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**EU AND COMPETITION LAW**

**News - Competition law and policy  
1<sup>st</sup> quarter 2020**

Below, you will find the issue of our competition law and policy newsletter for the 1<sup>st</sup> quarter of 2020, which compiles the most significant news in this area.

**IN FOCUS**

**PORTUGAL**

**I. Portuguese Competition Authority**

Portuguese Competition Authority opens in-depth investigation into the purchase of Fundão Group by Transdev Group

[Read more](#)

Portuguese Competition Authority imposes fines on Fergrupo - Construções e Técnicas Ferroviárias, S.A. and Somafel - Engenharia e Obras Ferroviárias, S.A.

[Read more](#)

Portuguese Competition Authority affirms that it will be particularly alert to anticompetitive practices during the coronavirus crisis

[Read more](#)

Portuguese Competition Authority finds Hospital Particular do Algarve, S.A. guilty of acquiring sole control of another hospital unit without prior notification

[Read more](#)

European Competition Network issues statement on the application of competition rules during the coronavirus crisis

[Read more](#)

**EUROPEAN UNION**

**I. Courts**

Court of Justice clarifies that a generic medicines manufacturer can be deemed a potential competitor in relation to a patent holder

[Read more](#)

Court of Justice confirms that it is lawful to impose two separate fines in a concentration control case

[Read more](#)

General Court holds that the Commission can reject a complaint based on a prior investigation handled by a national competition authority

[Read more](#)

**I. European Commission**

European Commission approves the acquisition of Allergan by Abbvie subject to divestment

[Read more](#)

European Commission fines Meliá Group for market partitioning

[Read more](#)

European Commission makes commitments assumed by a natural gas company legally binding

[Read more](#)

European Commission approves four Portuguese guarantee schemes

[Read more](#)

European Commission opens in-depth investigation into the acquisition of Takeda's haemostatic patches by Johnson & Johnson

[Read more](#)

## PORTUGAL

# I. Portuguese Competition Authority

### **Portuguese Competition Authority opens in-depth investigation into the purchase of Fundão Group by Transdev Group**

On 26 February 2020, the Portuguese Competition Authority (PCA) decided to open the in-depth investigation phase (Phase II) of the merger consisting of the acquisition of the companies ATF - Auto Transportes do Fundão, S.A. and Joaquim Martins da Fonseca, Lda, jointly designated as "Fundão Group" by the company Rodoviária da Beira Interior, S.A., belonging to the Transdev Group. This merger also includes the transfer of public transport service concessions.

According to the PCA, there is a risk that this merger will result in an effective elimination of competition in future public transport service concession tenders or contracts in the current geographical areas of the Fundão Group (Intermunicipal Community of Beira Baixa, Beiras and Serra da Estrela and Coimbra), since, without this merger, these two Groups would be potentially strong competitors in these tender procedures.

**"The two companies now sanctioned are also banned from participating in public tenders for the purchase of certain national railway maintenance services for a period of two years."**

### **Portuguese Competition Authority imposes fines on Fergrupo - Construções e Técnicas Ferroviárias, S.A. and Somafel - Engenharia e Obras Ferroviárias, S.A.**

On 4 March 2020, the Portuguese Competition Authority (PCA) fined the companies Fergrupo - Construções e Técnicas Ferroviárias, S.A. and Somafel - Engenharia e Obras Ferroviárias, S.A., as well as a board member or director of each of these companies, for their alleged participation in a cartel that involved five companies. The alleged cartel concerned public tenders for railway maintenance launched by Infraestruturas de Portugal, which resulted in market sharing and an increase in the cost paid by the public authorities.

The PCA had previously ordered three companies, which had recourse to settlement procedures, to pay fines in a total amount of EUR 1.6 million.

These two companies now sanctioned are also banned from participating in public tenders for the purchase of certain national railway maintenance services for a period of two years.

### **Portuguese Competition Authority affirms that it will be particularly alert to anticompetitive practices during the coronavirus crisis**

On 16 March 2020, the Portuguese Competition Authority (PCA) issued a statement stressing that it will remain vigilant about possible abuses or anticompetitive practices during the coronavirus crisis, such as price fixing or market sharing agreements.

**"As the country is facing a health crisis, the fine will be paid by the Hospital Particular do Algarve in a phased manner, in order to avoid any impact on the services provided by this company."**

Recalling that the adoption of practices that restrict competition will worsen the situation of the economy, the PCA informs that it is in constant coordination with sector regulators and public entities to proactively detect competition problems.

More information on the implications of coronavirus on state aid and competition can be found [here](#).

### **Portuguese Competition Authority finds Hospital Particular do Algarve, S.A. guilty of acquiring sole control of another hospital unit without prior notification**

On 19 March 2020, the Portuguese Competition Authority (PCA) fined Hospital Particular do Algarve, S.A. a total amount of EUR 155,000 for acquiring sole control of Hospital S. Gonalo de Lagos, S.A. without first notifying PCA of the operation. In PCA's view, this operation would require a notification because it would have created or reinforced a market share of more than 50% in the provision of hospital care by private units in the Algarve.

After detection of the breach by PCA, Hospital do Particular do Algarve notified this operation to the former, which, notwithstanding the high market share created by the merger in the relevant market, authorised it, having taken into account the argument regarding the imminent bankruptcy of Hospital de So Gonalo de Lagos.

Hospital do Particular do Algarve submitted a settlement proposal to PCA, and this collaborative effort was considered when setting the amount of the fine, which will be paid in a phased manner, in order to avoid any impact on the services provided by this company at a time when the country is facing a health crisis.

### **European Competition Network issues statement on the application of competition rules during the coronavirus crisis**

On 23 March 2020, the European Competition Network (ECN), of which the Portuguese Competition Authority is a member, as well as the European Commission (EC), shared in a statement its understanding that competition rules allow for companies to cooperate with each other as a way to guarantee the supply and distribution of products with scarce availability, ensuring that both national competition authorities and the EC will not intervene against cooperation measures between companies that prove to be necessary and temporary and that aim to prevent the scarcity of product supply.

However, the ECN has also stated that competition authorities will not hesitate to act against companies seeking to profit from the current environment, whether through cartelising or abusing a dominant position.

More information on the State aid and competition implications of coronavirus can be found [here](#).

## EUROPEAN UNION

### I. Courts

#### **Court of Justice clarifies that a generic medicines manufacturer can be deemed a potential competitor in relation to a patent holder**

On 30 January 2020, the Court of Justice (CJ) held that, for the purpose of prohibiting anti-competitive agreements, a producer of generic medicines may be considered a potential competitor vis-à-vis the holder of the corresponding patent, provided it has actual and concrete possibilities of access to the market.

In the CJ's view, even if a patent is in force, its validity can always be challenged. Therefore, the existence of a potential competitor will be assessed taking into account both the intention and inherently capacity of generics producer to enter in the market concerned.

This ruling arises in response to a preliminary question brought by a UK appeal court. This court was faced with a question of whether an agreement between a patent holder and a generic medicine manufacturer whereby the latter would delay its entry in the market in return for an agreed payment would be lawful under competition law rules.

**"In the Court of Justice's view, the European Commission (EC) is entitled to impose two different fines in a single decision."**

#### **Court of Justice confirms that it is lawful to impose two separate fines in a concentration control case**

On 4 March 2020, the Court of Justice (CJ) rejected the appeal lodged by the company Marine Harvest, thereby confirming that the European Commission (EC) is entitled to impose two separate fines in a single decision, considering that that company had (i) failed to notify the acquisition of the company Morpol and (ii) implemented the deal before granting clearance by the EC.

The CJ held that the principle of *ne bis in idem* (according to which no one can be condemned twice for the same fact) would not be applied in this case because the EC imposed the two fines in a single decision for two different illegal acts.

The CJ rejected the company's argument that the EC was bound by the principle of concurrent offences, as in the CJ's view, there are no specific European Union's rules that oblige the EC to do so.

#### **General Court holds that the Commission can reject a complaint based on a prior investigation handled by a national competition authority**

On 12 March 2020, the General Court (GC) dismissed an action brought a Czech car dealer that wanted the European Commission (EC) to investigate an alleged refusal to supply perpetrated by Subaru.

In the GC's view, the EC was entitled, for reasons of consistency, to reject a complaint already rejected by a national competition authority.

Nevertheless, the GC clarified that EU law does not require the EC to wait for a national competition authority's decision to reject an identical complaint.

## II. European Commission

### **European Commission approves the acquisition of Allergan by Abbvie subject to divestment**

On 10 January 2020, the European Commission (EC) approved the acquisition of Allergan by Abbvie. However, this approval is conditional on the divestment of a product under development to treat inflammatory bowel diseases.

According to the EC's view, a product that was being developed by Allergan was likely to become a competitor of other product under development owned by Abbvie. Additionally, the EC's market investigation led to the conclusion that, after the concentration, Abbvie would not continue with the product development hitherto undertaken by Allergan.

The commitment to sell this pipeline product to a purchaser that will continue the development of the product in question adequately addressed the competition law concerns, and therefore the EC cleared this transaction.

### **European Commission fines Meliá Group for market partitioning**

On 21 February 2020, the European Commission (EC) fined Meliá Group EUR 6.7 million for allegedly concluding contracts with tour operators that contained geographic partitioning clauses concerning the European Economic Area.

According to the EC's view, under these contracts, the tour operators were allegedly prohibited from making active and passive sales to customers that are resident outside their allocated geographic area. This restriction led to a partitioning of the EU single market, as consumers were not allowed to ask for quotes from tour operators allocated to other areas.

As Group Meliá acknowledged its participation in the infringement, a 30% fine reduction was granted, having regard to the fact that the company cooperated with the Commission beyond its legal obligation to do so.

### **European Commission makes commitments assumed by a natural gas company legally binding**

On 6 March 2020, the European Commission (EC) adopted a decision to terminate the ongoing proceedings against Romanian company Transgaz rendering legally binding a set of commitments to make significant volumes of natural gas available to Romania's neighbouring Member States.

The EC had suspected that this company was allegedly restricting exports of natural gas, either by underinvesting in or delaying construction of infrastructure for gas transport, or imposing tariffs that made exports commercially unviable.

After the period of public consultation on the proposed commitments, the EC held that compliance with these commitments would eliminate the potential adverse effects on competition that had been identified during the investigation.

### European Commission approves four Portuguese guarantee schemes

On 22 March 2020, the European Commission approved four guarantee schemes, with a total budget of EUR 3 billion, for loans contracted by SMEs and mid-cap companies established in Portugal that are active in the following economic areas: (i) tourism; (ii) catering and similar activities; extractive and manufacturing industry; travel agency, tourist animations and event organisation and related activities.

These measures are in line with the conditions set out in the State aid Temporary Framework to support the economy in the context of the COVID-19 outbreak that will be in place until the end of December 2020.

The schemes aim to limit the risks associated with issuing operating loans to those companies that are severely affected by the economic impact of the Coronavirus outbreak.

Further information on the implications of coronavirus for state aid and competition can be found [here](#).

### European Commission opens in-depth investigation into the acquisition of Takeda's haemostatic patches by Johnson & Johnson

On 25 March 2020, the European Commission has decided to open an in-depth investigation (Phase II) into the acquisition by Johnson & Johnson of the Tachosil product business, owned by Takeda, which is designed to manage severe bleeding during surgeries.

**"The Commission approved four guarantee schemes, with a total budget of EUR 3 billion, for loans taken by SMEs and mid-cap companies."**

According to the EC, this acquisition could lead to a loss of incentive of Johnson & Johnson to market in the European Economic Area a product competing with the one produced by Takeda, the latter being dominant in the relevant market. Additionally, the EC stated that this market is characterised by high barriers to entry of new competitors, due to the existence of significant development costs and strong loyalty to Takeda's product, making the entry of other competitors more unlikely.

The EC was therefore concerned that this transaction would result in higher prices and less choice and innovation. On 10 April 2020, Johnson & Johnson announced that it had abandoned this acquisition plan. ■