

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023: Portugal

Miguel Mendes Pereira, Carla Marcelino, Beatriz Ribeiro Fernandes, Ana Wallis de Carvalho (DLA Piper Portugal) · Wednesday, January 31st, 2024

2023 was the year in which fines in the ongoing “hub & spoke war” reached the staggering amount of € 733 million. An accomplishment haunted by the rulings from the Constitutional Court finding that the Competition Authority have been conducting dawn raids (including in the hub & spoke cases) illegally. This was also the year that saw the Ticketmaster-Live Nation saga, which has been brewing for some years in the US, taking a Portuguese turn with the attempt by Live Nation to acquire the largest arena in the country.

New Chairman, new priorities

In March 2023 a new Chairman of the Portuguese Competition Authority (“PCA”) was appointed. Quite unsurprisingly, December brought along new priorities for the PCA ([Competition Policy Priorities for 2024](#)). Worth emphasizing is the focus on digitalization, the attention given to computer forensics tools, the effort to strengthen international cooperation (especially concerning the implementation of European legislation such as the Digital Markets Regulation) and an increased scrutiny of gun-jumping practices.

Antitrust

Search warrants and dawn-raids

The Portuguese Competition Act determines that the search warrant allowing the PCA to conduct a dawn-raid is issued by the “*competent judicial authority*”, meaning either a judge or a public prosecutor. The understanding of the PCA so far (supported by the courts) was that the public prosecutor had the power to issue such warrant allowing for the seizure of electronic communications. Defendants, on the other hand, argued relentlessly over the years that only a judge could issue a warrant for that purpose.

It was only in 2023 that one of the disputed cases made it all the way up to the Constitutional Court. To the absolute horror of the PCA, the Constitutional Court pulled everyone’s ears and reminded the lower instance courts about the importance of the constitutional safeguards

concerning privacy and the prohibition of intromission in one's correspondence except in the case of very serious crimes, explicitly provided for in statute. Such safeguards require the intervention of a proper judge (not a public prosecutor) and demand a careful assessment of the collected evidence. Not entirely surprising for a country that endured an autocratic regime for 38 years and only in 1976 came to adopt a Constitution allowing for a sound protection of human rights.

The ruling by the Constitutional Court had a significant backlash in all Article 101 TFEU cases dealt with by the PCA since most of the evidence in those cases were emails seized in the context of dawn raids authorised by a public prosecutor (rather than a judge). The trial hearings in the hub & spoke cases that were ongoing before the Competition Court were all stayed and now await clarification as regards the implementation of the Constitutional Court rulings.

Notwithstanding the wreck

The antitrust activity by the PCA was not entirely wiped out notwithstanding the quarrel with the Constitutional Court. Five decisions were adopted:

- a settlement decision concerning two electrical cable companies for engaging in a horizontal agreement, with a total fine of € 2 million.
- one fining decision concerning companies participating in a cartel involving the provision of teleradiology services with a total fine of € 6,8 million;
- one fining decision (€ 1 million) for resale price maintenance; and
- two decisions in the hub & spoke set of cases, likely to be impacted further to the rulings by the Constitutional Court.

Mergers

2023 was an absolute record year for the PCA in merger control with 81 concentrations filed, out of which 74 received a Phase I clearance, 5 others were found not to be subject to mandatory filing and in one case the notifying party withdrew the notification. There was one single case in which the PCA decided to open a Phase II in-depth investigation.

In terms of sectors, 13 transactions concerned manufacturing industries, another 13 concerned the healthcare sector and then, by decreasing order of importance, the sectors in question were: energy, real estate and tourism, services, logistics and transportation, construction, finance and banking, retail and showbusiness.

Vodafone/Nowo

In November 2022, Vodafone Portugal notified the acquisition of Cabonitel, the company that controls Nowo Communications, an electronic communications service provider. Nowo became Cabonitel's most valuable asset after being granted significant radioelectric spectrum frequencies in the context of the 5G auction, allowing it to develop its own mobile telecommunications network.

In April 2023, a Phase II in-depth investigation was opened for the reason that, according to the

released [statement](#), “*the PCA considers that the merger is likely to generate a set of unilateral effects and coordinated effects, with adverse impacts for telecommunications customers in Portugal.*”

The PCA identified a series of potential negative effects caused by the transaction, such as elimination of a competitor offering comparatively lower prices, reinforcement of barriers to entry, and Vodafone, a large competitor, gaining control over the rights acquired by Nowo through the 5G auction.

Vodafone submitted commitments including an agreement with Digi (a telco currently entering the telecommunications market in Portugal) providing for the transfer of 40 MHz of Nowo’s spectrum and access to the bitstream wholesale offer of the fibre-optic network owned by Vodafone. The PCA was seemingly not convinced by the proposed remedies and rejected them.

As of December 31, 2023, no decision had yet been adopted by the PCA and the prospects of a clearance decision did not appear particularly bright.

Live Nation

[Live Nation / Arena Atlântica / Ritmos & Blues](#) was the only concentration filed in 2023 that went into Phase II. It was notified on April 27.

Through this transaction Live Nation, the largest live concerts promoter in the world, is targeting the acquisition of the Altice Arena in Lisbon. This filing partially revives the case dealt with by the PCA back in 2012 involving the Altice Arena (then called “Pavilhão Atlântico”), a transaction cleared only after the acceptance by the notifying parties of a significant set of remedies.

Developments are expected over the next few months.

State Aid

In 2023 the European Commission adopted seven compatibility State Aid decisions in respect of Portugal, most of them aiming to provide [liquidity support](#) and support to the [agricultural](#) and [fishery](#) sectors.

In October, the Portuguese Government announced the financial restructuring of CP – Comboios de Portugal, the public incumbent railway passenger services provider, and stated that CP would be compensated for 2002-2019 public service obligations in the amount of € 1,900 million. In practice, this corresponds to a debt write-off. Quite surprisingly, the European Commission did not adopt any formal decision in this regard (nor did they open a formal investigation), which reinforced the logical doubts as to whether the railway liberalization process will ever take-off in Portugal and whether the entry of private companies to provide passenger services is viable at all.

To make sure you do not miss out on regular updates from the *Kluwer Competition Law Blog*, please subscribe [here](#).

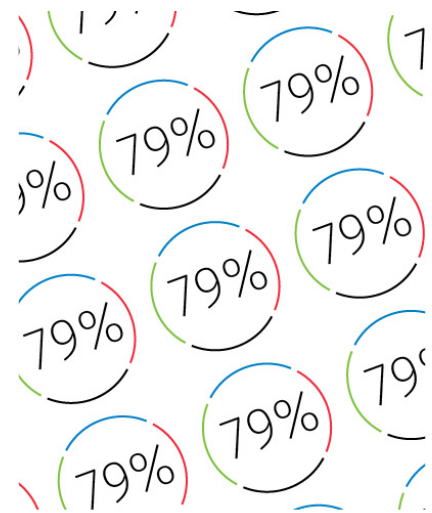
Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Wednesday, January 31st, 2024 at 9:00 am and is filed under [Competition Law 2023, Portugal](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.