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**EU AND COMPETITION LAW**

**News - Competition law and policy  
3<sup>rd</sup> quarter 2020**

Below, you will find the issue of our competition law and policy newsletter for the 3<sup>rd</sup> quarter of 2020, which compiles the most significant news in this area.

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## PORTUGAL

### I. Courts

#### **The Competition Court reduces fine of EUR 38.3 million imposed on EDP and Sonae by 10%**

On 30 September 2020, the Competition, Regulation and Supervision Court (Competition Court) reduced by 10% the fine of EUR 38.3 million imposed by the Portuguese Competition Authority (PCA) on EDP and SONAE in May 2017. These companies had been accused for concluding a non-competition agreement as part of the partnership created for the implementation of the "EDP Continente Plan" commercial campaign in 2012.

In the view of PCA, EDP and Sonae undertook not to enter their respective markets through the alleged non-competition pact, by obliging Sonae not to compete in the supply of electricity in mainland Portugal for a period of 2 years. The PCA considered that the companies were potential competitors in this market, particularly since the practice took place in the context of the liberalisation of the supply of electricity and natural gas in Portugal.

**"The Competition Court opted to reduce the amount of the fine after it was shown that the partnership created between the two undertakings from which the non-competition agreement arose, had pro-competitive effects."**

Despite confirming the PCA's decision on the existence of the non-competition agreement between these companies, the Competition Court decided to reduce the amount of the fine to EUR 34.5 million after it was shown that the partnership created between the two undertakings from which the non-competition agreement arose, had pro-competitive effects.

### II. Portuguese Competition Authority

#### **The Portuguese Competition Authority accuses six supermarket groups and two drinks suppliers**

On 4 July 2020, the Portuguese Competition Authority (PCA) accused six food distribution groups, one supplier and one drinks distributor of allegedly colluding on consumer prices.

The PCA concluded that there were indications that Modelo Continente, Pingo Doce and Auchan used their business relationships with the supplier Sumol+Compal, and with a distributor of wines and other alcoholic beverages, to align the retail prices of their main products. This accusation is also made against Lidl (in respect of its business relationship with Sumol+Compal), Intermarché and E.Leclerc (in respect of its relationship with the distributor of wine and other alcoholic beverages).

The charge now presented is part of the second set of "hub-and-spoke" cases investigated in Portugal, in addition to the four cases for the same practice for which the PCA has already adopted a Statement of Objections.

The companies concerned now have the opportunity to exercise their rights of defence.

### **The Portuguese Competition Authority accuses MEO, NOS, NOWO and Vodafone of participating in a cartel to limit competition in online advertising**

On 16 July 2020, the Portuguese Competition Authority (PCA) adopted a Statement of Objections in which it accused MEO, Vodafone, NOS and NOWO of allegedly agreeing to limit advertising to their respective telecommunications services on Google's search engine since 2010.

According to the alleged agreement, if consumers were to search for the telecommunications services of one of these companies, they would not see in the most visible results advertisements for the equivalent services of any of the other companies participating in the alleged agreement.

In the PCA's view, this alleged agreement would distort competition, as customers would not be able to easily access offers from other telecom companies, especially in a sector where the comparison between competing offers is already complex to begin with.

The PCA started its investigation in January 2019, following a leniency application by one of the cartel participants and the companies concerned now have the opportunity to exercise their rights of defence.

### **The Portuguese Competition Authority accuses companies and board members of the Blueotter and EGEO groups of non-compete agreement**

On 29 July 2020, the Portuguese Competition Authority (PCA) accused six companies and six directors of the Blueotter and EGEO waste management groups of forming an alleged non-compete agreement.

In the PCA's view, the companies belonging to these two groups maintained non-compete obligations between them between 2017 and 2019, covering all of their clients in the provision of waste management system services in Portugal.

According to the PCA, the investigation began in May 2019 when the Blueotter group notified the PCA of its acquisition of sole control over EGEO Circular S.A. At that time, the PCA became aware of the existence of these non-compete agreements.

Those accused in the Statement of Objections now have the opportunity to exercise their rights of defence.

**"The Portuguese Competition Authority accused Fidelidade SGOII of acquiring sole control of the investment fund without first notifying the PCA of that transaction."**

### **The Portuguese Competition Authority accuses Fidelidade of gun-jumping**

On 22 September 2020, the Portuguese Competition Authority (PCA) accused Fidelidade SGOII of acquiring sole control of the *Fechado Saudeinveste* Investment Fund on 1 October 2018, without first notifying the PCA of that transaction, thus concluding the transaction without obtaining the PCA's prior decision of non-opposition to the transaction in question.

According to the PCA, the notification of this transaction took place only on 21 February 2019, after the acquisition of sole control had already been completed. It should be noted that, because the PCA considered that the acquisition was likely to generate competitive concerns, the transaction was reversed and Fidelidade SGOII returned the management of the Saudeinveste Fund to its former managing entity.

Nevertheless, the administrative offence proceedings continue, and the target company now has the opportunity to exercise its right of defence.

**"In the view of the General Court, the Commission has failed to prove that a selective economic advantage was granted to Apple."**

## EUROPEAN UNION

### I. Courts

#### **General Court annuls the European Commission's decision regarding an alleged State aid measure granted to Apple**

On 15 July 2020, the General Court (GC) annulled the European Commission's (EC) decision that required Ireland to claim EUR 13 billion from Apple, a figure which relates to unfulfilled tax obligations that Apple was alleged to have towards Ireland.

In the EC's view, Apple was not required to pay these amounts as tax, because the Irish tax authorities approved Apple's method for determining the tax base for the income of Apple's two subsidiaries in Ireland. The EC considered that the decisions of these Irish tax authorities constituted unlawful aid incompatible with the internal market.

However, in the GC's view, the EC was unable to prove that there had been a selective economic advantage granted to Apple. More specifically, the GC concluded that the EC's reasoning was inadequate, since it did not show that Apple's revenue – supposedly untaxed – resulted from activities carried out by Apple's subsidiaries in Ireland. In addition, the GC stated that the EC had failed to prove the existence of an undue exercise of its discretionary power by the Irish authorities when they decided to approve the methods proposed by Apple to fix its tax base.

In the meantime, the EC stated that it would appeal to the Court of Justice against that decision.

#### **Court of Justice rules that the European Commission is empowered to take copies of unexamined evidence during a dawn raid to inspect at its own offices**

On 16 July 2020, the Court of Justice of the European Union (CJEU) rejected the appeal brought by the company Nexan. In doing so, it confirmed the decision of the General Court, which had held that the fine of EUR 70.6 million imposed on the company by the European Commission (EC) for its participation in the high-voltage electrical cable cartel was lawful.

In support of the EC decision, the CJEU stated that European Union law offers some discretion to the EC regarding its powers of investigation, with the EC being allowed to copy data and information seized – which were used as evidence – during its inspections of the companies.

### **Advocate-General Pitruzzella clarifies the conditions for partial immunity from fines**

On 3 September 2020, Advocate-General (AG) Giovanni Pitruzzella argued that the Court of Justice should reject the possibility of the company Recyclax benefiting from partial immunity, which would lead to a reduction in the conviction of that company for allegedly participating in a cartel.

In the AG's view, such a reduction of the fine (on the ground that the facts which are the subject of the application for partial immunity are not taken into account in determining the fine) would only have been possible if the undertaking concerned had been the first to offer to the European Commission (EC) facts which were decisive. In other words, the first to offer facts that would have enabled the EC to establish the facts presented by the undertaking applying for partial immunity and which concerned additional facts of the practice in question not yet known to the EC which, in the end, would have increased the gravity or duration of the infringement as a whole.

On the contrary, for the AG, undertakings will not be entitled to partial immunity if they merely contribute to the EC's better knowledge of facts already known to it.

## II. European Commission

### **The European Commission extends validity of certain documents and amends certain rules, both relating to State aid**

On 2 July 2020, the European Commission (EC) announced that it will extend the validity of certain legal documents relating to State aid rules that would otherwise expire at the end of 2020, and that it will make adjustments to existing rules in order to mitigate the impact of the COVID-19 pandemic on businesses.

As regards the extension of legal documents, it has been determined that the validity of the General Block Exemption Regulation, the *de minimis* Regulation and the Guidelines on State aid for rescuing and restructuring firms in difficulty have been extended for a further 3 years. In addition, the validity of other EC documents has been extended for another year (such as the "Guidelines on national regional aid for 2014-2020" and the "Guidelines on state aid to promote risk financing investments").

The adjustments to the existing rules mean that companies in difficulty due to the pandemic will be able to receive certain types of aid for which they would not previously have been eligible. They will also continue to be able to benefit from schemes such as the General Block Exemption Regulation. Secondly, the EC has introduced changes to ensure that job reductions occurring as a result of the pandemic are not considered to be in breach of the commitments made when receiving regional investment aid under the scheme of the Block Exemption Regulation. In detail, these commitments would prohibit the beneficiary company, within a certain period, from reducing jobs in other locations in the European Economic Area which have the same economic activity as the company receiving the aid.

More information on the state aid and competition legislation applicable in view of the COVID-19 pandemic can be found [here](#).

### **The European Commission clears Alstom's purchase of Bombardier Transportation, albeit subject to commitments**

On 31 July 2020, the European Commission (EC) approved Alstom's acquisition of Bombardier Transportation from the Bombardier Group, albeit subject to several commitments.

In the EC's view, the transaction, as initially notified, would pose serious risks to competition in different markets for the supply of railway rolling stock. It also signalled that after the merger, Alstom would have a very strong market position, in addition to the possibility of harming some of the competitors providing railway signalling.

The parties have submitted commitments to address these concerns and thus ensure the EC's clearance to **(i)** maintain the production of innovative rolling stock, **(ii)** sell rolling stock production sites and **(iii)** ensure access to certain interfaces and products to competitors in the supply of railway signalling.

### **The European Commission opens in-depth investigation into Google's acquisition of Fitbit**

On 4 August 2020, the European Commission (EC) opened the phase for an in-depth investigation (Phase II) of Google's proposed acquisition of Fitbit (producer of smart watches, among other products).

In the EC's view, this deal could give Google increased market power and a greater ability to raise barriers to entry and expansion of competitors in the online advertising market, given the amount of data that Google could acquire from Fitbit, which would serve to customise the advertising services Google provides.

With the acquisition of Fitbit, Google would control **(i)** the data collected by Fitbit through its devices concerning the health and fitness of users of those products and **(ii)** the technology to develop a database similar to that used by Fitbit.

In order to reduce the competitive risks, Google proposed to the EC not to use some of the data collected by Fitbit for advertising purposes but the EC considered this commitment insufficient.

The EC now has 90 working days to issue a decision.

### **The European Commission approves SATA's liquidity aid and opens investigation into previous aid granted to SATA**

On 18 August 2020, the European Commission (EC) approved a liquidity support measure worth EUR 133 million for SATA Air Azores (SATA), having also announced that it had begun investigations into past state support for this airline.

According to the EC, the aid measure granted in the form of a guarantee will enable the company to fulfil its public service obligations and provide services to the outermost region of the Azores.

The EC also opened an investigation into aid previously granted to SATA (in the form of three capital increases by the regional government of the Azores) to ascertain its compatibility with EU rules. ■

**"The Commission also opened an investigation into previous aid measures granted to SATA in order to check its compatibility with European Union rules."**