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Portugal

Miguel Mendes Pereira

Vieira de Almeida & Associados

After the entry into force of a new Competition Act in 2012, 2013 added yet another new element to the Portuguese competition ecosystem: a new president and a new board of the Competition Authority were appointed by the government. Expectations are running high to see whether the toolbox provided by reinforced investigation powers will lead the Competition Authority into a more muscular enforcement.

So far, the more obvious signs were a major dawn raid in the banking sector linked to suspicions of exchange of information (the investigation is ongoing) and a €3.7 million fine in the market of premium sports channels for pay-TV.

On the legislative front, the most remarkable event has been the review of the legislation on unfair trade practices, with emphasis on the rules on below-cost sales and abusive practices by distributors in the agro-food sector. Fines may now rise to as much as €2.5 million for large companies.

As regards case law, a number of cases dealing with cartels, resale price maintenance and decisions by associations of undertakings has been confirmed by the courts, including the ECJ. Companies in the mobile communications and pay-TV markets have been particularly active on the merger front.

Last but not least, the privatisation programme continues further to the memorandum of understanding concluded between Portugal, the IMF, the ECB and the European Commission. In December 2013, the historic postal operator was privatised by means of the disposal of 70 per cent of the state's holding at a highly successful IPO.

Legislative developments

Further to the entry into force of a new Competition Act in May 2012, the Portuguese Competition Authority (PCA) adopted in January 2013 a new Leniency Regulation setting out the administrative procedure for immunity or reduction of fines in competition proceedings. The Portuguese leniency framework now closely follows the EU regime.

The PCA also adopted guidelines on the definition of its priorities. The 2012 Competition Act determines that the PCA must define on an yearly basis its priorities for the next year, and at the end of 2012 annual priorities were set for the first time under three headings:

- optimising work on competition enforcement and advocacy;
- contributing to effective application of the new Competition Act; and
- reinforcing the PCA's capacity to act.

The definition of annual priorities is a mechanism devised by the legislator to smooth the transition from the classic principle of legality that had so far reigned in competition matters (and still rules in criminal investigations) to the principle of opportunity (prosecutorial discretion), according to which the PCA is entitled to investigate complaints and open cases according to its priorities. The

principle of legality, according to which public authorities are bound to investigate every single complaint brought to their attention without any differentiation, is typical in continental legal systems and its replacement by the principle of opportunity did not occur without lively discussion within the competition community.

In February 2013, the PCA issued a Regulation containing new notification forms for the filing of concentrations. The main innovation consists of a long-awaited simplified notification form for those concentrations that are not likely to raise major objections given the absence of significant overlaps in the activities of participating undertakings or as the result of non-significant market shares. The preliminary assessment leading to the use of the simplified form is complemented with the existing pre-notification (informal) procedure which may be used to confirm the absence of significant concerns.

Since 1983, Portugal has had legislation on 'individual restrictive trade practices' which prohibits the sale of products at a loss, the discrimination between economic agents as well as the refusal to sell, and renders mandatory the existence of price catalogues displaying conditions and terms for every transaction. Also prohibited are classic unfair trade practices consisting of abusive conditions imposed by distributors on suppliers (eg, price, payment conditions, duration, etc). Enforcement has been incumbent upon the PCA since 2003.

Changes to the regime were introduced in 1993 and 1998, but the aim of attempting to regulate bargaining power and fairness has remained unchanged, as much as its questionable (some would argue contradictory) relationship with competition law rules within the same legal order. Over the past few years, tension has grown between large retailers and their suppliers, and public debate has sometimes been fierce. As a consequence, in May 2013, parliament mandated the government to revise the Act. The changes entered into force in February 2014.

The main novelties concern below-cost sales, abusive practices, provisions specifically targeted at the agro-food sector and the level of fines.

As regards below-cost sales, the law now explicitly provides for discounts being taken into consideration when calculating the purchase price paid by the reseller. This includes discounts 'that consist of a right to compensation in a subsequent purchase of equivalent goods or of goods of a different nature' – in other words, deferred discounts such as 'card-deferred discounts' or 'voucher-deferred discounts', both of which are common practice in retail trade. However, the wording is ambiguous, and so legal certainty has unfortunately not been increased to the desired standard. Another novelty is that below-cost pricing is no longer accepted as a legitimate response by an undertaking to an equivalent price charged by a competitor.

As regards abusive practices, the scope of the prohibition was enlarged and now includes the prohibition of retroactive modification of a supply agreement or the claim for compensation in respect of ongoing or past promotions.

The agro-food sector is the aim of a number of new provisions that prohibit:

- the purchaser's refusal of purchased goods or their return on grounds of poor quality or delay in delivery, without evidence of the supplier's fault; and
- the imposition of direct or indirect payments (under the form of discounts) in case of non-achievement of sales targets or where costs arise in connection with complaints by customers, except if the purchaser proves that fault by the supplier was the cause.

It goes without saying that this sort of provision is mainly targeted at protecting small suppliers from large retail distribution groups.

The dramatic increase in the amount of fines bears emphasis: infringements that were previously punishable with fines of between €500 and €3,000 will now be punished with fines ranging from €2,500 to €2.5 million. The PCA leaves the stage and the responsibility for the enforcement is now attributed to the Portuguese Authority for Economic and Food Safety, which also gains the power to grant interim measures and to provide for the application of periodic penalty payments in case of continued non-compliance.

Unsurprisingly, a significant number of companies (mostly, but not exclusively, large retailers) have expressed their dismay at the new Act, all the more so given that liability is not at all dependent on holding a dominant position.

Institutional developments

New Judiciary Act

During the summer, a deep reform of the Portuguese judiciary system was enacted, leading to changes in the jurisdiction of a number of courts. The new Judiciary System Act of August 2013 transferred the jurisdiction to hear appeals against rulings from the Competition, Regulation and Supervision Court from the Évora Court of Appeal to the Lisbon Court of Appeal in what was a generally welcome follow-up of the creation of the Competition, Regulation and Supervision Court in 2012.

Independent regulatory agencies

At the end of July, parliament adopted a law providing the institutional framework for independent regulatory agencies, covering the Competition Authority and all the sector-specific regulators (with the exception of the central bank and the media regulator). The aim is to carve into a single piece of legislation all the features required to ensure the independence of the agencies.

Competition Authority

In September, a new president of the PCA was appointed: António Ferreira Gomes, who holds an economics PhD from the University of York. It's his second stint at the PCA, where he had been in charge of the Merger Control Department from 2007 to 2013. At the time of the appointment, he was a senior competition expert at the OECD in Paris. The new board was completed in April 2014 with the appointment of Maria João Melícias, a *référéndaire* at the chambers of Judge Cruz Vilaça at the Court of Justice of the EU.

Expectations are running high as regards the new mandate at the PCA. After a high-profile start in 2003 further to its creation, the PCA had fallen into a semi-lethargic state over the last five years that kept most of the competition community wondering.

The first visible measure undertaken by the new president was a complete reshuffle of the internal structure of the PCA and the appointment of new directors for all the departments.

Case law

Antitrust

Dawn raids in the banking sector

On 6 March 2013, the PCA carried out dawn raids in over 10 banks spread across 15 different locations on grounds of suspicions related to exchanges of information allegedly infringing Portuguese and EU competition law rules. Press reports indicate that the investigation might have been triggered by a leniency application from the London offices of Barclays.

According to the press, the following banks are under investigation: Barclays, Santander Totta, Banco Espírito Santo, Caixa Geral de Depósitos, Banco Comercial Português, BPI, BIC, Montepio, Banif and Caixa de Crédito Agrícola. This was the first dawn raid publicly reported since the new Competition Act entered into force in July 2012.

A major legal battle is expected to take place around the search and seizure powers of the PCA, which the new Competition Act has strengthened in some respects. Serious constitutional questions hang over the seizure of e-mails, and the legislature does not seem to have found the most effective way to deal with them in the new Competition Act. As always, the courts shall the final word.

Abuse of dominant position in the premium sports channels market

On 20 June 2013, Sport TV was fined €3.7 million for abuse of its dominant position in the Portuguese market for premium sports television channels. The PCA considered that Sport TV had put in place a remuneration system for the distribution of its channels that seriously discriminated between different pay-TV operators.

The case was triggered by a complaint from Cabovisão, the third operator in the country. The PCA concluded that Sport TV holds a dominant position in both upstream and downstream markets and considered that their remuneration scheme in respect of their channels had the effect of limiting the production, distribution, technical development and investment by favouring one particular pay-TV operator to the detriment of its competitors.

Cartel in the flexible foam market

On 18 July 2013, three companies in the Portuguese market for flexible PUR foam (Flex 2000, Flexipol and Eurospuma) were fined a total of €993,000 for participating in a long-standing cartel. Flexible PUR foam (also called polyurethane) is used in the manufacture of flexible, high-resilience foam seating, rigid foam insulation panels, high performance adhesives, surface coatings and surface sealants, hard-plastic parts (eg, for electronic instruments) and hoses.

The investigation was triggered by a leniency application from Flex 2000. The PCA established that the three companies had fixed prices and exchanged commercially sensitive information for over a decade, covering 90 per cent of the relevant market. The PCA fined Flexipol (€498,000) and Eurospuma (€495,000), as well as five of their directors. No fine was applied to Flex 2000 or its directors as the result of their leniency application. None of the parties challenged the decision in court.

Mergers

The economic and financial crisis continues to take its toll on mergers and acquisitions in Portugal. Naturally, merger control cannot but reflect the low tide. In 2013, only 39 concentrations were notified to the PCA – an all-time low. Almost half of the operations were notified by investment funds.

Live music events and ticketing

On 22 March 2013, the PCA cleared with conditions the acquisition of the Atlântico Pavillion (now rebranded as MEO Arena) by the consortium Arena Atlântida. The case raised many of the same issues and involved the same product markets assessed by the US Department of Justice and the UK Office for Fair Trading and Competition Commission over 2009 and 2010 in the *Ticketmaster/Live Nation* case: the organisation of live music events; ticketing; and the management of venues for live shows and large-scale events.

The case went into second phase and the notifying parties had to commit to:

- eliminate the vertical exclusive link between the ticketing company and the arena, allowing concert promoters leasing the arena to use a ticketing company of their choice;
- ensure the confidentiality of business information of concert promoters in relation to the new shareholders who are promoters themselves; and
- ensure fair, reasonable and non-discriminatory terms for the lease of the arena.

The arena was found to be a unique infrastructure with no equivalent substitute in Portugal.

The decision by the PCA has been challenged in court by a third interested party. The appeal is pending.

Mobile communications, pay-TV and quadruple play

On 26 August 2013, the PCA cleared with conditions and obligations the high-profile merger of ZON and Optimus. The undertakings are active in, among others, the media and mobile communications markets.

ZON was the leading player in the pay-TV, broadband Internet and triple-play markets while Optimus was the fourth player in the mobile communications market. The merger would provide ZON with access to a mobile communications infrastructure of its own, thus strengthening its capacity to compete with the leading Portuguese mobile operator – namely, considering that quadruple-play packages were becoming increasingly relevant in the market.

However, the PCA considered that the concentration would likely significantly impede effective competition in those areas where Optimus owned an optical fibre network, especially given that in some of those areas the supply of services by Vodafone was based on Optimus' network. The parties therefore undertook a set of commitments aimed at ensuring third-party access (particularly Vodafone) to Optimus' network and enabling Optimus' triple-play clients covered by fidelity periods to change supplier without penalties.

The new entity resulting from the merger has in the meantime been rebranded as NOS.

Premium sports rights and channels

Another high-profile concentration in the media sector was notified in 2013: *Controlinveste*ZON*PT / Sport TV*PPTV*Sportinveste*. The operation entails the acquisition of joint control over Sport TV by Portugal Telecom, together with Controlinveste and ZON, which already jointly controlled Sport TV. Sport TV is the leading provider of premium sports channels for pay-TV and Sportinveste is the main player in the trade of premium sports rights.

In August 2013, the PCA initiated a Phase II investigation which is still ongoing at the time of writing, due to appeals that have been lodged on procedural points and pending the outcome of negotiations concerning the commitments.

Judicial review

Association of undertakings

On 8 May 2013, the Lisbon Court of Appeal upheld the 2012 ruling from the Lisbon Court of Commerce which had confirmed a fine of €969,000 applied to the National Parking Operators Association (ANEPE). At stake was a decision of an association of undertakings under the form of a recommendation to its associates on the need to change price lists. The original decision by the PCA fined ANEPE over €1.9 million in December 2010.

Association of undertakings as viewed by the ECJ

On 28 February 2013, the ECJ delivered a preliminary ruling on the question of whether mandatory training by an association of professionals may infringe competition rules.

The PCA considered that a regulation issued by the Association of Chartered Accountants (OTOC) constituted an infringement of both national and European competition rules insofar as it constituted a decision of an association of undertakings that had as its object or effect the restriction of competition within the internal market. Under the contested regulation, chartered accountants had to attend paid-for mandatory training classes and OTOC reserved the right to exclusively supply one-third of the required training. At the same time, OTOC also determined discretionary criteria for the selection of other training providers and for the approval of their training courses. OTOC was fined €90,000 by the PCA.

The decision by the PCA was subject to a sequence of appeals until the Lisbon Court of Appeal eventually referred a number of questions to the ECJ. The ECJ found that the disputed regulation indeed eliminated competition in favour of OTOC in a substantial part of the relevant market, and imposed discriminatory conditions on the remaining providers of training courses. The Lisbon Court of Appeal subsequently confirmed on 7 January 2014 the ruling of the first instance court. However, the OTOC did not throw in the towel and appealed yet again, this time to the Constitutional Court. At the time of writing, the decision is still pending.

Resale price maintenance

On 24 May 2013, the Competition, Regulation and Supervision Court fully upheld a 2012 decision from the PCA against Lactogal concerning minimum resale price maintenance in the dairy products' market. The undertaking was fined €341,098 for having entered into 59 distribution agreements with 55 distributors active in the HORECA channel. Under the terms of such agreements, the distributors were bound to comply with resale prices and mark-ups set by Lactogal.

Market sharing and exchange of information

In 2012, the PCA fined five catering companies (Eurest, Trivalor, Uniself, ICA/Nordigal, Sodexo) €14,7 million for market sharing and the exchange of sensitive information in the market for catering services in cafeterias, canteens and restaurants. On 19 July 2013, the Competition, Regulation and Supervision Tribunal found that the statute of limitation concerning the market sharing infringement had expired. However, the Court considered that the undertakings were still liable for the exchange of sensitive information. The fines were roughly halved and five directors of the companies were also individually fined.

Abuse of dominant position

In 2013, the PCA fined Sport TV €3.7 million for abuse of dominant position in the Portuguese market for premium sports television

channels. The PCA considered that Sport TV had discriminated between the pay-TV operators that distributed its channels. On 4 June 2014 the Competition, Regulation and Supervision Court confirmed the decision by the PCA but reduced the fine to €2.7 million. The case may still be appealed to the Lisbon Court of Appeal.

Failure to notify a concentration

In December 2012, the PCA fined three undertakings in the pharmacy market €150,000 for implementing a concentration before notifying and receiving clearance. This was the first case in which undertakings were fined for having implemented a concentration in disregard of the standstill obligation. The decision by the PCA was quashed by the Competition, Regulation and Supervision Tribunal on 27 September 2013 on grounds of infringement of the defendants' defence rights. The Court found that the PCA had introduced in its final decision new incriminatory facts that had not been put forward in the statement of objections, thereby depriving the undertakings from the opportunity of properly defending themselves.

Privatisations

The number of mergers between national companies has unavoidably suffered from the general economic downturn and from the particularly harsh recession in Portugal. However, privatisations carried out in accordance with the memorandum of understanding entered into with the IMF, the ECB and the EC led to a number of high-profile concentrations in 2012 and to the successful privatisation of the incumbent postal operator CTT. In December 2013, CTT was privatised by means of the disposal of 70 per cent of the state's holding at a highly successful IPO. Proceeds exceeded €500,000.

Expected privatisations during 2014 are EGF (waste management) and Águas de Portugal (water distribution). Depending on market circumstances, the privatisation of TAP Air Portugal, the airline, may be resumed.



Miguel Mendes Pereira

Vieira de Almeida & Associados

Miguel Mendes Pereira has a law degree from the Faculty of Law of the University of Lisbon, an LLM in European legal studies from the College of Europe, Bruges, Belgium, and a master's in European legal sciences from the Faculty of Law of the University of Lisbon. He is a lecturer at the Faculty of Law of the University of Lisbon in EU law and competition law (postgraduates).

He joined VdA in 2011 and is currently a partner in the competition and EU area of practice. He is also active in the field of copyright, electronic communications, media and advertising.

Before joining the firm, he was a partner at Abreu Advogados (2008 to 2011), lead legal counsel at the Portuguese Competition Authority (2006 to 2008), legal secretary at the chambers of the Portuguese judge at the General Court of the EU in Luxembourg (2004 to 2006), administrator at the Directorate-General for Competition of the European Commission in Brussels (2000 to 2004), head of legal affairs at Lusomundo and Warner Lusomundo (1997 to 2000) in Lisbon and an associate lawyer, as well as trainee, with Athayde de Tavares, & Associados (1992 to 1997) also in Lisbon.

He is the author of various articles and publications, including the 2009 'Commentary to the Portuguese Competition Act', and speaks regularly at conferences and seminars.

His work has also been recognised by the most important international rankings, including *Chambers Europe*, *Legal 500* and *Who's Who Legal*, in all of which Miguel Mendes Pereira appears as a leading and recommended lawyer.



Av. Duarte Pacheco, 26
1070-110 Lisbon
Portugal
Tel: +351 21 311 34 00
Fax: +351 21 357 00 09

Miguel Mendes Pereira
mig@vda.pt

www.vda.pt

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