



# Portugal ❖

Portugal is an independent country since the first half of the 12<sup>th</sup> century. The country was a world maritime power from the late 15<sup>th</sup> century to the beginning of the 17<sup>th</sup> century. In the 17<sup>th</sup> and 18<sup>th</sup> centuries domestic economic growth was much dependent on the development of the Brazilian economy and on the trade between Africa, Portugal and Brazil. Following Napoleonic Wars and the independence of Brazil in 1822, Portugal lost its dominant position in the South Atlantic.

The political bases for institutions' development of a liberal economy were created by the middle of the 19<sup>th</sup> century, following a civil war. A constitutional monarchy was replaced by a Republic in 1910.

From 1926 to 1974 Portugal was governed by a military regime that imposed a repressive government. Since 1933 until 1974 started a new non democratic type of government, called "Estado Novo". In 1974, a military coup ended Estado Novo and laid the basis for a fully democratic system. In the same year the country started to grant independence to its African colonies (Guinea Bissau in 1974 and Angola, Mozambique, Cape Verde and Sao Tome and Principe in 1975).

Portugal was a founding member of NATO and EFTA. In 1986 the country joined the EU (formerly EC).

Portugal began to participate in the European Economic and Monetary Union (EMU) in 1998, and introduced the Euro as its new form of currency on January 1, 2002.

During the 2011 and 2012 term, Portugal assumed a nonpermanent seat on the UN Security Council.

## Economy

In the second half of the 20<sup>th</sup> century the Portuguese economy grew the most between 1950 and 1973, reducing the income gap with the high income European countries. After the 1974 revolution short periods of high growth were followed by economic crisis, usually involving serious external imbalances. In 1978 and in 1983 economic and financial crisis involved the adoption of an adjustment

PROFILE	
Population:	10.64 million*
GDP (Current US\$):	237.4 billion*
Per Capita Income: (Current US\$)	21,210 (Atlas method)* 24,44 (at PHP.)*
Surface Area:	92.09 thousand sq. km**
Life Expectancy:	79 years*
Literacy (%):	95 (of ages 15 and above)*
HDI Rank:	43***
<i>Sources:</i>	
* World Development Indicators Database, The World Bank, 2011	
** CIA The World Factbook, 2011	
*** Human Development Report Statistics, UNDP, 2011	

programme negotiated with the IMF. From 1986 to the late 1990s the economy grew at rates above the EU average, benefitting from membership of the EU and the Monetary Union. However, high public deficits and unsustainable current account deficits led to a period of low growth and stagnation and, after the 2007-2008 financial crises, to a new adjustment programme, negotiated with the EU, the ECB and the IMF, and to prolonged recession.

## Competitiveness

Portugal's competitiveness is ranked 14<sup>th</sup> in the Europe 2020 Competitiveness Report. To create a more innovative-driven economy it is fundamental for Portugal to improve the efficiency of the education and innovation systems.

The coup of 1974 initiated a social revolution in Portugal, transforming both the political and economic systems of the country. The revolutionary leadership undercut the old elite economic regime by nationalising banks and most of the country's medium and large-scale enterprises. A variety of economic models were proposed between 1974 and 1975, by the provisional armed forced movement [*Movimento das Forças Armadas (MFA)*].

❖ Original paper written (2006-07) & updated (September 2012) internally by CUTS International.

On May 15, 1974, the MFA published an economic and social programme. This document provided for the “adoption of new methods of government intervention in the basic sectors of the economy and particularly in the sectors of national interest”, making no provision for the large-scale nationalisation that was verified.

In March 1975, the Marxist oriented office bearers of the MFA, together with the communist dominated trade union, began to carry nationalisation reforms. During the remaining part of the year, the Government nationalised the banking, insurance, cement, iron and steel, shipping lines, public transport, and communications sectors. Nationalisation was followed by the consolidation of several private firms into state monopolies, particularly in industries such as chemicals and fertilizers, oil and gas, tobacco, breweries cement, shipping and transport. An example of sectorial nationalisation was the case when fourteen private electric enterprises were merged into a single power and transmission monopoly, *Electricidade de Portugal*.

The Constitution of 1976 confirmed the large and interventionist role of the state in the economy.

The commercial banking system and insurance industry were not consolidated into monopolies. In 1979, only nine banks were left with public status and they still managed to compete with each other and retain their own identities.

The reform of this system, decreasing the role of the state was initiated when the country was preparing for membership of the EEC. After accession the *acquis communautaire* and the domestic political process converged in an economic model based on privatisation and liberalisation. Over the past two decades, successive governments have privatised many state-controlled firms and liberalised key areas of the economy, including the financial, energy and telecommunications sectors. At the same time the regulatory framework of most markets has changed according to ongoing changes in EU regulation.

### Competition Law and Institutions

Article 81 (e) of the Constitution of the Portuguese Republic (CPR) has evolved from the original 1976 version. It was amended in 1989, and establishes that it is the state’s duty to eliminate and prevent the setting up of private monopolies; and to oppose all abuses of economic power and any such practice that is harmful to the general interest, thereby guaranteeing the protection of the interests and rights of the consumer. Competition is seen as an essential element of the Portuguese economic system.

The *Decree-Law no 371/93* of October 29, 1993 on the protection of competition was enacted and came into force on January 01, 1994. This decree sets out rules very similar to the basic provisions of the European competition regime.

### Box 1: Anticompetitive Business Practices: Distribution System of MultiOpticas

*MultiOpticas De Gestão* organises the distribution system of optical products by two types of arrangements. The first, involves ‘franchisees’ whose shops, as a whole, are integrated in the MultiOpticas system. The second type of arrangements are ‘preferred dealers’, who are free to sell outside the network, but they need to pay MultiOpticas 10 percent of the net value of sales, to network and to grant to the retailers integrated in the network, the negotiated discounts.

As regards the relations with franchisees, MultiOpticas allows them to use its name, brand and logo, gives them territorial exclusivity, allows them to keep the negotiated discounts agreed by their suppliers and to make direct purchases from independent suppliers. The retailers agree to identify their shops with MultiOpticas logo, to give preference to suppliers who share contracts with MultiOpticas, and to inform MultiOpticas about purchases made to independent suppliers, in which case they have to pay a fee of 15 percent of the value of these purchases, as a share of the costs of the franchising.

MultiOpticas was accused, together with two other firms, of issuing a concerted recommendation, on the purchases to be made to preferential suppliers that in practice would bar the entry to independent suppliers.

The Competition Council (CC), in its decision, although ruling that some of the clauses of the contracts entered with suppliers and retailers were not in conformity with Competition Act, made a positive economic balance of the system as a whole, since it was recognised it provided an improvement in the market mechanisms.

The clause stipulating the obligation of a payment to MultiOpticas, of an amount of 15 percent of the purchases made to independent suppliers, was not accepted by the CC, and ordered its removal from the present contracts, as being too limiting of the freedom of choice of the retailers.

Source: Paper on Portugal’s Competition Law, 1997

The Portuguese competition regime underwent another significant transformation in the year 2003, with the adoption of a new Competition Act (i.e. *Law No, 18/2003 of June 11, 2003*), which replaced the former Competition Act (i.e. Decree Law No. 371/93). It addresses agreements, decisions of associations of undertakings and undertakings’ concerted practices, concentrations and state aid, the abuse of a dominant position and economic dependence and rules established at EU level. The Act has meanwhile been amended by Decree Law No. 219/2006, of November 2,

2006, Decree Law No. 18/2008 of January 26, 2008, and by Law No. 52/2008 of August 22, 2008.

At the same time a new competition authority (*Autoridade da Concorrência*) was created by Decree-Law No. 10/2003 of January 18. It is independent from the government and with independent sources of financing, which implied a major overhaul of the previous system based on an institutional framework part of the government and often underfinanced, given their scope of activities (Directorate General for Trade and Competition and Competition Council).

On May 17, 2011 a memorandum of understanding was signed by Portuguese government, the European Commission, the International Monetary Fund and the European Central Bank which identified the revision of the act as one of the structural benchmarks of the financial assistance plan for Portugal. The memorandum identifies a need to simplify the act, rationalise in opening an investigation and make as autonomous as possible from the structures of administrative and criminal law and more closely harmonised with the EU competition framework.

The new Competition Act, approved by Law No. 19/2012 of May 8, 2012, came into force on July 8 2012. The reform brings to align Portugal's competition system with the EU regime in both substantive and procedural matters. It signifies a comprehensive reworking of the rules of the Competition Act 2003. The new act introduces the possibility to terminate proceedings through commitments, and settlement agreements and impose structural remedies whenever behavioural remedies are not sufficient to put an end to the restrictive practice concerned. It has completely altered the rules on judicial appeals against the authority's decisions. The appellate court now has unlimited jurisdiction to resolve disputes, in particular, it may confirm, reduce or increase any fine imposed by the authority.

To the extent that market dominance is concerned, the law introduced the "significant impediment to effective competition" substantive test, in line with EU competition law. With regard to merger control, the new law has significantly modified notification thresholds. Merging undertakings will be subject to the obligation to notify a proposed concentration and previous deadline of seven

**Box 2: Court quashes Competition Authority decision on discriminatory pricing on Portugal Telecom**

On February 29, 2012, the Lisbon Commerce Court cancelled a decision issued by Portuguese Competition Authority against Portugal Telecom on discriminatory pricing in September 2008, whereby the authority fined •2.1 million for alleged abuse of a dominant position in the wholesale market for leased lines.

This was the second decision involving abuse of a dominant position by Portugal Telecom. The abusive conduct consisted of Portugal Telecom's application of a discriminatory pricing policy for leased lines between March 2003 and March 2004. This pricing scheme was held to benefit companies in the Portugal Telecom group; therefore, it was deemed discriminatory and was held to limit production, technical development and investment to the detriment of competitors and consumers. The authority considered that the abusive conduct also affected the downstream markets (eg., fixed telephony, broadband and mobile communications).

The authority considered the mitigating circumstance that the national regulatory authority for the electronic communications sector had not objected to the introduction of the pricing policy in question. It also took into account Portugal Telecom's decision to abandon the policy following a decision by the sector regulator in February 2004.

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 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. 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.

The authority appealed the judgment to the Lisbon Appeals Court on March 6, 2012 but on March 8 the procedure had been declared extinct 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). 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.

*Source: International Law Office*

working days to notify a merger has also been removed. The authority has also been given possibility to prioritise cases, which will allow the Authority to focus on the most critical cases and handle complaints more efficiently. The right to raid corporate offices was maintained, subject to court authorisation, and in some cases extended to partners, managers and employees' private homes, again subject to the approval of competent courts.

Fines may be imposed by the Competition Authority. The firms have the right to appeal and it is possible to ask for a suspension of the fine by paying a caution as a fee.

In general it is usually considered that this reform has increased the Competition Authority's investigatory and fact-finding powers.

It remains to be seen if this increase in the Portuguese Competition Authority's (AdC) powers does not reduce control and transparency, maintaining a high level of accountability.

In 2011 the Government tried to solve some of the problems related to delays in courts when dealing with appeals against some decisions of regulatory authorities. A specialised court for competition, regulation and supervision was created in June 2011 (Law No. 46/2011 of 24 June) and established in March 2012. It remains to be seen the actual effectiveness of this new Court.

### **Sectoral Regulation**

The Portuguese Competition Act recognises that Sectorial authorities and the Competition Authority must cooperate in their application of Competition Law and sectorial legislation, so that both fields of law remain effective.

The Portuguese main regulatory authorities are:

- Banco de Portugal (BdP) (Bank of Portugal - Central Bank)
- *Entidade Reguladora dos Serviços Energéticos* – ERSE (Regulatory Entity for the Energy Sector)
- *Autoridade Nacional de Comunicações* – ICP - ANACOM (National Communications Authority)
- *Entidade Reguladora da Saúde* – ERS (Regulatory Authority for Health)
- *Instituto Seguros Portugal* – ISP (Portuguese Insurance Institute)
- *Comissão de Mercado de Valores Mobiliários* – CMVM (Stock Exchange Commission)
- *Autoridade Nacional do Medicamento e Produtos de Saúde* - Infarmed (National Authority for Drugs and Health Products)
- *Instituto Regulador das Águas e Resíduos* – IRAR (Water Regulation Institute)
- *Entidade Reguladora da Comunicação* (ERC)
- *Instituto Nacional de Aviação Civil* – INAC (National Civil Aviation Institute)
- *Instituto da Mobilidade e dos Transportes* – IMT (Transport and Mobility Institute)

A new draft law has been recently sent by the government to the Parliament to provide a common legal framework for some of these regulatory authorities in electronic communications and post, energy, financial, water and waste, transport and aviation. The law will also apply to the Competition Authority.

To highlight some features of sectorial regulation in Portugal, we can consider the examples of electronic communications and energy, as well as some institutions related to the defense of consumer rights.

### ***Electronic communications Sector***

The regulatory structure in Portugal has been strongly influenced by the European Union (EU). The regulatory framework in place implements EU Directives and Regulations.

The *Autoridade Nacional de Comunicações* (ICP-ANACOM) is the national regulatory authority for postal and electronic communications in Portugal. In accordance with the base law for postal services, Law nº 17/2012 April 16, and also the law for electronic communications, Law 51/2011 September 13.

ANACOM was established under the Act approved by Decree Law no. 309/2001 December 7, 2001 and it is the new designation for *Instituto das Comunicações de Portugal* (ICP), created in 1989.

Among others, ANACOM is endowed with the following responsibilities: to guarantee network access for communications operators under conditions of transparency and equality, to promote competition and development in communications markets, namely in the context of convergence of telecommunications, media and information technologies, to grant rights for the exercise of postal and electronic communications activities, to assure management of the radio spectrum, guaranteeing co-ordination between civil, military and paramilitary communications, along with management of numbering in the communications sector. It also ensures application and supervision of laws, regulations and technical requirements applicable in the context of its responsibilities, as well as compliance by communications operators with provisions of the respective license or concession contracts. ANACOM must co-ordinate with the AdC in matters of application of the competition law in the communications sector.

To strengthen the historical bonds of friendship and cooperation between the member states of the Community of Portuguese Speaking Countries (CPLP), National Regulatory Authorities of Angola, Brazil, Cape Verde, Guinea-Bissau, Mozambique, Portugal, São Tomé and Príncipe and East Timor created the Association of Communications and Telecommunications Regulators of the Community of Portuguese Speaking Countries

(ARCTEL-CPLP) for debate and sharing of experiences and development in communication in the countries.

### **Energy Sector**

On November 14, 2001, the Portuguese and Spanish Governments entered into cooperation protocol, in order to implement the Iberian Electricity Market (IEM). The protocol followed the adoption of a National Energy Strategy, and was adopted by the Portuguese Council of Ministers in 2001, aiming to increase the overall efficiency of the Portuguese electricity system, in terms of production, transportation and distribution.

The Energy Services Regulatory Authority (ERSE) is the entity responsible for the regulation of the natural gas and electricity sectors. The main objective of its activity is to protect consumers' interest, in particular relatively to prices, service's quality, access to information and security of supply. It also promotes competition between agents in the internal energy market, granting to companies an economic and financial balance.

The Authority was created by Decree-Law 187/95. Decree-Law 97/2002 subsequently extended its regulatory powers to the regulation of natural gas, in accordance with the EU Gas Directive, which was transposed into national law by Decree-Law 14/2001. In 2012 was approved the Decree-Law 212/2012 that review some of the old authority powers, approving new ones.

### **Consumer Protection**

In Portugal, consumer protection is enshrined in the Constitution of the Portuguese Republic. Consumer policy has been placed under the responsibility of the Ministers' Council, clearly testifying the importance attached to it, and to its cross-the-board nature. At the same time, a process of consolidation of consumer protection legislation is in progress. In many cases, Portugal guarantees a higher level of consumer protection than that required by the EU. Portugal is one of the EU member states, which has done a great deal to ensure the harmonisation of directives in this field.

Almost all sectoral regulators now take additional care with its consumers, increasing the information transparency within each sector and making available to consumers all the information needed to protect themselves against same injuries.

In Portugal, the agency responsible for consumers' protection is the *Direcção Geral do Consumidor*. Some of the country's consumer organisations, for example DECO, helped to implement policies and measures adopted by the authorities. In the context of drafting legislative and regulatory texts concerning consumers, the Government and the regulatory authorities are able to consult these organisations. Moreover, they are represented on the National Consumer Council and are involved in the work of the Economic and Social Council, the national quality system, the Committee on Competition and Prices, and the consumer disputes arbitration system.

The Consumer Protection Council was created by Article 22 of Law No. 24/96, and governed by Decree-Law No.154/97, and is an independent body within Council of Ministers Presidency. The Consumer Institute provides technical, administrative and logistic support to the National Consumer Council (CNC).

The National Consumer Council's mission is to contribute to development, definition and execution of the consumer's defense policy with the objective of ensure a high level of protection.

### **Concluding Observations and Future Scenario**

This paper provides a glimpse of the competition regime of the country. With the passing of the competition act, recently, Portugal is in the process of making competition enforcement faster and more effective. It is considered an essential objective of Portugal's financial assistance plan.

The country is committed to increase competition and reinforce regulation to correct market failures in each economic sector. The new Competition Law needs to strike a balance between more efficient competition enforcement and the constitutional and legal guarantees that protect the rights of defence of those involved in infringement procedures. The rigidity that characterises Civil Law may sometimes be a drag to competition. It has been verified that there are not huge incentives for consumers' claims in courts.

However, the act is only one of several tools that contributes to the effective enforcement of competition law. There is also a dire requirement to improve the independence of the national regulatory authorities and their coordination with the Competition Authority.

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### **Suggested Readings**

1. International Law Office – *Legal Newsletter/Legal Overview section*
2. Global Competition Review
3. European Antitrust Review, 2012
4. Paper on Portugal's Competition Law, 1997 (anon)
5. Annual Report on Competition Policy Developments in Portugal, 2004.
6. Competition in the Portuguese Economy: An Overview of Classical Indicators