



EU AND COMPETITION LAW

NEWS - COMPETITION LAW AND POLICY 1ST QUARTER 2018

Below you will find the edition of the Competition Law and Policy Newsletter for the 1st quarter of 2018, which compiles the most significant news in this area.

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PORTUGAL

I. PORTUGUESE COMPETITION AUTHORITY

Portuguese Competition Authority opens in-depth investigation into the RUBIS / Ativos Repsol acquisition

In January 2018, the Portuguese Competition Authority (PCA) decided to go ahead with an in-depth investigation into the merger involving the acquisition of the assets of the liquefied petroleum gas (LPG) distribution business in the Azores and Madeira, owned by REPSOL Gás Portugal.

The operation consists of the acquisition, through the transfer of commercial establishment and shares, of the assets constituting the LPG distribution business, in Madeira and the Azores.

The supply and distribution of LPG in the Azores and Madeira, including bottled gas, is currently provided by three operators (GALP, REPSOL and RUBIS), a number which the proposed acquisition will reduce to two. The PCA is concerned that the transaction would significantly restrain competition in those markets to the prejudice of consumers.

Accordingly, the PCA stated that it will carry out the necessary investigations and, particularly, will seek to assess whether new operators are likely to enter the above markets and compete with GALP and RUBIS.

The Private Enforcement Act is expected to efficiently increase the number of actions brought by private parties seeking compensation for the damages caused by competition law infringements.

Portuguese Competition Authority identifies barriers to entry of new FinTech firms in Portugal

In April 2018, the Portuguese Competition Authority (PCA) published the Draft Version for Public Consultation of its study on “Technological Innovation and Competition in the Financial Sector” in Portugal.

In this document, the PCA identified barriers to entry of new firms based on innovative technologies applied to the financial sector – known as FinTech – in Portugal. These barriers relate principally to the regulatory framework and the risk of market foreclosure of FinTech entrants by incumbent banks.

According to the PCA, the introduction of innovative technologies into the financial sectors and the new FinTech entrants may play a key role in promoting choice and increased access to credit and other financial services for consumers and companies.

The PCA underlined that Fintech brings important innovations to payment services, crowdfunding, and other innovative technologies such as robo-advisory.

In its Paper, the PCA highlights the barriers that exist against the introduction of these new technologies into the Portuguese market. Barriers are created both by the incumbent banks, which hinder FinTech entrants’ access to key inputs including client account data and settlement and clearing infrastructure, and by the regulatory framework. As regards the latter, the PCA considers it particularly important to go ahead with the implementation of the revised Payment Services Directive (PSD 2 - Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015).

Amongst other recommendations, the PCA advocates for the adoption of a regulatory framework that allows FinTech and InsurTech to test innovative products, services and business models in a live market environment, while safeguarding the interest of consumers and preserving system security – what are known as regulatory sandboxes. It also highlights the importance of the monitoring role played by the Bank of Portugal, the Portuguese Securities Market Commission and other competent authorities.



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ROSA CARVALHO

S/ título, 1998 (detail)

Óleo s/tela - 150 x 150 cm

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Private Enforcement Act expected to increase actions for damages

Act 23/2018 (“the Private Enforcement Act”) establishing the legal framework on actions for damages from competition law infringements, was published on 5 June, implementing Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014.

It seeks to remove obstacles to effective compensation for competition law infringements. Among other matters, it establishes rules on the evidentiary value of national competition authorities’ decisions, provisions concerning the disclosure of evidence and the limitation period for bringing actions for damages.

The Private Enforcement Act extends the competence of the Portuguese Competition, Regulation and Supervision Court to issue rulings on actions for damages resulting exclusively from competition law infringements and enters into force 60 days after its publication.

It is expected to efficiently increase the number of actions brought by private parties seeking compensation for the damages caused by competition law infringements.

In the proposed acquisition by MEO of Grupo Media Capital, the Portuguese Competition Authority rejected the commitments the parties proposed to make because they allegedly did not sufficiently address the restrictions of competition identified. Subsequently, the parties announced that they would not proceed with the deal.

Altice abandons Media Capital acquisition following Portuguese Competition Authority's in-depth investigation

In February 2018, the Portuguese Competition Authority (PCA) decided to go ahead with an in-depth investigation into the merger involving the acquisition of Media Capital by Altice.

The proposed operation consists of the acquisition by MEO - Serviços de Telecomunicações e Multimédia, S.A. ("MEO") of sole control of Grupo Media Capital, SGPS, S.A. ("GMC"), through the purchase of the entire share capital of Vertix, SGPS, which owns 94.69% of the share capital of GMC, and through the launch of a public acquisition operation in relation to GMC's remaining capital.

The PCA expressed concerns about the creation of significant impediments to effective competition in several markets, in terms of both audiovisual content production and competition between TV channels and advertising markets, and in the telecommunications and pay-TV services markets.

The PCA considered that the transaction was likely to have a significantly negative impact in the development of new TV contents and business models regarding the online broadcast and access to audiovisual contents.

In June, the PCA rejected the commitments the parties proposed to make because they allegedly did not sufficiently address the restrictions of competition identified. Subsequently, the parties announced that they would not proceed with the deal on the ground that the term of one of the conditions precedent specified in the sales agreement on the clearance of the acquisition by the PCA was not complied with.

EUROPEAN UNION

I. COURTS

Court of Justice issues ruling on agreement in the pharmaceutical sector regarded as a restriction "by object"

In its judgment of 23 January 2018, the Court of Justice of the European Union (CJEU) held that an agreement between undertakings designed to achieve an artificial differentiation between medicinal products amounts to a concerted practice and thus may fall within the scope of Article 101 of the Treaty on the Functioning of the European Union (TFEU).

The Italian Competition Authority had imposed two fines: one on Roche and its subsidiary Roche Italia and the other on Novartis and its subsidiary Novartis Italia, on the ground that those undertakings had concluded an agreement contrary to Article 101 TFEU. This agreement was allegedly designed to achieve an artificial differentiation between the medicinal products Avastin and Lucentis by manipulating the perception of the risks of using Avastin in the field of ophthalmology.

After the national court dismissed the actions brought against that decision, the undertakings lodged an appeal with the Council of State. The Council of State decided to stay the proceedings and to refer certain questions to the CJEU for a preliminary ruling, including whether the concerted practice at issue could be regarded as a restriction of competition by object.

In its analysis, the CJEU highlighted that the case involved an arrangement between two undertakings marketing two competing products, which concerned the dissemination, in a context of scientific uncertainty, to the European Medicines Agency, healthcare professionals and the general public of misleading information relating to adverse reactions resulting from the use of one of those medicinal products for the treatment of diseases not covered by the marketing authorisation of that product. The Court found that the aim of this arrangement was to reduce the competitive pressure resulting from such use on the use of the other product. Accordingly, it held that the arrangement amounted to a restriction of competition 'by object'.

It should be recalled that in the 2012 AstraZeneca case, the CJEU held that, in certain circumstances, providing misleading information to patent offices can amount to an abuse of dominance.

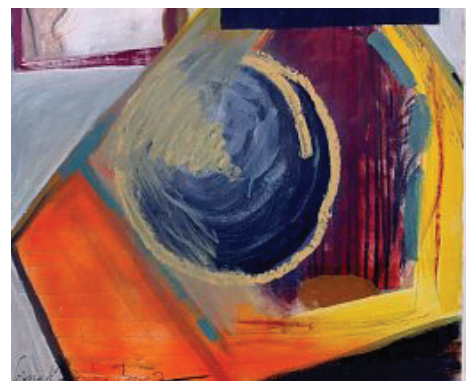
Advocate General Wathelet proposes that the Court of Justice should set aside the judgment handed down by the General Court in the Smart Card Chips cartel

By its decision of 3 September 2014, the European Commission (Commission) imposed fines totalling approximately €138 million on four companies (Infineon Technologies, Philips, Samsung and Renesas) for having established a network of bilateral contacts and exchanges of commercially sensitive information relating inter alia to prices. Smart card chips are used in mobile telephone SIM cards, bank cards, identity cards and passports, pay TV cards and various other devices.

Infineon brought an action before the General Court (GC), which dismissed it. Subsequently, Infineon appealed to the Court of Justice (CJ).

In April 2018, in his Opinion, Advocate General Wathelet proposed that the GC's judgment against Infineon be set aside and that the case be referred back to the General Court. According to the Advocate General, the General Court failed to examine each of the arguments put forward by Infineon with a view to establishing the lawfulness of the bilateral contacts made with the other participants in the cartel.

The Advocate General went on to state that, insofar as the GC limited its analysis to 5 of 11 bilateral contacts Infineon had engaged in with the other participants to the cartel, it did not carry out an exhaustive review. Therefore, it failed to show whether the amount of the fine was commensurate with the gravity of the participation of that undertaking in the cartel.



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SÉRGIO POMBO

S/ título, 2003 (detail)

Óleo s/papel - 100 x 70 cm

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MEO v. Portuguese Competition Authority: Court of Justice clarifies the conditions under which discriminatory pricing amounts to abuse of dominance

In 2014, PT Comunicações S.A., the predecessor in law of MEO, lodged a complaint with the Portuguese Competition Authority (PCA) alleging that GDA - Gestão dos Direitos dos Artistas (GDA), a cooperative for the management of the rights of performing artists, had abused its dominant position. It claimed that that abuse arose from the fact that GDA had been charging excessive prices for the rights related to copyright and that GDA had also been applying terms and conditions to MEO different from those it had applied to another entity providing a paid television signal service and television content, NOS Comunicações S.A..

In 2016, the PCA decided to close the investigation on the ground that there was no evidence of sufficiently probative value of an abuse of a dominant position. MEO brought an action against the PCA's decision to close the investigation, claiming that it did not interpret Article 102(2)(c) TFEU correctly. The Competition, Regulation and Supervision Court in Portugal had doubts as to the interpretation of EU law, in particular as regards the concept of "competitive disadvantage". It thus decided to stay the proceedings and refer questions to the Court of Justice of the European Union ("CJEU") for a preliminary ruling.

In its judgment of 19 April 2018, the CJEU clarified that the price discrimination referred to in Article 102 TFEU(2)(c) must affect the interests of the operator which was charged higher tariffs compared with its competitors

Indeed, according to the CJEU, "the mere presence of an immediate disadvantage affecting operators who were charged more, compared with the tariffs applied to their competitors for an equivalent service, does not, however, mean that competition is distorted or is capable of being distorted".

Following other cases, such as *Post Danmark II* and *Intel*, the CJEU seems to have taken a step further toward the rejection of the "form-based" approach to Article 102 TFEU.

Following other cases, such as Post Danmark II and Intel, in MEO v. Portuguese Competition Authority, the Court of Justice seems to have taken a step further toward the rejection of the "form-based" approach to Article 102 TFEU.

II. EUROPEAN COMMISSION

European Commission fines Qualcomm €997 million for abuse of dominance

In January 2018, the European Commission (Commission) fined Qualcomm €997m for allegedly abusing its market dominance in LTE baseband chipsets.

According to the Commission, Qualcomm signed an agreement with Apple, committing to make significant payments to Apple on condition that the company would exclusively use Qualcomm chipsets in its «iPhone» and «iPad» devices. Therefore, Qualcomm's rivals were allegedly denied the possibility to compete effectively for Apple's business.

According to the Commission's investigation, internal documents evidence that Apple gave serious consideration to switching part of its baseband chipset requirements to Intel and Qualcomm's exclusivity condition was a material factor in Apple's decision not to do so.

European Commission fines companies in the transport sector for concerted practices

In February 2018, in three separate decisions, the European Commission (Commission) fined maritime car carriers a total of €395 million, suppliers of spark plugs a total of €76 million, and suppliers of braking systems a total of €75 million, for taking part in cartels.

In the first case, according to the Commission, the maritime car carriers CSAC, "K" Çome, MOL, NYK and WWL-EUKOR participated in a cartel concerning intercontinental maritime transport of vehicles, having coordinated prices, allocated customers and exchanged commercially sensitive information about price elements.

In the second case, the Commission found that Bosch, Denso and NGK participated in a cartel concerning supplies of spark plugs to car manufacturers in the European Economic Area and imposed a total fine of €76 million. According to the Commission's investigation, the anticompetitive practices included the exchange of commercially sensitive information through bilateral contacts between Bosch and NGK, and between Denso and NGK.

In the third case, the Commission found two cartels relating to braking systems. The first concerned the supply of hydraulic braking systems and involved TRW, Bosch and Continental. The second concerned the supply of electronic braking systems and involved Bosch and Continental. In both cartels, the three car part suppliers allegedly sought to coordinate their market behaviour by exchanging sensitive information, including on pricing elements. According to the Commission, the alleged coordination took place at bilateral meetings and through phone conversations or email exchanges, which lead the Commission to impose a total fine of €75 million.

European Commission fines eight producers of capacitors €254 million

In March 2018, the European Commission (Commission) fined Elna, Hitachi Chemical, Holy Stone, Matsuo, NEC Tokin, Nichicon, Nippon Chemi-Con, Rubycon €254 million for allegedly participating in a cartel. According to the Commission, between 1998 and 2012, eight companies exchanged commercially sensitive information. The objective was allegedly to coordinate future behaviour and avoid price competition in the market for capacitors. These products are electrical components used in a wide variety of electric and electronic products.

According to the Commission's investigation, messages exchanged between the companies or internal emails containing reports of the meetings included mentions such as «Discard after reading» or «After reading this email, please destroy it without stowing it away».

Sanyo Electric Co., Ltd. and its parent Panasonic Corporation received full immunity for revealing the existence of the cartel to the Commission, under the Commission notice on immunity from fines and reduction of fines.

European Commission approves state aid to the maritime sector in Portugal

On 6 April 2018, the European Commission (Commission) announced that, under EU State aid rules, it had approved a Portuguese tonnage tax scheme together with a scheme to support seafarers.

Under this scheme, maritime transport companies will pay taxes on the basis of the net tonnage (the size of the shipping fleet) operated in maritime transport activities rather than on the basis of their taxable profit.

It also exempts seafarers employed on vessels that are eligible under the tonnage tax scheme from paying personal income tax and allows them to pay reduced rates of contribution for social insurance.

The Commission assessed the measures under EU State aid rules, in particular its Guidelines on State aid to maritime transport, and concluded that the Portuguese scheme is in line with EU State aid rules.

The 125 million fine imposed on Altice should alert companies to the need to comply with the rules on merger control, in particular, standstill obligations.

European Commission targets sports broadcasting

On 10 April 2018, the European Commission (Commission) carried out dawn raids at the premises of media groups, within an investigation on anticompetitive practices related to media rights and related rights pertaining to various sports events and/or their broadcasting.

Among other companies, the dawn raids targeted the London offices of Fox Networks and the Netherlands office of Ziggo Sport.

European Commission opens in-depth investigation into Apple's proposed acquisition of Shazam

In April 2018, the European Commission (Commission) opened an in-depth investigation to assess the proposed acquisition of Shazam by Apple under the EU Merger Regulation. The Commission is concerned that the merger could reduce choice for users of music streaming services.

According to the Commission's preliminary results, following the takeover of Shazam, Apple would obtain access to commercially sensitive data about customers of its competitors for the provision of music streaming services in the EEA.

Access to such data would allegedly allow Apple to target its competitors' customers directly and encourage them to switch to Apple Music. As a result, competing music streaming services could be put at a competitive disadvantage.

European Commission fines Altice €125 million for gun-jumping

In April 2018, the European Commission (Commission) announced its decision to fine Altice €124.5 million for implementing its 2015 acquisition of PT Portugal, before notification to, or approval by, the Commission.

According to the Commission:

- Certain provisions of the purchase agreement resulted in Altice acquiring the legal right to exercise decisive influence over PT Portugal, for instance by granting Altice veto rights over decisions concerning PT Portugal's business;
- In certain circumstances, Altice exercised decisive influence over aspects of PT Portugal's business, for instance by giving instructions on how to carry out a marketing campaign or by seeking and receiving detailed commercially sensitive information about PT Portugal outside the framework of any confidentiality agreement.

Thus, the Commission concluded that the Altice breached the EU Merger Regulation. In the meantime, Altice has announced that it will seek the annulment of the decision or at the least a reduction in the amount of the fine.

This decision should alert companies to the need to comply with the rules on merger control, in particular, standstill obligations, before the Commission or national competition authorities, depending on the specific circumstances.

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 Portuguese Law Firm of the Year
 Who's Who Legal 2017-2015, 2011-2006
 The Lawyer European Awards 2015, 2012
 Chambers European Excellence Awards 2014, 2012, 2009

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 Financial Times - Innovative Lawyers Awards 2017-2011