

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2021 – Portugal

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This overview covers the main developments in competition law and policy in Portugal in the course of 2021.

Legislative and institutional developments

The Competition Act was supplemented with a new provision rendering illegal most-favoured-nation clauses benefiting hotel booking electronic platforms. Article 9 (which is similar to Article 101 of the Treaty) now prohibits agreements preventing the owners of tourism or local accommodation businesses from offering prices or other conditions that are more advantageous than those offered by the intermediary operating through an electronic platform. It also now subjects them to the same penalties applicable to other competition restricting practices: fines of up to 10% of the annual turnover of the involved companies and nullity of the contractual clauses at stake.

Regarding case handling, the Portuguese Competition Authority (“PCA”) has created an electronic platform called [STEP](#) – Electronic Case Processing System for the submission of documents in antitrust cases in order to increase the speed of antitrust proceedings.

Along the same lines, on the merger control front, the Portuguese Competition Authority approved new rules to simplify the procedure through the increasing use of electronic means. A new [regulation for merger notifications](#) establishing a fully electronic merger control procedure was adopted. It also provides for an extension of the scope of application of the simplified form, which can now be used when the combined share of the merging parties does not exceed 20%, instead of the previous 15%.

Decisional practice

Antitrust

The enforcement of antitrust legislation in 2021 has focused on anticompetitive agreements in the

labour market and hub & spoke practices in the food distribution and retail sector.

No-poach agreements

The PCA is committed to tackling anticompetitive agreements in the labour market. In September 2021, the PCA published a [Report](#) on these anticompetitive agreements, namely no-poach agreements and wage-fixing agreements, and a set of [Good Practices](#) that companies should follow.

These initiatives followed the adoption by the PCA on 13 April 2021 of [statements of objections](#) against 31 football clubs and the Portuguese Professional Football League. At stake was the agreement not to hire players who unilaterally terminated the employment contracts with their clubs, invoking grounds related to the Covid-19 pandemic.

The PCA has elected the promotion of open labour markets as one of its [priorities for 2022](#) because they convey more opportunities for workers and preserve incentives to innovate. The Authority promises to be attentive to no-poach and wage-fixing agreements that may arise in any sector.

Hub & spoke cases in the food distribution & retail sector

In 2020, the PCA adopted the first infringement decisions concerning hub & spoke practices in the food distribution and retail sector. The PCA imposed a record fine of €304 million against beverage suppliers Central de Cervejas and PrimeDrinks, and four large supermarket groups, Modelo Continente, Pingo Doce, Auchan and Intermarché, as it claims that the retailers sought the alignment of prices to the public through common suppliers.

This focus on hub & spoke practices in the food distribution, and retail sector continued in 2021. In the last quarter of 2021, the PCA adopted infringement decisions against beverage suppliers [Super Bock](#) and [Sogrape](#), supplier of bakery products [Bimbo Donuts](#), and five large supermarket groups, Modelo Continente, Pingo Doce, Auchan, Intermarché and E.Leclerc, imposing fines amounting to €134.8 million. The PCA also adopted a statement of objections against a [supplier of food, home and personal care products](#) and four large supermarket groups. According to the PCA's findings in all these cases, the retailers (acting as spokes) exchanged information through the common suppliers (the hubs) in order to align retail prices.

Hub & spoke has thus been portrayed as a horizontal price-fixing practice by means of a vertical communication channel, which in these cases is the supplier. Infringement decisions based on this practice are very scarce across the EU and worldwide, since the burden to prove the continuous existence of a triangle relationship between the spokes and the hub is high. All bets are off as to how the Portuguese Competition Court will rule on these cases.

Health & Pharmaceutical

The year in which the world kept fighting a pandemic, the PCA took a closer look at the health &

pharmaceutical markets.

Following a settlement procedure, the PCA imposed on 27 April 2021 a fine of €100,000 to **Natus Medical Incorporated** due to an alleged vertical agreement involving the supplier Natus and its two national distributors, Mundinter and Sano-Técnica, which provided for market sharing and a ban on passive sales.

On 29 July 2021, the PCA adopted a **statement of objections** against the Portuguese Association for Private Hospitalisation and several private healthcare service providers – CUF, Trofa Saúde, Hospital Particular do Algarve, Lusíadas and Luz Saúde – for an alleged agreement or concerted practice restricting competition in the provision of services to public health sub-systems ADSE and IASFA. According to the PCA, this agreement or concerted practice was aimed at fixing the level of prices and other commercial conditions, as well as coordinating the suspension and/or threat of termination of the provision of services.

Mergers

In 2021, there was a slight increase in merger control activity. The PCA rendered 59 merger decisions: 53 clearance decisions, 5 decisions of inapplicability of the Competition Act and 1 decision closing the proceedings after the notifying party withdrew the notification. The most active industries in terms of merger transactions were the extractive and manufacturing industries (15 decisions), followed by the supply and food industry, and transport & infrastructures (8 decisions each).

Merger control is not a mere bureaucratic formality

Following the notification of the acquisition of sole control of a company of the EGEO Group by the Blueotter Group in the waste management sector, the PCA found non-compete clauses in the Preliminary Purchase and Sale Agreement through which the Blueotter Group and the EGEO Group agreed not to compete in the business areas in which the other group was active.

This investigation led to the adoption of an **infringement decision** in June 2021 for a non-compete agreement in the market for the provision of services to waste management systems, fining the Blueotter Group companies and the EGEO Group companies €2.9 million.

This case shows that merger control is not a mere bureaucratic formality. As such, companies and their legal counsel must do thorough self-assessment beforehand in order to avoid serious consequences.

Gun-jumping

Enforcement of the prior notification and standstill requirements was also a focus of the PCA's Merger Control Department in 2021.

The PCA adopted decisions on gun-jumping in three separate proceedings. In August 2021, it fined

Fidelidade SGOIC €300,000 for failure to notify the acquisition of sole control over the Saudeinveste Fund, a real estate investment fund. Fidelidade abandoned the transaction due to the competition concerns raised by the PCA. In October 2021, the PCA fined **SFI Group Gestión de Participaciones Minoritarias** €60,000 for failure to notify the acquisition of White and Green Natural, a producer and distributor of plant-based drinks, and **AOC Health GmbH** €35,000 for failure to notify its acquisition of Stemlab, the owner of the Crioestaminal and Bebecord, providers of cryo-preservation services for stem cells. The PCA eventually cleared the transactions.

The PCA has also issued a statement of objections against **Santa Casa da Misericórdia** for allegedly failing to notify the acquisition of sole control of CVP – Sociedade de Gestão Hospital, the managing company of the Portuguese Red Cross Hospital.

Private enforcement

In 2021, the Competition Court was busy with follow-on actions derived from the decisions by the European Commission in the so-called ‘trucks cartel’. No final judgment in any of these cases has yet been rendered, which raises questions as to how the courts in Portugal will actually apply the private enforcement regime.

Regarding class actions, the Competition Court approved, on 20 September 2021, the first settlement in the context of a class action filed by Ius Omnibus, a consumer protection association, aiming at obtaining compensation for the damages suffered by consumers as a result of the National Association of Land Surveyors’ anticompetitive behaviour, following an infringement decision adopted by the PCA in July 2021. More details on this case and its impact can be found in our article from [16 November](#).

Opt-out representative actions for alleged infringements of competition law are on the rise in Portugal, with Ius Omnibus filing several other class actions in 2021, namely against Super Bock, Daimler/Mercedes-Benz, Stellantis/Fiat Chrysler Automobiles and Apple. These class actions are still in early stages, but it will be interesting to see how the Court will rule on the existence and quantification of damages considering many of these actions are based on alleged infringements qualified as ‘restrictions by object’, destitute of an assessment of anticompetitive effects on the market.

Judicial review

In the context of judicial review, in October 2021, the Competition Court reviewed the infringement decision against beverage supplier Super Bock for allegedly fixing minimum resale prices and other commercial conditions of beverages in the HORECA channel and upheld the €24 million fine applied by the PCA.

The PCA endured some defeats last year. The Competition Court annulled the infringement decision fining APAP (Portuguese Association of Advertising Agencies) €3.6 million for an alleged anticompetitive decision by an association of undertakings and sent it back to the PCA for

reformulation purposes.

The so-called ‘bank cartel’ trial started in October 2021 at the Competition Court. At stake are the appeals submitted by the 12 banks (one of which is already out of the process, as a consequence of the statute of limitations) that the PCA found to have exchanged “sensitive information regarding the housing credit, consumer credit and credit to companies”.

State Aid

Due to the massive economic impact of the coronavirus pandemic, State Aid continued to be in the spotlight during 2021, with an impressive amount of aid being authorized for State aid to be granted by Member States to their companies under both the Temporary Framework (which has been extended) and the common mechanisms provided for in article 107 (2) and (3) TFEU.

The big news in Portugal in 2021 was the State aid granted to TAP Air Portugal, the Portuguese flagship airline. The European Commission adopted in July 2021 a [decision to initiate the formal investigation](#) procedure into the €3.2 billion Portuguese restructuring aid to TAP in order to assess the compatibility of the grant with State aid rules.

Following an extensive negotiation process, the European Commission [approved](#), in December 2021, €2.55 billion of restructuring aid to enable the return to the viability of the Group TAP SGPS and the TAP airline; and €107.1 million aid to compensate TAP for damages suffered as a consequence of the Covid-19 pandemic. However, this approval is subject to commitments, namely the disposal of its stakes in non-core businesses of maintenance, catering, and ground handling. Moreover, TAP must make available 18 slots per day at Lisbon airport to a competing carrier.

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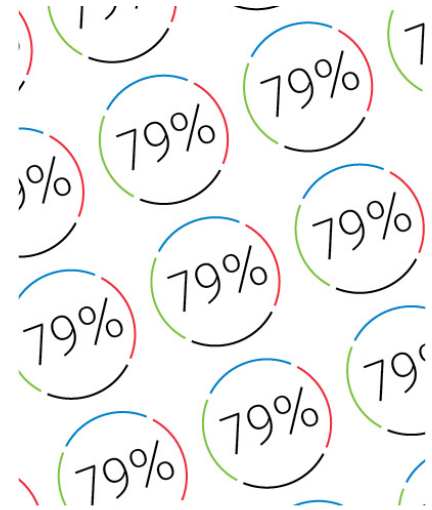
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This entry was posted on Monday, January 31st, 2022 at 9:00 am and is filed under [Competition Law 2021, Portugal](#)

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