



COMPETITION LAW AND POLICY

LEGISLATIVE CHANGES 3RD QUARTER 2018

Below, you will find the edition of the Competition Law and Policy Newsletter for the 3rd quarter of 2018, which compiles the most significant news in this area.

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PORTUGAL

I. PORTUGUESE COMPETITION AUTHORITY

Portuguese Competition Authority makes commitments assumed by CTT binding

On 5 July 2018, the Portuguese Competition Authority (PCA) adopted a decision to terminate the ongoing proceedings against CTT – Correios de Portugal, S.A. (CTT), the main Portuguese postal undertaking, rendering a set of commitments legally binding.

The investigation, which began in February 2015, revealed the existence of a number of obstacles to the development of effective competition in the market for standard postal services relating to access to CTT's standard post delivery network, which prompted a Statement of Objections in August 2016.

CTT had submitted a set of commitments which made it possible to: (i) expand access to CTT's standard mail delivery network to competing postal operators; (ii) create new access points in CTT's postal network; (iii) faster delivery time in certain services; (iv) increase opportunities for competing postal operators to carry out post distribution work and; (v) finally, reduce and differentiate prices for competing postal operators.

The PCA has concluded that compliance with these commitments would eliminate the potential adverse effects on competition that have been identified during the investigation.



PASCAL FERREIRA

Desenhos aos montes: 'lugar cativo #2', 2007

Grafite s/ papel

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Portuguese Competition Authority puts forward an action plan to implement OECD recommendations for transport and liberal professions

The Organisation for Economic Cooperation and Development (OECD), working together with the Portuguese Competition Authority (PCA), has presented several recommendations aimed at providing the transport sector and the liberal professions with more competitive environments.

These sectors were chosen by the OECD because of their importance to the productivity, competitiveness and employability of the Portuguese economy.

Regarding the transport sector, the OECD has suggested, among others, the abolition of access and price restrictions for the market of long-distance bus routes as well as the removal of certain financial requirements to start operations in this sector.

The OECD has also proposed to abolish quotas and geographical restrictions for taxis, broaden the private sector's access to the activities of piloting, towing and cargo handling, open the market for the provision of port labour to temporary work agencies, and bringing into force mandatory secondary legislation regarding certification of train drivers.

With respect to liberal professions, the recommendations include opening up professions to individuals with university degrees in other fields, the elimination of restrictions on partnership, ownership and management of professional firms that should be available to individuals outside the profession, and, among others, the abolition of restrictions on multidisciplinary firms.

Based on these recommendations, the PCA presented an action plan on 6 July 2018 to promote and monitor the implementation of these recommendations in the Portuguese political and legal system, through the necessary legislative and regulatory reforms, in close collaboration with all the public decision-makers involved.

Portuguese Competition Authority sends Statement of Objections to Super Bock for alleged price fixing of beverages in hotels, restaurants and cafes

On 10 August 2018, the Portuguese Competition Authority (PCA) issued a Statement of Objections to Super Bock Bebidas S.A. (Super Bock) for allegedly having fixed minimum resale prices of its products in hotels, restaurants and cafes (the HORECA channel) from 2006 to 2017.

In the Statement of Objections, the PCA concluded that the undertaking also allegedly determined trade margins, as well as other direct or indirect remunerations of the distributors of its beverage brands in the HORECA channel.

In addition to Super Bock itself, six members of its board and directors are also addressees of the Statement of Objections.

The investigation was started by the PCA in June 2016, following two complaints. In 2017, the PCA carried out dawn raids at the undertaking's premises.

The addressees of the Statement of Objections have now the opportunity to exercise their rights of defence.

Portuguese Competition Authority sends Statement of Objections to five insurance companies for alleged price fixing and market sharing

The Portuguese Competition Authority (PCA) has issued a Statement of Objections to the insurance companies Fidelidade – Companhia de Seguros, Lusitania – Companhia de Seguros, Multicare – Seguros de Saúde, Seguradoras Unidas, S.A. (formerly Tranquilidade and Açoreana) and Zurich Insurance PLC – Sucursal Portugal for allegedly having participated in a price fixing and market sharing cartel that lasted approximately seven years.

In addition to the insurance companies, fourteen members of the boards and directors of those companies are also addressees of the Statement of Objections.

According to the PCA, anticompetitive practices by insurance companies have had an impact on the cost of insurance acquired by large companies in the sub-sectors of occupational accidents, health and motor vehicles. The companies involved have a combined market share of around 50% in each sub-sector.

In accordance with the press release of the PCA, the investigation was opened in May 2017 following leniency applications by companies involved in the cartel. In June and July of the same year, the PCA carried out dawn raids at the companies' premises.

The addressees of the Statement of Objections have now the opportunity to exercise their rights of defence.

Portuguese Competition Authority sends Statement of Objections against EDP Produção for alleged abuse of dominance

On 3 September 2018, the Portuguese Competition Authority (PCA) issued a Statement of Objections to EDP Produção for alleged abuse of dominance, a practice that led to price increases in electricity paid by Portuguese consumers.

The dominant position, allied with a rigid demand, has allegedly given EDP Produção the ability to influence price formation in the market for providing secondary balancing reserve.

According to the PCA, between 2009 and 2013, EDP Produção manipulated the supply of a segment of the Electric System (supply of secondary balancing reserve), limiting the capacity of supply through power plants under the CMEC regime, in order to supply it through its market-based power plants. Thus, EDP would allegedly receive a double benefit, since it obtained state compensation from the CMEC regime and higher revenues from the non-CMEC power plants.

The PCA has estimated that EDP Produção's practice has caused losses to the national electricity system and to consumers of around €40 million.

EDP Produção is now given the opportunity to exercise its right to be heard and to defend itself.

The Portuguese Competition Authority issued a Statement of Objections to EDP Produção for alleged abuse of dominance, a practice that led to price increases in electricity paid by Portuguese consumers.

Portuguese Competition Authority accuses five companies, managers and directors of participating in a cartel in railway maintenance

On 13 September 2018, the Portuguese Competition Authority (PCA) issued a Statement of Objections to five railway maintenance companies of the Mota-Engil, Comsa, Somague, Teixeira Duarte and Vossloh groups for allegedly taking part in a cartel in public tenders to provide maintenance services for equipment of the national railway network launched by Infraestruturas de Portugal, in 2014 and 2015.

Six directors and managers were also addressed by the Statement of Objections.

According to the PCA, these companies manipulated the proposals presented in the public tenders, concluding agreements to determine the level of the prices and the distribution of the lots included in the different public tenders.

The file was opened by the PCA in October 2016, following a complaint lodged in the context of the PCA's Campaign to Fighting Bid-Rigging in Public Procurement.

The addressees are now given the opportunity to exercise their right to be heard and defend themselves in relation to the wrongful act attributed to them, as well as in relation to the penalties they may incur.

Portuguese Competition Authority and Infarmed sign cooperation protocol

On 21 September 2018, the Portuguese Competition Authority (PCA) and Infarmed (the Portuguese Authority for Medicine and Health Products) signed a memorandum of understanding that establishes instruments for cooperation and exchange of information.

The detection of market failures or competitive distortions are some of the objectives shared by the PCA and Infarmed. In this regard, they established an exchange of information on supervision and monitoring and follow-up of the sales and of the consumption of medical products, medical devices and cosmetics.

The two institutions have agreed on the importance of monitoring the price developments, patent periods, introduction of generic medicines, development of biosimilars, and shortages of medicines in the market, with a view to evaluating the extent to which situations identified as anomalies may be related to the existence of anticompetitive practices. This protocol is also intended to increase the sustainability of the National Health Service through the rational use of health products.

Portuguese Competition Authority decides not to oppose the acquisition of Repsol's LPG business by Rubis

On 27 September 2018, the Portuguese Competition Authority (PCA) decided not to oppose the acquisition of Repsol's LPG distribution business in the Azores and Madeira by Rubis, in exchange for compliance with a divestiture commitment submitted by the latter.

After the merger had been notified on 21 September 2017, the PCA decided to open an in-depth investigation (Phase II), as the PCA found that Rubis' acquisition could pose a significant impediment to effective competition.

The concerns of the PCA stemmed from the fact that the markets in question had very concentrated supply structures, a scenario that would be worsened by the acquisition. This scenario would be harmful to consumers from the Azores and Madeira, as it could result in higher prices or hinder product quality and service levels. Furthermore, the PCA had identified relevant barriers to entry of new competitors, due to logistics reasons, the existing distribution contracts, and the relatively small size of these markets.

In this respect, Rubis undertook to carry out a divestiture in favour of a third party, which is the operator of the businesses concerned, thus allowing the maintenance of a supply structure similar to the one currently in existence.

EUROPEAN UNION

I. COURTS

General Court upholds fine of €57 million imposed in the context of the cartel on the bathroom fixtures and fittings market

On 3 July 2018, the General Court (GC) decided to uphold the fine of €57.69 million imposed on Sanitec Europe and its subsidiaries for their alleged participation in the cartel concerning bathroom fixtures and fittings, contrary to a decision of the same Court of 2013, which had reduced the fine to €50.58 million.

In the 2013 judgment, the GC considered that two Sanitec subsidiaries had not participated in the collusive practice. However, in 2017 the Court of Justice of the European Union (CJUE), following an appeal from the European Commission (EC), ordered the GC to reassess the available evidence, since it disagreed with the assessment of the GC that allowed it to reduce the fine imposed.

Consequently, in the judgment of July 2018, the GC reinstated the initial fine by concluding that the subsidiaries in question had also participated in the cartel with other members of the French Association of Bathroom Industries. The undertakings allegedly fixed the annual price of ceramics and disclosed and exchanged sensitive business information.

General Court confirms fines of over €300 million imposed on the main European and Asian power cable producers

On 12 July 2018, the General Court (GC) rejected the appeals lodged by most of the undertakings which had been previously sanctioned with fines imposed by the European Commission (EC) totalling over €300 million.

According to the EC, from 1999 onwards and for almost ten years, the main European, Japanese and South Korean power cable producers allegedly participated in a cartel aimed at restricting competition for projects in specific territories by allocating markets and customers.

In particular, the GC found that the EC was not required to examine the evidence seized solely at the undertakings' premises, but rather is entitled to continue the inspection at its own premises (in the presence of the lawyers of the undertakings concerned).

The GC also considered that the EC had jurisdiction to sanction these undertakings, because it was foreseeable that the practices in question would have an immediate and substantial effect on competition in the internal market. The substantial effects were due to the importance and number of the producers that participated in the cartel, the wide range of products affected, the gravity of the practices in question and the considerable duration of the infringement.

With respect to the actions brought by certain undertakings ordered to pay jointly and severally the fines imposed on their subsidiaries, the GC upheld the EC's analysis that those undertakings exercised influence over the conduct of the subsidiaries in question. In that regard, the GC concluded, as did the EC, that where a parent company, in this case an investment bank, is able to exercise all the voting rights associated with its subsidiary's shares, in particular in combination with a very high majority stake in the share capital of that subsidiary, it can be presumed that the parent company determines the economic and commercial strategy of the subsidiary.

The Court therefore extends the presumption of the actual exercise of decisive influence laid down in the Akzo judgment to the case where a parent company is able to exercise all the voting rights associated with the shares of its subsidiary, even if it does not hold 100% of the subsidiary's share capital.

The GC held, lastly, that the undertaking concerned failed to show that its shareholding in its subsidiary was intended solely as a pure financial investment, rather than to manage and control the subsidiary, which would have the effect of rebutting the presumption.

The European Commission published draft guidelines to help national courts estimate the share of price increases caused by cartels.

Court of Justice rules on anticompetitive effect analysis of abuse of dominance infractions

On 25 July 2018, the Court of Justice of the European Union (CJEU) dismissed an appeal by mobile network operator Orange against a €127.6 million abuse of dominance fine.

In 2011, the European Commission (EC) fined this undertaking for locking potential new operators out of Poland's broadband market. Orange appealed to the General Court (GC) claiming that the EC had taken market effects of Orange's behaviour into consideration, without presenting any evidence of these effects. According to Orange, the CJEU's 2017 "Intel" ruling requires a reviewing court to "examine all of the applicant's argument and evidence seeking to call into question the merits" of the EC's markets effects analysis.

The GC has rejected the appeal, concluding that, insofar as the Commission did not take into account the effects of the infringement, it was not obliged to prove their existence. Accordingly, the CJEU confirmed this ruling, stepping away from the conclusions presented by the AG Wathelet.

Court of Justice confirms European Commission's discretion on competition law enforcement

On 20 September 2018, the Court of Justice of the European Union (CJEU) confirmed the General Court's ruling that the European Commission (EC) acted legally when it dropped an investigation into alleged collusion by a group of agricultural producers in Poland and Austria.

Some companies had originally filed a complaint with Poland's Competition Authority, which was rejected because it was filed after the deadline to do so. In November 2010, these undertakings then complained to the EC, which decided not to pursue the investigations because (i) the complaint lacked evidence; (ii) it would demand a high level of resources; (iii) it was not of interest to the EU as a whole; (iv) the national courts would be better placed than the EC to investigate. This EC's decision was upheld by both EU courts.

In a nutshell, through this ruling, the CJEU confirmed that the EC can act under the discretionary principle, in a similar way as provided for in the Portuguese Competition Act in respect of the Portuguese Competition Authority.

II. EUROPEAN COMMISSION

European Commission adopts draft guidelines on passing-on of overcharges in actions for damages

On 5 July 2018, the European Commission (EC) published draft guidelines to help national courts estimate the share of price increases caused by cartels that are passed on to indirect purchasers and final consumers.

These guidelines are even more important in view of the recent implementation in Portugal of the Antitrust Damages Directive on actions for damages for infringement of competition rules, since it would always have been necessary to assess and quantify the damage caused by the collusive practice in order to obtain economic compensation.

These Guidelines indicate the criteria to estimate these pass-on overcharges, including the demand, the product type and characteristics and the intensity of competition between the sellers. These factors will certainly be important to setting the price and sales volume of the products covered by the cartel.

The Court of Justice confirmed the European Commission's discretion on competition law enforcement, in a similar way as provided for in the Portuguese Competition Act in respect of the Portuguese Competition Authority.

European Commission imposes fine of €111 million on four manufacturers of electronic goods

In July 2018, in four separate decisions, the European Commission (EC) imposed fines on Asus, Denon & Marantz, Phillips and Pioneer, main manufacturers of consumer electronics, totalling €111 million. In the view of the EC, from 2011 to 2015, these undertakings restricted the ability of their online retailers to set their own retail prices, imposing a fixed or a minimum resale price in certain consumer electronics, such as, computers hardware, notebooks, headphones, speakers, kitchen appliances, coffee machines and vacuum cleaners.

In its decision, the EC concludes that these manufacturers intervened with the online retailers whose prices were lower. If the online retailers would not comply with manufacturers' instructions, they faced threats or sanctions such as blocking of supplies.

The EC has demonstrated the use of sophisticated monitoring tools that allowed the manufacturers to effectively track resale price setting in the distribution network and to intervene swiftly in case of price decrease.

With regard to Pioneer, the EC concluded that the undertaking made use of supply-blocking threats in order to limit cross-border sales with a view to maintaining different resale prices in the different Member States.

As all four companies cooperated with the EC's investigation by providing evidence with significant added value and by expressly acknowledging the facts and the infringement of EU antitrust rules, the EC granted reductions in the fines, ranging from 40% to 50%.

European Commission issues a new Best Practices Code for state aid control

On 16 July 2018, the European Commission (EC) issued a new Best Practices Code to control state aid. With this code, the EC provides guidance to Member States, aid beneficiaries and other stakeholders on how state aid procedures work in practice to make them as transparent and simple as possible.

This Code replaces the previous Code that was adopted in 2009. It also draws up more detailed guidelines concerning different issues including the pre-notification procedure, mutual agreed planning, formal investigation procedure, complaints procedure, monitoring of aid schemes and evaluation plans.

The European Commission imposed on Google the highest ever fine for alleged illegal practices involving Android mobile devices.

European Commission imposes historic fine of €4.34 billion on Google

On 18 July 2018, the European Commission (EC) imposed on Google the highest ever fine for alleged illegal practices involving Android mobile devices.

According to the EC, since 2011, Google has required device manufacturers to pre-install the Google Search app and browser app (Chrome) as a condition for granting Android system licences.

The EC also accused Google of granting financial incentives to some of the largest device manufacturers as well as mobile network operators to guarantee exclusivity for its Google Search app across the Android devices. Lastly, Google has prevented device manufacturers from using any alternatives to Android that had not been approved by Google and threatened not to authorise the pre-installation of Google apps on those devices.

In the EC's view, pre-installing these apps may create a bias in users, resulting in a lower choice of competing's apps on those mobile phones. Furthermore, the above financial incentives granted by Google to the main mobile manufacturers and mobile network operators allegedly diminish the incentives to pre-install Google's competitors' apps. Furthermore, Google's ban on alternative Android versions has allegedly significantly reduced the incentives to develop different versions of Android and thereby diminished technological innovation.

In its decision, the EC requires Google to bring the conduct to an end within 90 days of the date of the decision or face penalty payments of up to 5% of the average daily worldwide turnover of Alphabet, Google's parent company.

The fine has been calculated based on the duration and gravity of the infringement, and on Google's revenues from search advertising services on Android devices in the European Economic Area.

European Commission issues a Statement of Objections against the Slovak rail company ZSSK for obstruction during a dawn raid

On 25 September 2018, the European Commission (EC) accused the Slovak state rail company ZSSK of obstructing access to information during a dawn raid carried out by the European Commission.

The EC suspects that ZSSK may have obstructed the inspection by providing incorrect information regarding the location of the laptop of one of its employees and by not providing the requested data available on it.

During a dawn raid, inspectors are empowered to examine and seize documents relating to the business, irrespective of the medium on which they are stored. Any companies subject to a dawn raid must provide full support to the EC. Failure to do so can lead to the imposition of fines of up to 1% of their total annual turnover.



JORGE MARTINS
 S/título, 1992

Mista s/papel

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