyalty premium prevented Portugal Telecom's clients or competitors from developing their own networks, thereby limiting production, distribution, technical development and investment in the relevant markets.

The authority concluded that the pricing policy had affected competition in both the wholesale leased lines markets and the retail markets, in violation of the Competition Act and Article 82 of the EC Treaty. However, it identified two mitigating circumstances: the national sector regulator had not opposed the entry into force of the pricing policy, and Portugal Telecom had replaced the policy after a year. The €2.1 million fine represented 0.1% of the group's annual turnover in 2004.

Appeal

Portugal Telecom appealed to the Lisbon Commerce Court, which gave its ruling on February 29 2012.

Portugal Telecom raised several issues of procedure, including breach of several rights of defence and procedural errors regarding consultation with the European Commission and the sector regulator. However, these pleas were rejected. The court also confirmed the decision's findings on the definition of the relevant markets and on Portugal Telecom's dominant position.

The defendant argued that the 2003 pricing policy could not be abusive unless its network infrastructure constituted an essential facility. The court did not rule on whether this was a necessary requirement for proving the existence of an abusive practice, but nevertheless concluded that, at the time, Portugal Telecom's network could not be replicated by any competitor and was therefore essential for any operator that wished to provide leased lines in the retail market.

However, the authority was overruled on the issue of discrimination. The court noted at the outset that quantity discounts are a common practice and that it is inherent in any quantity discount scheme that larger buyers receive higher average

discounts. As the authority was unable to demonstrate otherwise, the court agreed with Portugal Telecom that the increase in discount rates was compatible with the reductions in the typical average costs in the telecommunications industry. In addition, the authority did not prove that the discount thresholds could not be justified by Portugal Telecom's interest in a reasonable threshold of profitability.

As to the charge that only Portugal Telecom's subsidiaries had been able to benefit from the highest discount thresholds, the court noted that the pricing policy was to be in force for an indeterminate period, and that in 2003 demand for wholesale leased lines was expected to grow considerably. The court also found that the authority had failed to prove that the loyalty premium had the effect of reducing clients' incentives to invest in new networks. Finally, the court ruled the authority had not shown that the price policy was not economically justified from the perspective of Portugal Telecom's business.

Since the authority was unable to demonstrate that the 2003 pricing policy was discriminatory and limited production, distribution, technical development or investment, the court annulled the decision and acquitted Portugal Telecom of all charges brought by the authority.

Comment

On March 6 2012 the authority announced that it had appealed the judgment to the Lisbon Appeals Court "in order to reaffirm the EU case law on the abuse of dominant position". However, it was forced to recognise a few days later that the procedure had been declared extinct on March 8 2012 under the statute of limitations.

Infringements against the act must be successfully prosecuted within eight years of the end of the alleged infringement (including suspensions and interruptions). As the 2003 pricing policy had been discontinued on March 7 2004, the procedure was declared extinct, as by March 8 2012 a final decision on the case had not yet been adopted.

Since its creation in 2003 the authority's enforcement efforts on unilateral conduct have been largely directed at Portugal Telecom, but have been markedly unsuccessful. A 2007 decision imposing a €38 million fine was annulled by the Commerce Court in 2010 (for further details please see "[Regulator fines Portugal Telecom for refusing access to infrastructure](#)" and "[Portugal Telecom wins appeal against Competition Authority fine](#)"). This ruling was subsequently confirmed by the Lisbon Court of Appeals. The September 2008 decision on the leased lines markets was annulled by the Commerce Court and the proceedings were subsequently declared extinct. A September 2009 decision imposing fines of €53 million on Portugal Telecom and its former subsidiary ZON for an alleged margin squeeze on the broadband markets was similarly declared extinct under the statute of limitations in November 2010 (for further details please see "[Regulator fines Portugal Telecom and ZON for abuse on broadband markets](#)").

Dominance cases are typically complex, making it comparatively more difficult for competition regulators rule on them and successfully maintain their rulings in court. However, responsibility for this outcome lies firstly with the authority. Given the eight-year limitation period and the likelihood of subsequent judicial appeals, it is unclear why the authority took almost five years to decide the 2008 leased lines case - the complaint had been lodged in November 2003 - and nearly seven years to reach a final decision in the 2009 margin squeeze case.

In order to address this issue, the new Competition Act (which is likely to become law by the end of April 2012) will extend the limitation period for substantive infringements to a maximum of 10 years and six months.

For further information on this topic please contact [Pedro De Gouveia e Melo](#) at [Morais Leitão Galvão Teles Soares da Silva & Associados](#) by telephone (+351 21 381 7400), fax (+351 21 381 7499) or email (pgmelo@mlgts.pt).

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Author

Pedro De Gouveia e Melo



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