



EU AND COMPETITION LAW

Portuguese Competition Law Key developments

In 2023, Portugal continued to be an active jurisdiction in relation to both public and private enforcement of competition law, with some of the key highlights described below:

Constitutional Court rules that PCA practice of seeking search warrants from Public Prosecutor is unconstitutional.

The PCA suffered a significant setback in March 2023 when the Constitutional Court held that its practice of obtaining search warrants from the Public Prosecutor instead of from a judge was unconstitutional. The issue was put before the Constitutional Court in the context of the case that originated the PCA's overarching hub and spoke investigation (which has resulted in 10 infringement decisions and nearly €700 million in fines). The PCA's interpretation of the applicable rules was that if it only seized emails that were opened and not emails that were unread, a warrant from a Public Prosecutor was sufficient. The Constitutional Court rejected this interpretation. The court held that the constitutional protection of private correspondence required that the PCA could only seize such correspondence via a search warrant authorized by a judge irrespective of whether the emails in question had been read or not.

Interpretation of judgments by the Constitutional Court referred to the CJEU.

In unrelated litigation, the Competition Court made a series of preliminary rulings to the CJEU. Formally, these preliminary requests seek guidance on the notion of "correspondence" under the EU Charter of Fundamental Rights (**Charter**) and the protection the Charter gives to correspondence in the context of a dawn raid/investigation. There is a connection with the cases referred to above because the Competition Court had, in past cases, held that open emails do not fall within the notion of correspondence under the Charter. And that, therefore, the PCA was entitled to obtain a warrant for such emails from the Public Prosecutor rather than from a judge.

Preliminary requests seek guidance on the notion of "correspondence" under the EU Charter of Fundamental Rights.

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Impact of Constitutional Court judgments on past infringement decisions and next steps.

The Constitutional Court has ruled in two separate instances that the PCA's practice of seeking search warrants from the Public Prosecutor was unconstitutional. A third ruling is imminent – and it is expected that the court will reach the same conclusion. Such a ruling will trigger the legal mechanism to give binding force to the Constitutional Court's ruling on this point. Whether this will automatically result in all the PCA's past enforcement decisions based on evidence collected in this manner being declared null and void remains to be seen. Such an outcome would present a serious setback to the PCA, as it imposed more than €1.5bn in fines in the past 6-year period.

Private enforcement – and class actions in particular – continues to see material growth.

We expect further developments in 2024 as some of the initial class actions brought in 2020 will likely go to trial.

The material growth in competition class actions seen since December 2020 continued in 2023. The majority of these cases were brought by *Ius Omnibus*, a self-proclaimed consumer association that relies on litigation funding to bring most of its cases. Other players have emerged, however, and we expect further developments in 2024 as some of the initial class actions brought in 2020 will likely go to trial. The on-going *Trucks* follow-on litigation also saw material developments: in one case, the Lisbon Court of Appeal rejected the economic reports from both the

plaintiff and defendant and remitted the case to the Competition Court, ordering a retrial and a new joint expert exercise in order to reach a conclusion regarding the existence and extent of any damages.

Some indicators of greater judicial scrutiny.

There were some indicators in 2023 that the Competition Court could provide greater scrutiny to PCA decisions. Two of the PCA's gun-jumping fines were materially reduced – in one case from €300,000 to €40,000, and in another from €2.5 million to €160,000. In a cartel appeal, the Competition Court held that the two undertakings that had not applied for leniency did not participate in the cartel and annulled their fines. Whether this trend will be confirmed in 2024 is unclear, as most appeals to PCA decisions are currently suspended until the full effect of the Constitutional Court judgments referred to above becomes clearer.

Merger control: Record year for merger filings; greater focus on conglomerate theories harm.

Despite the slowdown in M&A activity, the PCA reviewed a record number of transactions in 2023. In total, the PCA reviewed over 80 transactions – a significant increase compared to 2022. The PCA continues to review simple transactions very quickly – sometimes in as little as three to four weeks (the Phase I statutory deadline is 30 working days and pre-notification is the exception not the rule). However, we have observed that the PCA has – like many other competition agencies – begun to investigate less traditional theories of harm, in particular conglomerate concerns. This may simply be a function of the cases it reviewed in 2023. However, this may signal a greater desire from the new PCA board to introduce a more demanding merger control regime.

The development of forensic tools to detect anti-competitive conduct, in particular cartels, is amongst the PCA's 2024 priorities.

Merger control: potential prohibition to start 2024.

2024 may see the PCA's first merger prohibition in several years, as the PCA rejected proposed commitments given in the context of its Phase 2 investigation of Vodafone's proposed acquisition of Nowo.

PCA enforcement priorities for 2024.

The PCA announced its priorities for 2024 in late December and highlighted the following: (i) the development of forensic tools to detect anti-competitive conduct, in particular cartels; (ii) greater focus on abuse of dominance enforcement; (iii) gun-jumping; (iv) digital transition work and the promotion of international cooperation in this domain (DMA, etc.); and (v) enhancing internal checks and balances.

Conclusion

We think that Portugal will continue to be an active jurisdiction in the coming year. The PCA was recently upgraded to a 4-star agency by GCR, and the new PCA board will likely have as one of its main objectives maintaining the PCA's reputation as one of the most active enforcers in the EU. The extent to which the PCA will be able to do so, however, will depend to a material extent on the outcome of upcoming Constitutional Court litigation regarding the legality of its dawn raids. ■