

# PORTUGUESE COURTS OVERTURNING REGULATOR'S DECISIONS - VIEIRA DE ALMEIDA

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Nuno Ruiz

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## **Appeal courts challenging the levels of analysis of Portugal's Competition Authority**

The recent dismissal of a €38m fine imposed by the Portuguese Competition Authority (PCA) on Portugal Telecom by Lisbon's Commercial Court (LCC) has reinforced the need for objectivity in claims of anti-competitive behaviour, says Nuno Ruiz, Head of Competition at Vieira de Almeida. "The Courts finally acknowledged Portugal Telecom's (PT) position. The LCC's decision highlights its readiness to follow European Union decisions, making it an exemplary case as regards the application of competition law in Portugal," he believes. In August 2007 the PCA fined PT for allegedly refusing competitors TV Tel and Cabovisão access to its network ducts. The PCA considered access to the ducts vital to any company wishing to develop

pay TV or triple play services in Portugal.

"In the PCA's opinion, PT's access refusal was intended to protect its own TV Cabo subsidiary. The PCA considered PT's ducts network an essential infrastructure with no objective justification for access denial," says Ruiz, who advised PT.

PT disagreed. Most pay TV operators were already using the ducts network, although it accepted that it had denied access to a limited number of sections based on the need to dispose of spare capacity and for maintenance and development.

"The LCC confirmed that PT was subject to competition laws notwithstanding its position as the universal service provider and that it enjoyed a dominant position in the market. However, it also found that access denial would only be abusive if PT's ducts were indispensable for new market entrants in the event that alternative infrastructure didn't exist or would be technically or economically unfeasible to replicate."

The LCC concluded that replication of the entire network would be economically unfeasible although replication of limited sections was not and that alternative broadcast methods existed. The PCA subsequently appealed to the Lisbon Court of Appeal, which agreed with PT's acquittal.

"The case indicates the strength of PT's belief in its own position against the PCA's findings. Its competitors could make use of alternative ways to develop their networks, and occasional access denial to certain sections was an inevitable act as a result of the limited capacity in the infrastructures," concludes Ruiz.