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A new world

Competition law enforcement in Portugal

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Historically, Portugal has not been at the international forefront when it comes to the enforcement of competition law. And, for several years following the adoption into the domestic regime of core principles of EU competition law (2003) and of tools such as leniency (2006), Portugal remained a jurisdiction that each year adopted only a handful of enforcement decisions (and in some years, none whatsoever) and potentially reviewed a number of complicated mergers.

Today, the enforcement landscape is entirely different. The Portuguese Competition Authority (PCA) has – over the past five years – been prolific in both its output of decisions and in the size of the fines it has imposed. Coupled with the emergence of an active private damages bar – in particular complex class actions seeking large amounts of alleged damages – Portugal has become one of the most active jurisdictions in the EU with respect to both private and public enforcement of competition law.

This article gives an overview of developments over the past few years and attempts to identify some short and medium-term trends that could influence the competition law landscape in Portugal in the coming years.

Public enforcement of competition law in Portugal

There are likely two points at which public enforcement of competition law in Portugal can viewed: post-2012 and post-2019.

Post-2012: Key amendments give the PCA greater investigatory autonomy

The year 2012 was significant, in that a number of key reforms were introduced into the domestic competition regime. Among these were:

1. The removal of the obligation for the PCA to investigate *every* complaint brought to its attention;
2. The creation of a specialist competition court (the Competition Court);
3. The introduction of a commitments and settlement programme; and
4. Harmonisation of the Portuguese leniency regime according to international best-practices (for example, by allowing fine reductions for companies that made applications following an initial application by a competitor).

The first of these reforms is likely to have been the most significant in both the short and long-term. One of the greatest challenges for any competition agency is how to allocate what are often scarce resources. The requirement that these resources had to be deployed in each instance of a complaint is likely one reason for the PCA's relatively modest output pre-2012.

Post-2019: Large fines and hub-and-spoke investigations dominate the landscape

On 9 September 2019, the PCA announced that it had found that 14 banks had been involved in an alleged exchange of competitively sensitive information related to the spreads applicable to certain credit products. According to the PCA, the alleged infringement took place over a period of just over ten years. The total fines applied were €225 million.[1] To put this figure into context, this amount was larger than *all* the fines applied by the PCA in the first 13 years of its existence (2003–2016).

Since September 2019, the PCA's output has been prolific. This output has been largely driven by its overarching investigation into alleged hub-and-spoke arrangements between Portugal's largest food retailers and certain distributors. To date, the PCA has adopted eight hub-and-spoke infringement decisions. Hub-and-spoke cases have rarely been successfully prosecuted. However, the PCA's approach is to use the notion of a "concerted practice" as the legal basis for its approach.[2] The legal test used by the PCA does not, therefore, reflect practice in the UK and US, ie, the two jurisdictions where hub-and-spoke infringements have been prosecuted and debated most widely and which, critically, require subjective intent between each element of the alleged

hub-and-spoke arrangement in order for an infringement to be proven.

In this respect, in a submission to the OECD regarding hub-and-spoke arrangements, the PCA states that:

> "[I]n a hub-and-spoke arrangement each retailer is aware, or could reasonably have foreseen, that a similar interaction with the supplier is occurring in parallel in relation to the competitor retailers. This originates the common understanding necessary for the coordination"[3] and that "[t]he proof of a concerted practice comprehends, therefore, a focus on the common (or shared) interest of the colluding undertakings, which encompasses the reduction of the uncertainty as to their future competitive conduct."[4]

Given the absence of any hub-and-spoke decisional practice at an EU level – either at the administrative or judicial level – and the challenges faced by UK and US enforcers in this complicated area of the law, it will be interesting to see the extent to which these decisions withstand appeal and/or any preliminary reference to the EU courts in Luxembourg.

However, as things currently stand, the PCA has imposed fines of nearly €665 million for alleged hub-and-spoke infringements. Whatever the ultimate outcome of these decisions, the PCA is clearly at the forefront in this area of competition law in the EU, and likely worldwide.

Enforcement of competition law in labour markets

Another area of competition law the PCA has been championing in the EU relates to the application of competition law to labour markets. The PCA signalled its intention of addressing potential breaches of competition law in labour markets with the publication of an issues paper in September 2021 that set out the results of a detailed study into potential competition law theories of harm resulting from labour market-related conduct (the "Issues Paper").[5]

In the Issues Paper, the PCA notes that "[it] is important to promote a labour market in which employers adopt an independent and competitive conduct, contributing to an efficient allocation of labour. This promotes efficiency and innovation, which are even more essential in a context of economic recovery".[6] The Issues Paper goes on to state that "No-poach agreements, by which companies agree not to poach or hire workers from each other restrict the mobility of workers and can harm competition in several dimensions".[7]

The Issues Paper sets out in some detail the potential harms that it considers could potentially flow from no-poach agreements, namely:

1. Introduce inefficiency in downstream markets, by distorting the allocation of "the labour input";
2. Limit production in downstream markets, ie, by artificially limiting the amount of labour available to each competitor at any given time, restricting the ability to expand production as a strategic reaction in the downstream market;
3. A reduction in the quality and/or variety of products and services provided to consumers, as well as a reduction in innovation in sectors where labour mobility is a relevant element in the innovation process;
4. Playing an instrumental role in the implementation of a market sharing strategy, namely in cases where companies' business models are based on customer portfolios and competitors agree not to compete for each other's customers;
5. The creation of agreements to allocate areas of expertise, avoiding the recruitment of a specialised workforce;
6. As a signal that interaction between competitors in the downstream market is not competitive;
7. As a way to indirectly fix wages; and
8. By dampening the investment in human capital, leading to a reduction in the quantity and/or quality of labour supply in the future.[8]

This is an ambitious list of potential theories of harm and it remains to be seen the extent to which any/each of these can be demonstrated to the requisite standard of proof.

The PCA nevertheless acted swiftly following the publication of the Issues Paper. In April 2022, the PCA adopted its first infringement decision in this space by sanctioning 31 first and second division football clubs and the Portuguese League for entering into a non-poach agreement. According to the PCA, the clubs agreed (via the League) not to poach each other's players in cases where a player had rescinded his contract for reasons associated to the Covid-19 pandemic.

According to the PCA's press release that announced the adoption of this infringement decision:

> "No-poach agreements are prohibited by Competition Law since they limit the autonomy of companies to define strategic commercial conditions, in this case, the companies' human resources hiring policy, and may occur in any economic sector. The practice is also likely to affect workers by reducing their bargaining power and wage levels, as well as depriving them of labour mobility."[9]

There appear, therefore, to be broader social considerations behind this decision, namely labour mobility and workers' ability to negotiate better wages. There is no prima facie reason that automatically excludes such factors being considered in the context of an infringement of the rules against anti-competitive agreements. The legal significance given to these considerations in the context of an alleged competition law infringement should, however, be subject to close scrutiny in future appeals and would, in our view, benefit from analysis by the European courts in Luxembourg (should a domestic appellate court make a request for a preliminary reference).

Private enforcement of competition law in Portugal

It is not only in the sphere of public enforcement that competition law has evolved dramatically in Portugal in the recent past. Private enforcement has also played a key role, with particular emphasis on the emergence of competition law class actions.

The emergence of competition law class actions

Until December 2020, competition law class actions could not be considered as being any meaningful part of the competition law landscape in Portugal. Since then, these class actions have become more prevalent than more traditional private enforcement of competition law, ie follow-on actions from competition agency infringement decisions.

The main driver of these class actions is a self-proclaimed consumer protection association called Ius Omnibus. According to Ius Omnibus' website:

> "Ius Omnibus is a non-profit association, created in March 2020, with the purpose of defending European Union consumers. We are based and registered in Portugal and we have members from several EU countries. We intend to progressively extend our range of activities to all member states of the European Union, benefiting from new EU rules on the cross-border protection of consumer rights."[10]

Since December 2020 – when it brought its first two class actions against Mastercard and domestic brewer Super Bock (in both cases seeking damages of approximately €400 million) – Ius Omnibus has brought numerous additional class actions against both multinational and domestic firms. Many of these actions are copy-cat cases to class actions or other types of private enforcement cases brought in other jurisdictions: for example, the class actions against Mastercard, the Google Play Store, the Apple App Store and the *Dieselgate* litigation.[11] Other cases are more bespoke to the Portuguese market, for example the class actions against Super Bock, EDP (the electricity incumbent) and a number of cases against platforms for the alleged failure of making an electronic complaints book available on their Portuguese websites.[12]

In turn, the creation of this market for competition class actions has led to international plaintiffs' lawyers such as Hausfeld sponsoring claims in Portugal, namely by way of what appear to be similar if not identical claims to those brought by Ius Omnibus against Google and Apple.[13] These cases have another class representative – a law professor at a Portuguese university. It is unclear how the courts will adjudicate between what appear to be carriage claims (ie, identical and competing class actions). It is equally not clear whether this new class representative will bring further claims or whether there will other future claimants bringing similar actions.

What has led to the emergence of competition law class actions in Portugal?

There are a number of reasons that explain the emergence of competition class actions in Portugal in the last two and a half years. The first is the emergence of a professional plaintiff, in this case a self-proclaimed consumer association that, to date, has as its only purpose bringing competition/consumer law class actions.

The secondary reasons relate to the domestic legal regime applicable to these class actions. Class actions are relatively cheap and easy to bring in Portugal. In particular:

1. Anyone can bring a class action and the general rule is that class actions are opt-out.
2. There is no separate class certification stage. A decision on the class of potentially harmed consumers is only made at final judgment. This means that a claimant is unburdened with a procedural hurdle that in other jurisdictions can result in delays to a final hearing on the merits and final judgment.
3. The costs associated with bringing class actions are relatively low. Judicial costs are only due at final judgment and the claimant is exempt from any court costs if the claim is totally or partially upheld. If the claim fails entirely, judges have the discretion to cap cost orders on plaintiffs. Based on past judicial practice, it is unlikely that a plaintiff will be burdened with a large order to pay a defendant's costs in the event the claim is dismissed in its entirety.
4. Portugal is a one-shot jurisdiction. This means that a defendant needs to make *all* its procedural and substantive defences in its defence to a claim. This can often place a defendant on the back-foot as deadlines to submit a defence are very tight – a domestic defendant will need to respond to a claim within 30 calendar days from service of the last defendant and a foreign defendant has 60 days to respond from service of the last defendant.

The combination of these factors makes Portugal an attractive jurisdiction for class action plaintiffs and can put Portuguese proceedings at or near the front of a defence strategy for a defendant facing similar/identical claims across jurisdictions. This is because, as noted, a defendant has to submit all defences at a very early stage in proceedings. This means that, while in other jurisdictions a defendant may be litigating class certification, in Portugal the same defendant will have to have developed all its arguments both on the merits of the case in addition to presenting any procedural defences.

Current issues relating to the class action regime in Portugal

The overnight emergence of competition class actions in Portugal has, as would be expected, raised several legal and practical issues that will need to be addressed by the

courts in the coming years. Two such issues are worth mentioning in this respect.

The first is the role of litigation funding in class actions that are seeking large damages awards. Litigation funding is a relatively new concept in the Portuguese legal order and courts have yet to materially address the extent to which a third party can be compensated for harm that it has not suffered. This is a live issue in a number of the cases brought by Ius Omnibus to date and beyond the civil law issues that it raises, there are questions whether on such third-party funding is constitutional.

The second issue is more practical, yet no less important. As noted above, Portugal has a specialised Competition Court. This court is competent as the first instance appellate court for parties that challenge PCA infringement decisions, as well as to hear private enforcement or other competition cases. However, the Competition Court also has supervisory powers over other economic regulators in Portugal.

The Competition Court therefore has an extremely heavy workload. In addition to the numerous class actions that have been filed with the court, the PCA's enforcement output has led to dozens of appeals, some of which are extremely lengthy and complex. Yet the court is currently staffed by only four full-time judges. These judges are allocated exclusively to appeals of PCA decisions given the size and complexity of many of these cases and to mitigate the risk that these cases do not reach final judgment before the expiry of the statute of limitations. This can have a knock-on effect on class action proceedings where, for example, the same case has been rotated between judges, likely due to (at least in part) the absence of these statute of limitations constraints.

Competition evolution

Competition law enforcement in Portugal has been the object of significant evolution over the past five years, both with respect to public and private enforcement. The PCA is pursuing novel theories of harm and is adopting infringement decisions at an unprecedented rate. Coupled with the emergence of Portugal as one of the EU's most active class action jurisdictions, Portugal is a jurisdiction where we can expect material developments in the coming years. It will, in particular, be interesting to see the extent to which the PCA's hub-and-spoke investigations withstand judicial scrutiny and the manner in which some of the threshold issues regarding the class action regime are resolved by the courts.

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Endnotes

1. The PCA's decision was appealed by a number of defendant banks to the Competition Court. The case is currently suspended as the Competition Court made a preliminary reference to the Court of Justice of the European Union regarding the legal qualification that should be given to the information exchanges in question.
2. OECD, Roundtable on Hub-and-Spoke Arrangements – Note by Portugal.
3. Ibid, at para 48.
4. Ibid, at para 50.
5. "Labour market agreements and competition policy", PCA Issues Paper, September 2021 (available at: https://www.concorrencia.pt/sites/default/files/Issues%20Paper_Labour%20Market%20Agreements%20and%20Competition%20Policy.pdf?.
6. Issues Paper, at p 4.
7. Ibid.
8. Ibid.
9. https://www.concorrencia.pt/en/articles/adc-issues-sanctioning-decision-anticompetitive-agreement-labor-market-first-time.
10. https://iusomnibus.eu/.
11. https://iusomnibus.eu/cases/.
12. Ibid.
13. "Launch of Apple and Google collectives in Portugal to seek redress for Portuguese consumers and businesses for anticompetitive conduct in app stores", Hausfeld, 27 July 2022, https://www.hausfeld.com/en-gb/news/apple-and-google-collective-actions-launched-in-portugal/.

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