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**EU AND COMPETITION LAW**

**News - Competition law and policy  
4<sup>th</sup> quarter 2020**

Below, you will find the issue of our competition law and policy newsletter for the 4<sup>th</sup> quarter of 2020, which compiles the most significant news in this area.

**IN FOCUS**

**PORTUGAL**

**I. Courts**

Lisbon Court of Appeal interprets Cogeco judgment of the Court of Justice in accordance with Portuguese law

Saiba Mais

**II. Portuguese Competition Authority (PCA)**

Competition Authority prohibits the acquisition of the Fundão Group by Transdev Group for eliminating competition in passenger transport in central Portugal

Saiba Mais

Portuguese Competition Authority accuses the National Association of Surveyors of price fixing

Saiba Mais

Portuguese Competition Authority imposes fines on supermarkets and two suppliers for alleged price fixing

Saiba Mais

Portuguese Competition Authority orders the APAP to pay a fine of EUR 3.6 million and closes the case against the APAN

Saiba Mais

Portuguese Competition Authority accuses supermarket chains and alcoholic beverage supplier of price fixing

Saiba Mais

Portuguese Competition Authority imposes EUR 84 million fine on MEO for alleged cartel with NOWO

Saiba Mais

Portuguese Competition Authority clears acquisition of Ferro Corporation by Pigments Spain, subject to commitments

Saiba Mais

**EUROPEAN UNION**

**I. Courts**

Court of Justice confirms the decision of the European Commission, recalling the concept of a single and continuous infringement

Saiba Mais

Court of Justice requires interest to be paid on non-notified aid which was later found to be compatible

Saiba Mais

Court of Justice clarifies the non-contractual nature of civil claims for breach of competition law

Saiba Mais

Court of Justice annuls commitments imposed by the European Commission because they infringed the rights of third parties

Saiba Mais

**II. European Commission**

European Commission closes Broadcom case with imposition of commitments

Saiba Mais

European Commission issues a Statement of Objections against Amazon for using data from independent sellers who make use of its marketplace

Saiba Mais

European Commission condemns Teva and Cephalon for delay in generic entry

Saiba Mais

European Commission considers that the implementation of the tax benefits rules in the Madeira Free Zone is incompatible with the Single Market

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## PORTUGAL

### I. Courts

#### **Lisbon Court of Appeal interprets Cogeco judgment of the Court of Justice in accordance with Portuguese law**

On 5 November 2020, the Lisbon Court of Appeal held that the interpretation made by the Court of Justice (CJ) did not consider the relevance of the Autonomous Judicial Notice, which would interrupt the civil limitation period in the course of a competition authority investigation. This would mean that there would be no incompatibility between the Portuguese limitation period rules and the EU law.

At the core of this dispute, there was an answer given by the ECJ that a three-year limitation period that was not interrupted/suspended during the proceedings before the competition authority was contrary to EU law.

### II. Portuguese Competition Authority

#### **Competition Authority prohibits the acquisition of the Fundão Group by Transdev Group for eliminating competition in passenger transport in central Portugal**

On 6 October 2020, the Portuguese Competition Authority (PCA) decided to prohibit the acquisition, by a company of the Transdev Group, of the Fundão Group and of public service concessions held by the Fundão Group. The PCA made this decision because the proposed concentration entailed the risk of eliminating competition for the future concessions or contracts that will be entered into to provide public transport services in the central region of mainland Portugal, with clear losses for consumers and for the awarding bodies.

In the PCA's view, there was the risk that this concentration operation would result in an effective elimination of competition in the current geographic areas where the Fundão Group operates.

The PCA asked for the opinion of the Mobility and Transport Authority (*Autoridade de Mobilidade e dos Transportes*), which indicated it had reservations about the operation, and the PCA also received opinions from the municipalities involved, which also showed concerns along the same lines.

#### **Portuguese Competition Authority accuses the National Association of Surveyors of price fixing**

On 11 November 2020, the Portuguese Competition Authority (PCA) adopted a Statement of Objections regarding the Associação Nacional de Topógrafos (ANT) for allegedly fixing the prices of surveying services.

According to the PCA, the ANT approved and disclosed on its website, as from November 2003, a schedule of fees to promote a standardisation of the prices of its associates.

According to the PCA, this process was opened in May 2020, following a complaint, and now the ANT is able to exercise its rights of defence.

#### **Portuguese Competition Authority imposes fines on supermarkets and two suppliers for alleged price fixing**

On 21 November 2020, the Portuguese Competition Authority (PCA) imposed fines, in two different cases, on supermarket chains Modelo Continente, Pingo Doce, Auchan and Intermarché and on the supplier Sociedade Central de Cervejas (in the first case) and on the already mentioned supermarket chains, as well as on Lidl and Cooplecnorte (responsible for E.Leclerc) and the alcoholic drink supplier Primedrinks (in the second case).

According to the PCA, by resorting to the respective suppliers, the participating companies ensured the alignment of their retail prices. These are the first two decisions for hub-and-spoke in Portugal.

As a result, the PCA decided to impose fines in the following amounts: around EUR 120 million on Modelo Continente, EUR 90 million on Pingo Doce, EUR 20 million on Auchan, EUR 19 million on Intermarché, EUR 10 million on Lidl and EUR 2 million on Cooplecnorte. As for suppliers, the PCA ordered Sociedade Central de Cervejas and Primedrinks to pay, respectively, around EUR 29 million and around EUR 7 million.

### **Portuguese Competition Authority orders the APAP to pay a fine of EUR 3.6 million and closes the case against the APAN**

On 22 November 2020, the PCA ordered the Portuguese Association of Advertising Agencies (APAP) to pay a fine of €3.6 million for preventing its members from freely competing in tenders for the supply of advertising services.

In the same case, the PCA dropped charges against the Portuguese Association of Advertisers (APAN) for failing to conclude that this association imposed rules on its members regarding their advertising agency contracting processes.

According to the PCA, for at least three and a half years, the APAP sought to align the behaviour of its members to specific tenders launched by advertisers, and the advertising agencies that were part of the APAP's management during the period in question are now jointly and severally liable to pay the fine.

### **Portuguese Competition Authority accuses supermarket chains and alcoholic beverage supplier of price fixing**

On 24 November 2020 and 2 December 2020, the Portuguese Competition Authority (PCA) accused supermarket chains Modelo, Continente, Pingo Doce and Auchan, the alcoholic beverages supplier, Active Brands and cosmetics and personal care products supplier, Beiersdorf, of allegedly colluding on consumer prices.

The PCA concluded that there were indications that, between 2008 and 2017, Modelo Continente, Pingo Doce and Auchan used their commercial relationships with each of these suppliers to seek to align the retail prices of these suppliers' main products. This investigation is part of the set of "hub-and-spoke" cases that the PCA is dealing with.

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

**"The investigation is part of the set of "hub-and-spoke" cases that the PCA is dealing with."**

### **Portuguese Competition Authority imposes EUR 84 million fine on MEO for alleged cartel with NOWO**

On 3 December 2020, the Portuguese Competition Authority (PCA) imposed a fine of eighty-four million euros on MEO for alleged price fixing and market sharing with NOWO in mobile and fixed communications services.

**"The Portuguese Competition Authority (PCA) imposed a fine on MEO for alleged price fixing and market sharing with NOWO in mobile and fixed communications services."**

According to the PCA, MEO and NOWO entered into a contract under which NOWO, which did not invest in telecoms infrastructure, was entitled to provide mobile communications services all over Portugal. After concluding that contract, NOWO undertook not to launch mobile services outside the geographical areas where it provided fixed-line services, thus not competing with MEO in the Lisbon and Porto areas. According to the PCA, NOWO also agreed with MEO not to make its services available below a certain value, to increase the price of its services and to reduce their quality.

This practice was in force during 2018, and NOWO was exempted from the payment of the fine because this process resulted from a leniency application made by this company.

### **Portuguese Competition Authority clears acquisition of Ferro Corporation by Pigments Spain, subject to commitments**

On 28 December 2020, the Portuguese Competition Authority (PCA) cleared the acquisition of Ferro Corporation by Pigments Spain, SL albeit subject to commitments.

The PCA opened an in-depth investigation into this acquisition because it had identified potential competition concerns. The main concern was that the merged company would have the ability and incentive to deteriorate supply conditions (both in terms of price, quality and variety) in the market for glazes, glazed paints and digital paints, which are essential markets for the ceramic floor and wall tile industry.

In order to address these concerns and thus ensure the PCA's authorisation, the parties involved submitted commitments, which included the disposal of all the assets acquired from Ferro Corporation in Portugal to a third party operator, thus maintaining a supply structure similar to the one existing before this operation.

## **EUROPEAN UNION**

### **I. Courts**

#### **Court of Justice confirms the decision of the European Commission, recalling the concept of a single and continuous infringement**

On 22 October 2020, the Court of Justice of the European Union (CJ) rejected the appeal brought by Silver Plastics and Johannes Reifenhäuser Holding, upholding the General Court's decision, which did not uphold the application for partial annulment of the European Commission's (EC) decision of 2015.

Among other things, in its judgment, the CJ recalled that the concept of 'single and continuous infringement' presupposes the existence of an 'overall scheme' in which different practices are involved, even if, taken in isolation, one or more of those practices may also constitute infringements of competition law.

In the CJ's view, this means that, for each undertaking, it is not necessary for it to have participated directly in all the anti-competitive conduct constituting the infringement, nor is it necessary that all the undertakings participating in a single and continuous infringement be active on the same market.

### **Court of Justice requires interest to be paid on non-notified aid which was later found to be compatible**

On 24 November 2020, in a preliminary reference, the CJ held that where there is State aid which has not been notified to the EC before being implemented, the beneficiary of the aid must be ordered to pay interest, even if the EC subsequently concludes that the aid is compatible with the internal market.

In the CJ's view, the EC's final decision does not have the effect of remedying the invalid acts implementing the aid. Therefore, national courts are obliged to order the aid recipient to pay interest for the period in which the aid was implemented without the EC's approval.

### **Court of Justice clarifies the non-contractual nature of civil claims for breach of competition law**

On 24 November 2020, in a preliminary reference, the CJ ruled, in a case in which a German hotel wanted Booking.com to be prohibited from a practice that the hotel considered to be an abuse of a dominant position, that the hotel's claims could be classed as non-contractual in nature, and this despite the fact that the two companies had concluded a contract with each other.

**"According to the Court of Justice, abuse of a dominant position is a violation of competition law, and the analysis of the existence of such abuse does not have to be based on the content of the contract concluded."**

According to the CJ, abuse of a dominant position is a violation of competition law, and the analysis of the existence of such abuse (and its illegality) does not have to be based on the content of the contract concluded, since such obligation not to abuse a dominant position is imposed independently of that contract.

This conclusion had, in this case, implications regarding the definition of the competent court and it allowed the action to be filed in the courts of the market allegedly affected by Booking.com's practice.

### **Court of Justice annuls commitments imposed by the European Commission because they infringed the rights of third parties**

On 9 December 2020, the CJ annulled the decision of the General Court (GC), which had held that the decision of the EC to accept the commitments of Paramount company, which allowed the proceedings against the company to be closed, was correct. According to this commitment decision, Paramount would be prohibited, within a period of five years, from imposing, in its contracts with broadcasters, geographic blocks on cross-border access to pay-TV content.

The company Canal Plus, which would have entered into a contract with Paramount, initially asked the GC that these commitments be considered invalid because they violated its rights, including itself in a group of broadcasters who would have benefited from broadcasting exclusivity. In contrast with the GC, the CJ accepted Canal Plus' argument and found that the commitments would infringe the contractual rights of the broadcasters in a non-proportional manner.

The CJ also agreed with Canal Plus that recourse to national courts to enforce its contractual rights (the solution put forward by the GC) would be pointless, given the existence of the commitments, which the courts would not be able to counter, because if they did counter them, they would be failing to respect the primacy of EU law in such matters.

## II. European Commission

### **European Commission closes Broadcom case with imposition of commitments**

On 7 October 2020, the EC decided to close the proceedings against Broadcom and required the company to undertake to suspend all exclusivity or quasi-exclusivity agreements concerning chips for Internet modems and for television receivers. With these commitments, this company is also barred from entering into new agreements of a similar nature for a period of seven years.

Accordingly, the EC decided to close the investigation against Broadcom. In that investigation, the EC took the decision to impose interim measures on Broadcom in connection with an investigation into alleged abuse of a dominant position. This was the first time the EC had used this instrument since the entry into force of Regulation 1/2003.

In the EC's view, these undertakings allow consumers to benefit from lower prices and more innovative products and therefore address the concerns it initially raised.

### **European Commission issues a Statement of Objections against Amazon for using data from independent sellers who make use of its marketplace**

On 10 November 2020, the EC accused Amazon of allegedly distorting competition in the online retail market. In the EC's view, for the benefit of its own retail sales, Amazon made use of (non-public) commercial information held by independent sellers using Amazon's marketplace, which would always mean that Amazon was making use of information obtained by its competitors.

According to the EC, with this data, which originated from several sellers in the marketplace, Amazon was able to avoid the normal risks of competition in the retail market and thus abused its dominant position.

The company concerned now has the opportunity to exercise its right of defence.

### **European Commission condemns Teva and Cephalon for delay in generic entry**

On 26 November 2020, the EC fined the companies Teva and Cephalon EUR 30 and 30.5 million respectively for allegedly agreeing to delay the placing on the market of a generic version of Cephalon's drug for sleep disorders.

According to the EC, this agreement allowed Cephalon, despite the expiry of its patent, to charge higher prices for this drug and not face competition in this market, while Teva benefited from a package of side agreements.

**European Commission considers that the implementation of the tax benefits rules in the Madeira Free Zone is incompatible with the Single Market**

On 4 December 2020, the EC adopted a decision that obliges Portugal to recover State aid from companies that did not comply with the rules contained in previous EC authorisations for the tax benefits of the Madeira Free Zone to be granted to these companies, meaning that the aid was considered incompatible with the single market.

According to the EC decision, the tax benefits offered to the Madeira Free Zone were not implemented in accordance with the Commission authorisations, since many of the beneficiary companies did not really contribute to development, with the creation of jobs in Madeira, as was mandatory according to the EC decision. ■

**"According to the Commission, tax benefits offered to the Madeira Free Zone were not implemented in accordance with the Commission authorisations."**