

Competition Impact Assessment of Public Policies Regime: views from the Portuguese Competition Authority



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(PCA Impact 2020)

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Competition Impact Assessment of Public Policies Regime: views from the PCA

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1. Portuguese Competition Authority

Institutional framework

- ❑ The **Portugal Constitutional** framework [1976; Art. 81 (f)] says it is a priority for the State in the economic and social spheres to "*ensure the efficient functioning of the markets in order to ensure balanced competition between undertakings, to counteract monopolistic forms of organization and to suppress abuses of a dominant position and other harmful practices of general interest*".
- ❑ **PCA's mission** - according to the **PCA's By-laws** [Decree-Law 125/2014; Art. 5 (g)], it is responsible for promoting the adoption of pro-competitive practices and for disseminating a competition culture, as well as tasked with contributing to the improvement of the Portuguese legal system in all areas that may affect competition. In pursuance of those goals, the PCA has the power to issue recommendations, to issue opinions on the Parliament's or the Government's request on legal and other initiatives that relate to the promotion and safeguard of competition, as well as the power to issue suggestions or proposals to the creation or revision of the legal and regulatory framework.
- ❑ Under the new **Portuguese Competition Act** of 2012 (Law 19/2012), the PCA also has the power, to conduct market studies and sector inquiries, following which it may address recommendations to re-establish or ensure competition on the market.
- ❑ **Aim of an impact assessment analysis:** to contribute to a more efficient public intervention, to strengthen competition in the markets and to promote more efficient use of resources, greater innovation, greater freedom of choice for consumers and, consequently, an increase in well-being.
- ❑ If the legislator or political decision-maker necessarily has to define the public interest objectives that it intends to achieve, the PCA considers that it can contribute to a more informed public decision-making process.



2. Portugal Jurisdictions's regime for CIA

Portugal jurisdiction's regime for CIA conducting competition assessment of draft and existing legislation, regulations and policies (source: adapted from ICN, 2015, *Framework of Competition Assessment Regimes*)

Table of the general features of the competition assessment regime	
Location of competition assessment in the policy development process: what does competition assessment apply to?	Competition assessment applies both to new and existing legislation
Body responsible for conducting the competition assessment?	Competition Agency
Remit of the competition agency to undertake the competition assessment: is there a legal mandate for the competition agency to undertake competition assessment?	The Competition Agency follows specific legal basis for conducting <i>ex ante</i> and <i>ex post</i> competition assessment or market/sector studies
Indirect or informal involvement of the competition agency in the context where it is not directly responsible for CA?	N.A.
Tools used to facilitate competition assessment?	Competition Agency provides guidance on competition assessment; monitors government and legislature work programmes; considers the work of Stakeholders, academia/and/or NGA's to identify targets for competition assessment
Scope of the competition assessment?	All sector-wide policies and/or individual or specific legislation/regulations/policies are subject to competition assessment. No exemptions.

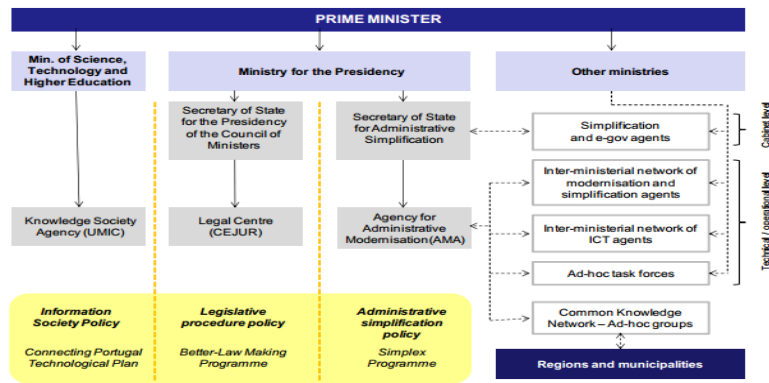


2. Portugal Jurisdictions's regime for CIA

Portugal jurisdiction's regime for CIA conducting competition assessment of draft and existing legislation, regulations and policies (source: adapted from EU, OECD, 2009, *Better Regulation in Portugal*)

Key institutions for Better Regulation policy : the executive centre of government; other central government players; co-ordination across central government

Figure 2. Institutional framework for Better Regulation policies in Portugal



3. Portuguese Competition Authority

Jurisdiction's regime for CIA: Special Unit for Competition Assessment of Public Policies

The Portuguese Competition Authority (PCA) has established as a priority the development of **internal capacities** for the implementation of a Competition Impact Assessment program for **ex-ante** and **ex-post evaluation** of Portuguese public policies.

The PCA created, in 2013, a **Special Unit for Competition Assessment of Public Policies**, with the mission of implementing a competition impact assessment procedure of public legislative and regulatory activities, within the PCA, thus contributing to a more procompetitive approach to market regulation. With the creation of this Special Unit, the PCA recognizes that its role in Competition Policy is not restricted to **enforcement** but also involves **competition advocacy** and the promotion of more **efficient practices** in the markets and in the regulation of those markets.

The PCA has planned a number of initiatives to contribute to creating competition impact assessment capacities within the authority and raise public and private awareness of the benefits of pro-competitive public interventions.



3. Portuguese Competition Authority

Jurisdiction's regime for CIA: Special Unit for Competition Assessment of Public Policies

To attain the described objectives, a **plan** was defined with the following stages to be implemented in parallel:

1) Policy formulation:

- a. Drafting Competition Assessment Guidelines (drawing on the OECD Toolkit, the experience of other EU competition authorities and the on-going ICN work);
- b. Capacity building at the PCA.

2) Advocacy:

- a. Institutional: promoting awareness of competition assessment as part of a more efficient regulation and a means of enhancing public policies impact on economic efficiency, which may also involve capacity building in Government, Parliament and other specific public institutions.
- b. Private stakeholders: involving business and consumer organizations to promote awareness and develop partnerships in identifying possible areas of intervention;
- c. Internal: building on the knowledge of sectors deriving from competition law enforcement and creating internal communication channels to identify areas of intervention.
- d. Public consultation of draft guidelines



3. Portuguese Competition Authority

Jurisdiction's regime for CIA: Special Unit for Competition Assessment of Public Policies

3) Intervention: at this stage, intervention will focus on developing institutional capabilities (knowledge, skills and human resources) by:

- a. Intervention in a small number of cases selected to illustrate competition assessment in the Portuguese context, considering the likely impact on competitive conditions;
- b. *Ex post* intervention by conducting competition assessment analysis of the regulatory framework in two selected sectors.

4) Strategic Planning: the development of the project will form a team with substantial experience to continue carrying out these functions on an on-going basis.

According to its By-laws of 2014: the PCA has the power to issue recommendations, to issue opinions on the Parliament's or the Government's request on legal and other initiatives that relate to the promotion and safeguard of competition, as well as the power to issue suggestions or proposals to the creation or revision of the legal and regulatory framework all areas that may affect competition.

Under Portuguese Competition Act of 2012: the PCA can conduct market studies and sector inquiries, following which it may address recommendations to re-establish or ensure competition on the market.

Given the broad mandate that the Statute (By-laws of 2014) entrusts to the PCA, there are no explicit limits, exemptions or exceptions to its advocacy powers.



3. Portuguese Competition Authority

*Jurisdiction's regime for CIA: Special Unit for Competition
Assessment of Public Policies*



Opinions and Recommendations given by the Special Unit on an *ex ante* basis at the request of the Parliament or the Government before the adoption of new legislation/regulation:

http://www.concorrenca.pt/vPT/Estudos_e_Publicacoes/Recomendacoes_e_Pareceres/Paginas/Recomendacoes-e-Pareceres.aspx (only available in Portuguese)

List of examples by sectors:

- Tabaco products; Education; Auditory; Telecommunications; Environment; Self-regulated professions
- Etc.

Parliamentary Hearings of the PCA (represented by the Special Unit) on an *ex ante* basis at the request of the Parliament before the adoption of new legislation/regulation:

- Example: Recently, 2017, about a proposal to adopt a new law on definition of professionals acts, in certain health professions.



4. Portuguese Competition Authority

*PCA Impact 2020 Project (Apr/2016 – Mar/2018)
- Drafting CIA Guidelines for policymakers*



PCA Impact 2020 Project (co-financed project by the European Social Fund): few points on the outcome of a Competition Impact Assessment exercise that is being carried out by the Competition Authority:

- CIA is a technique meant to make sure that adopted regulation is the **least restrictive** of competition possible;
- Therefore, when the answer to any of those 4 Competition check-list questions is **YES**, than the proposed regulation or existing regulation, is compared with **alternatives** assessing their respective **costs and benefits**; the alternative that assures the highest net benefits should then be chosen; because the objective is to introduce the **lower distortions** on the economy;
- And, how about challenges, as considering **State Aids and Subsidies** in the scope of the impact of costs and benefits analysis?
 - It is a fact that the EU system leads Member States to consider State Aid as optimal when authorised by the Commission;
 - It is also a fact that they may cause distortions and inefficiencies, but, on the other hand they are frequently rationalised as an instrument to tackle market failures and to produce positive externalities;
 - Member States should have *ex ante* and *ex post* mechanisms analysis to limit their negative impact;
 - Advocacy by Competition Authorities to other parts of the Government...points for future discussions.



4. Portuguese Competition Authority

PCA Impact 2020 Project (Apr/2016 – Mar/2018)

- Drafting CIA Guidelines for policymakers



Competition Assessment Checklist

(draft over European and International examples – EU; OECD; ICN):

A **YES** answer to any of the four questions would signal a competition concern:

- A) Do the regulations limit the **number** or **range** of suppliers? (barriers to entry)
- B) Do the regulations limit the **ability** of the suppliers to compete?
- C) Do the regulations limit the **incentives** for the suppliers to compete?
- D) Do the regulations limit the **choices** or **information** available to the consumers?



5. Cooperation with the Organisation for Economic Co-operation and Development (OECD)

PCA/OECD Project (Sep/2016 – Jan/2018)

[PCA Impact 2020 Project (Apr/2016 – Mar/2018)]



“Competition Impact Assessment Project of the Existing Legal and Regulatory Framework of the Transport Sector and the Liberal Professions” (Sept/2016 – Jan/2018)

Self-regulated Professions covered		Transport sectors covered
Accountants	Lawyers	Road
Architects	Notaries	Rail
Auditors	Nutritionists	Maritime
Custom Brokers	Pharmacists	Ports
Economists	Solicitors and Enforcement agents	Multimodal legislation
Engineers	Technical engineers	Horizontal legislation



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For the selection of the sectors to be analysed, the AdC considers that three criteria should be considered:

- The importance of the sectors for external competitiveness (criterion A);
- Their weight in domestic consumption (criterion B); and
- The contribution to employability (criterion C).



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“Competition Impact Assessment Project of the Existing Legal and Regulatory Framework of the Transport Sector and the Liberal Professions” (Sept/2016 – Jan/2018)

To ensure the success of the project and the implementation of recommendations (revocation or proposal of other alternative measures less restrictive to competition), the AdC highlights the following factors:

- Need for articulation with the Government regarding the selection of the two sectors to analyze;
- Involvement of experts from their respective ministries throughout the project (better identification of legislation; legislative objectives; checklist application and to benefit from specific training/capacity building in CIA);
- Promoting workshops, at the premises of the Competition Authority, for capacity building in CIA with the experts from the ministries: giving practical examples from real legislation /regulation which came about to be the object of a recommendation for being either revoked/amended/alternative redaction;



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“Competition Impact Assessment Project of the Existing Legal and Regulatory Framework of the Transport Sector and the Liberal Professions” (Sept/2016 – Jan/2018)

To ensure the success of the project and the implementation of recommendations (revocation or proposal of other alternative measures less restrictive to competition), the AdC highlights the following factors:

- Relevance of existing inter-ministerial coordination with line-ministers to ensure stakeholder buy-in and access to information (as well as designated ministerial experts to follow the project; to receive capacity building and to participate in check-list scan): *in casu*, a **High Level Committee** was set up, with senior officials / civil servants of the Public Administration/Government, who’s Chairman is the **Secretariat-General of the Presidency of the Council of Ministers (SGPCM)**;
- Periodic High Level Committee meetings: e.g. every two months to ensure engagement and follow up from the line-ministers, in every stage of the procedure;



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“Competition Impact Assessment Project of the Existing Legal and Regulatory Framework of the Transport Sector and the Liberal Professions” (Sept/2016 – Jan/2018)

To ensure the success of the project and the implementation of recommendations (revocation or proposal of other alternative measures less restrictive to competition), the AdC highlights the following factors:

- Importance of the engagement of the Government, through an important body, *in casu*, the SGPCM’s, whose mission is:
- ✓ To provide and coordinate support for the Presidency of the Council of Ministers (PCM) in the legal, information, technical and administrative fields; to exercise inspection and auditing functions by considering whether the acts which are undertaken by the PCM’s departments, services and bodies, or which are subject to the oversight of members of the Government who belong to the Council of Ministers, comply with the applicable laws and regulations; and to evaluate those entities’ management and results by using technical, performance and financial auditing methods to control them;



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5. Cooperation with the Organisation for Economic Co-operation and Development (OECD)

PCA/OECD Project (Sep/2016 – Jan/2018)

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“Competition Impact Assessment Project of the Existing Legal and Regulatory Framework of the Transport Sector and the Liberal Professions” (Sept/2016 – Jan/2018)

To ensure the success of the project and the implementation of recommendations (revocation or proposal of other alternative measures less restrictive to competition), the AdC highlights the following factors:

- ✓ The PCM is the central government department with the mission of supporting the Council of Ministers, the Prime Minister and the other members of the Government in the Council’s organic structure, and of promoting the interministerial coordination of the different government departments.



5. Cooperation with the Secretariat-General of the Presidency of the Council of Ministers (SGPCM)

“High Level Committee” – PCA/OECD Project

[PCA Impact 2020 Project (Apr/2016 – Mar/2018)]



Final notes

- The intervention of the Competition Authority in the impact assessment of competitive policies will only contribute to a pro-competitive and better legal and regulatory framework if it is developed in **collaboration** with the Government, the Parliament, the Regulatory Entities and other Public entities.
- It necessarily falls to the legislator or the political or public decision-maker the definition of the policy objectives it intends to achieve. The Competition Authority considers that it can contribute to a better legislation and regulation by making decision-makers available more information on the impact of the measures adopted by them.
- The PCA is available to give its contribute to the *ex-ante* or *ex-post* evaluation of legislation, regulation and measures that may have an impact on competition.
- Within the **PCA/OECD Project**, the involvement of the SGPCM, at a High Level Committee level, guarantees a more **collaborative** approach towards the future **Recommendations** the PCA will adopt, in the framework of its **PCA Impact 2020 Project**.



Thank you very much!

It was with great pleasure and honor that I was present in this
Conference.

Questions?

