

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2020: Portugal

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This overview covers the main developments in competition law in Portugal in the course of 2020. This year is inevitably marked by the outburst of the Covid-19 pandemic, which seriously affected the world economy generating enormous costs for companies in most sectors. This situation was reflected in an unprecedented wave of State aid granted by EU Member States, including Portugal.

The pandemic, however, does not seem to have refrained the intense enforcement activity of the Portuguese Competition Authority (PCA) this year. In line with the activity carried out in the previous year, the PCA prioritized the investigation of restrictive practices, namely cartels. Worth noting is the development in the *Hub & Spoke* cases in the food distribution & retail sector with the adoption of the first decisions, as well as the decision to suspend the first *no-poach* agreement detected by the PCA. The telecommunications sector has also received prominent attention, both in cartel investigations and in regulatory matters. Record fines were imposed on companies, with wide repercussion in the media.

Legislative and institutional developments

The most noticeable legislative development was the submission by the PCA to the Government of the proposal for the transposition of the ECN+ Directive (Directive (EU) 2019/1), to empower competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market through closer cooperation between national authorities. The Directive must be transposed into the national legislation by 4 February 2021. In drafting the proposed legislation, the PCA has considered the contributions given by different stakeholders during the public consultation period, including relevant sectorial associations, entities representing the judicial sector, as well as law firms. The PCA proposes significant amendments to the Competition Act, namely granting the PCA additional powers of search, examination, and seizure. It explicitly foresees that the PCA may access any technological device to seize evidence of competition infringements and makes it easier for the PCA to enforce fines imposed on companies with no physical presence in Portugal. It also clarifies the possibility of finding parent companies liable for infringements of competition rules by their subsidiaries, by applying the notion of “undertaking” used in EU case law.

From a regulatory perspective, it is noteworthy that in April 2020, the PCA published a set of recommendations to promote competition in telecoms addressed to the Parliament and ANACOM, the communications regulator. The recommendations aim to reduce barriers to consumer mobility between different service providers and increase transparency.

Decisional practice

Antitrust

Enforcement of antitrust legislation was PCA's high priority in 2020. The watchdog dedicated significant resources to sectors that it considered having a major impact on Portuguese consumers, namely the food distribution & retail and telecoms. There was a clear focus on restrictive agreements and concerted practices leading to the application of record fines and the use of unprecedented theories of harm.

No-poach agreement suspended

In April 2020, the Portuguese Professional Football League adopted a resolution involving the clubs of the First and Second Leagues by means of which they undertook not to hire football players who unilaterally terminated their employment contract for reasons caused by the Covid-19 pandemic.

The PCA deemed this practice as a horizontal *no-poach agreement*, the first case of no-poaching handled by the PCA. It was considered a serious restriction of competition, since companies renounced competition to acquire human resources and deprived workers of labor mobility. Interim measures were imposed by the PCA to suspend this agreement. The Portuguese Professional Football League was ordered to suspend it with immediate effect.

Developments in the Hub & Spoke cases in the food distribution & retail sector

In 2019, the PCA issued three Statements of Objections for alleged *Hub & Spoke* practices against six large food retail groups and three beverage suppliers for allegedly participating in arrangements aiming at artificially determining the prices of certain products.

Two of these cases were closed in the last days of 2020, resulting in the adoption of infringement decisions amounting to a total record fine of €304 million. Beverage suppliers Sociedade Central de Cervejas and PrimeDrinks were accused of concerting prices with the four large supermarket groups Modelo Continente, Pingo Doce, Auchan and Intermarché for more than nine years. According to the PCA's findings, companies ensured the alignment of sales prices to the public through a common supplier, thus restricting price competition between supermarkets and depriving consumers from the benefits of price differentiation. These are the first decisions in Portugal for a *Hub & Spoke* practice, impacting on the most significant groups active in the Portuguese food distribution & retail market.

The case against the beverage supplier Super Bock and the same four large supermarket groups is still ongoing, after the adoption of a Statement of Objections in March 2019.

The PCA pursued its investigations in this sector and adopted five new Statements of Objections

between June and December of 2020. Four food and beverage suppliers (Bimbo Donuts, Sumol+Compal, Sogrape and Active Brands), a supplier of personal care, beauty and cosmetic products (Beiersdorf) and six large supermarket groups (Modelo Continente, Pingo Doce, Auchan, Lidl, Intermarché and E.Leclerc) were accused of similar anticompetitive practices. According to the PCA's provisional findings, the large retailers used, in different cases, their commercial relationships with the suppliers in order to line up retail prices. In all these cases the PCA considers that the supplier is the hub and that the large supermarket groups are the spokes.

Hub & Spoke has been portrayed essentially as a horizontal price-fixing practice by means of a vertical communication channel, that is, a practice in which retailers (the spokes) do not communicate directly with each other but instead use bilateral contacts with the supplier (the hub) to align retail prices. The use of this concept in EU countries, and indeed across the world, has very few precedents. The fact that it is not consolidated in national and EU case law will inevitably raise questions as to its scope and legal grounds.

Cartel investigations in the telecoms sector

The telecoms sector has also been the object of close attention by the PCA in 2020. In December, the PCA imposed a fine of €84 million to MEO for market sharing and price fixing of mobile and fixed telecommunications services with NOWO, following the latter's application to the PCA under the leniency program. According to the PCA, the cartel established by MEO and NOWO resulted in higher prices and less quality of service, as well in as geographical restrictions that harmed consumers throughout Portugal.

In another case, the PCA issued a Statement of Objections to telecommunications operators MEO, NOS, NOWO and Vodafone regarding a cartel agreement to limit competition in advertising on the Google search engine. Allegedly, whenever a user searched on Google for the name of one of the operators to provide telecommunications services, the other three operators voluntarily renounced appearing in that search.

Advertising services: APAP accused of adopting an anticompetitive decision

In October 2020, the case against APAP (Portuguese Association of Advertising Agencies) and APAN (Portuguese Association of Advertisers) came to an end. The former was accused of preventing its members from participating freely in procurement tenders for hiring advertising services and was fined €3.6 million. The agencies which were part of APAP's Board were considered joint and severally liable for the fine imposed. As regards the advertisers' association, the case was closed, as the investigation carried out by PCA did not allow for the conclusion that this association actually imposed on its member's restrictive rules.

Railway maintenance case closed

In March 2020 the PCA applied a total fine of €3.4 million on five companies and five Board members or managers involved in a railway maintenance cartel in public tenders launched by Infraestruturas de Portugal in 2014 and 2015. Fergrupo and Somafel, together with a Board member and manager of each of these companies were fined €1.8 million for participating in the cartel. The remaining three companies, Futrifer, Mota-Engil and Sacyr Neopul, engaged into settlement procedures between December 2018 and June 2019, further to which the companies admitted their guilt and agreed to waive their right to judicial remedy by paying a fine of €1.6 million.

Mergers

In 2020, the PCA rendered 50 merger decisions: 43 clearance decisions, two decisions of inapplicability of the Competition Act, three decisions closing proceedings after the notifying party withdrew the notification, one conditional clearance decision, subject to commitments and one prohibition decision, the last two following a phase II investigation. Enforcement of the prior notification and standstill requirements was a focus of the Merger Control Department of the PCA.

PCA prohibits the acquisition of Grupo Fundão by the Transdev Group

Following an in-depth investigation opened in February 2020, and further to the opinion by the Authority for Mobility and Transport, which raised serious concerns about the proposed merger, the PCA prohibited the acquisition by the Transdev Group of Grupo Fundão together with a number of public transport service concessions held by Transerramar and Auto Transportes do Fundão. With Transdev Group and Grupo Fundão having a strong presence in the regions of central Portugal, the PCA concluded that the merger would have resulted in effective elimination of competition in the future public transport service concessions or contracts, to the detriment of consumers and public procurement.

PCA fines Hospital Particular do Algarve for failure to notify merger

PCA fined Hospital Particular do Algarve (HSGL) €155,000 for failure to notify the acquisition of Hospital de S. Gonçalo de Lagos S.A. (gun-jumping). The company eventually notified the merger, which was cleared by the PCA. Although the merger created/reinforced a 50% or more share in the market of hospital health care by private units in the Algarve region, the PCA cleared the merger based on the imminent insolvency of HSGL and its assets.

This was the third time that the PCA imposed fines on undertakings for gun-jumping. The first occurred in June 2014 in the pharmaceutical sector and the second in December 2017, when the PCA fined three private-equity funds operating on the Iberian market.

Private enforcement

Private enforcement has taken an increasingly prominent role in Portugal since the transposition of Directive 2014/104/EU, of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Damages Directive) via Law nr. 23/2018.

One of the most paradigmatic examples has been the case of the trucks' cartel. Further to the European Commission's decisions against a group of European truck manufacturers, several follow-on actions have been lodged at the Competition Court by companies that consider themselves damaged by the cartel.

Other private enforcement cases have in the meantime been announced. On 2 December 2020, the first opt-out representative action for alleged infringement of competition law was filed at the Competition Court by Ius Omnibus, a consumer protection association, against Mastercard,

following two Commission decisions in 2019.

No final judgments have been rendered yet in Portugal and, consequently, much about as to how the private enforcement regime will be applied by the courts is still unknown. It will certainly be a topic to follow next year.

Judicial review

In the context of judicial review, the high number of private enforcement actions and the complexity of the proceedings have overburdened the Competition Court. As a result, two new judges were appointed in 2020 to ease the workload.

The PCA claimed victory in September 2020 as the Competition Court upheld its decision to fine EDP and Sonae for having entered into an anticompetitive agreement according to which the companies undertook not to compete in the distribution of electricity in mainland Portugal for a period of 2 years. The Competition Court confirmed the existence of the agreement, as well as the involvement of the parent companies in the illegal practice, although the fine was reduced by 10%, from €38.3 million to €34.4 million.

State Aid

Covid-19 pandemic

State Aid returned to the spotlight in 2020, after the massive economic impact of the coronavirus pandemic that hit Europe and the world without precedent. The European Commission's response was swift. On 19 March 2020, EU Competition Commissioner Margrethe Vestager launched the Temporary State Aid Framework, which was initially designed to cover aid granted to 'remedy a serious disturbance in the economy of a Member State'. An impressive amount of aid was authorized in 2020 for State aid to be granted by Member States to their companies under both the Temporary Framework and the common mechanisms provided for in article 107 (2) and (3) TFEU.

Temporary Framework

The Temporary Framework was approved by the Commission on 19 March 2020 and subsequently amended on 3 April, 8 May, 29 June and 13 October. On 31 December 2020, the Commission approved a total amount of €16.9 billion of aid notified by Portugal under the Temporary Framework and article 107(3)(b) TFEU. Among these, three deserve a closer look.

Guarantee schemes for SMEs and midcaps related to Covid-19

On 22 March 2020, the Commission approved aid measures notified by Portugal in the form of loan guarantees, in the amount of €3 billion. The measures take the form of four guarantee schemes that aim to support four sectors severely affected by the Covid-19 pandemic: (i) tourism (€900 million); (ii) restaurants (€600 million); (iii) extractive/manufacturing (€1.3 billion); and (iv) travel agencies and organization of events (€200 million).

Direct grant and loan guarantee schemes

On 4 April 2020, two schemes were approved amounting €13 billion: a direct grant scheme and a loan guarantee scheme. This aid is directed at companies active in Portugal, regardless of their size and activity, except for those whose main activities is financial and insurance. Aid is granted directly or through credit institutions and other financial institutions as intermediaries.

Direct grants to micro, small and medium companies in specific sectors: Apoiar.PT and Apoiar.Restauração

More recently, on 27 November 2020, the *Apoiari.PT* and *Apoiari.Restauração* programs were given the green light by the Commission, allowing Portugal to support micro, small and medium-sized companies with €750 million. *Apoiari.PT* targets micro and small companies that operate in three of the most severely impacted sectors: (i) commerce and services open to consumers; (ii) cultural activities; and (iii) tourist activities, hospitality sector and food and beverage service activities. *Apoiari.Restauração* is directed at micro, small and medium-sized companies that operate in the food and beverage service sector.

Rescue and restructuring aid

The Temporary Framework does not apply to ‘undertakings in difficulty’ which are companies almost certainly condemned to going out of business in the short or medium term without State intervention, either because most of their share capital has disappeared as result of accumulated losses or are subject to insolvency proceedings or their debt-to-equity ratio is fragile. In such cases, article 107(3)(c) TFEU and the ‘rescue and restructuring rules’ apply, subjecting the company concerned to a restructuring exercise.

The Commission approved two aid measures under these rules notified by Portugal: in June 2020, aid to TAP (main Portuguese airline), worth €1.2 billion and (ii) in August 2020, aid to SATA Group (which provides air transport services for passengers and cargo within Azores, and to and from several national and international destinations), worth €133 million.

Commission concludes the investigation on the Madeira Free Zone aid scheme

Following the in-depth investigation initiated in July 2018, the European Commission concluded in December 2020 that the implementation of the Madeira Free Zone aid scheme is not in line with the conditions of the Commission’s State aid decisions of 2007 and 2013 and therefore cannot be considered compatible with the internal market on the basis of article 107(3)(a) TFEU.

The Madeira Free Zone was created in 1987 to promote the economic development of the outermost region of Madeira, by attracting investment and creating jobs. With these objectives in mind, Portugal has instituted a regional aid scheme that grants corporate income tax reductions and certain exemptions from local taxes on corporate profits resulting from economic activity in Madeira. Between 1987 and 2014, the Commission approved several versions of the aid regime for the Madeira Free Zone under state aid legislation, provided that the measures are granted exclusively to companies that generate economic activity and create real jobs in the Free Zone.

During the in-depth investigation, the Commission found that the number of jobs considered by Portugal for calculating the amount of aid under the scheme unduly included jobs created outside the Madeira Free Zone, as well as outside the European Union. In addition, part-time jobs were considered to be full-time jobs and board members were considered to be employed in more than one company benefitting from the scheme. Finally, the Commission concluded that the profits benefitting from the tax reduction are not limited to those linked to activities that are actually and materially carried out in Madeira. Taken all this into account, the Commission concluded that the implementation of the scheme is not compatible with the internal market and ordered Portugal to identify the aid beneficiaries who did not respect the conditions determined in 2007 and 2013 and determine the amount to be recovered from each one.

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