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Portugal: Overview

Miguel Mendes Pereira and Pedro Saraiva
Vieira de Almeida & Associados

The Portuguese competition law community has been quite active over the past 12 months.

On the institutional side, a new chairman of the board of the Portuguese Competition Authority (PCA) was appointed in November 2016 and the watchdog's activity has notably increased since then.

On the antitrust front, the highlights were an abuse of dominance probe in the postal sector and investigations into exchanges of information in the financial sector. Also, the significant stream of cases since the last quarter of 2016 seems to indicate that the PCA is committed to step up the rhythm of enforcement.

Merger control notifications increased steadily as a result of the improvement in the economic situation. The merger control department of the PCA has been working hard, with as many as 64 concentrations notified throughout 2016.

As regards public policy, the PCA promoted initiatives related to the fight against bid-rigging and antitrust compliance by associations of undertakings.

Last but not least, the city of Porto hosted the ICN Annual Conference in May 2017. Over 600 delegates from 102 jurisdictions attended and used the occasion to eliminate all remaining doubts about the delights of Port wine, in addition of course to the multiple and intense work sessions.

Institutional and legislative developments

The PCA is increasing the pace of both enforcement and policy-making. More relevant, its success rate in appeals before the judiciary is also on the rise.

Throughout 2016 the PCA held over a dozen sessions across Portugal on the fight against bid-rigging, attended by more than 1,000 participants. The PCA also issued a guide, a checklist and a list of FAQs on how to detect and prevent bid-rigging, and expressed the intention to reinforce its ties with public contracting entities.

In November 2016 the watchdog issued a guide on the promotion of competition for associations of undertakings. The guide explains through practical examples deriving from the PCA's own decisional practice how and why associations of undertakings can be liable for anticompetitive wrongdoing. The guide may prove a useful tool as a significant percentage of competition infringements prosecuted in Portugal concerned associations of undertakings.

In its enforcement priorities for 2017 the PCA expressed its intention to strengthen the procedures to detect anticompetitive practices. Notably, the PCA intends to expand its capability for detecting infringements and committed to launch ex officio 15-20% of all new antitrust investigations in 2017. It has also announced its intention to enhance the interaction with complainants and to launch a new online portal for the submission of complaints.

Fully consistent with its announced priorities, in the first four months of 2017 the PCA raided 15 different undertakings in different proceedings, implying nearly 60 days of inspections. While the exact subject of the majority of the investigations remains undisclosed,

it is known that one of them relates to the river cruise industry in Porto and another one concerns an association of driving schools.

In May 2017, the PCA launched a public consultation on guidelines on how to treat confidentiality claims, thereby addressing a topic that has constituted matter of concern for practitioners for a long time. Recently, confidentiality has been at the root of numerous legal disputes between investigated undertakings and the PCA, most notably over access to file. It is yet to be seen whether the newly published guidelines will be the first step of the much-needed evolution on access to file conditions.

At the legislative front, transposition of Directive 2014/104/EU (the Private Enforcement Directive) is still awaited. The PCA has prepared a draft bill at the request of the Ministry of the Economy and submitted it to a public consultation which was widely participated. The draft bill was subsequently submitted to the government.

Case law

Antitrust

Financial sector on the spotlight

In March 2013 the PCA carried out dawn raids at 15 banks on the grounds of suspicion related to exchanges of sensitive information. The investigation was triggered by a leniency application from the London offices of Barclays, followed by a second leniency application by Montepio.

According to press reports, the following banks are being probed: Barclays, Santander Totta, Banco Espírito Santo, Caixa Geral de Depósitos, Banco Comercial Português, BPI, BIC, Montepio, Banif and Caixa de Crédito Agrícola.

The PCA sent statements of objections to the banks in June 2015. A major legal battle is under way around access to file and the search and seizure powers of the PCA, which the 2012 Competition Act has strengthened in some respects. Serious constitutional questions hang over the seizure of emails which the 2012 Competition Act did not solve. The investigated undertakings have presented 11 appeals to the Competition, Regulation and Supervision Court (the Competition Court) regarding a number of procedural decisions taken by the PCA concerning access to file, extension of time limits and confidentiality of documents.

Unsurprisingly, the procedure has been suspended for over a year by order of the Competition Court as it granted suspensive effect to several of the appeals. The suspension was due to last until the Lisbon Court of Appeal ruled on such appeals. Nonetheless, and even though in October 2016 the PCA received the judiciary's green light to resume the investigation, at the time of writing over six months have passed and the PCA is yet to resume the probe.

It is worth noting that according to public reports the PCA is undertaking two further investigations in the financial sector, at least one of which in the consumer credit sector. Within the context of such probe the watchdog carried out dawn raids in 13 financial institutions in January 2016. Press reports suggest this initiative may be connected to original investigation into the banking sector.

The PCA cracks down on envelope cartel

Following dawn raids in February 2015, over the course of 2016 the PCA fined five undertakings active in the market for the provision of paper envelopes. During the investigation the PCA concluded that the undertakings had put in place market-sharing and price-fixing arrangements between 2007 and 2010. Fines were applied in two waves.

In the first wave, in May 2016, the PCA fined Antalis Portugal €440,000 for taking part in the agreement. The PCA justified the early conclusion of proceedings against Antalis as a result of the undertaking's cooperation through both the leniency and settlement procedures. Likewise, the amount of the fine imposed on the undertaking was reduced accordingly.

The second wave occurred in December 2016, when the PCA convicted four other undertakings – Copidata; Tompla – Indústria internacional do Envelope (Tompla); Firmo Papéis e Papelarias (Firmo) and Papelaria Fernandes – Indústria e Comércio (Papelaria Fernandes) – for taking part in the same arrangement. Copidata and Tompla were granted immunity from fines as the investigated started with a leniency application by those two companies which are part of the same economic group. Firmo, in turn, was fined €160,000 for its alleged wrongdoing. Finally, Papelaria Fernandes was convicted but not fined as it faces a lengthy and intricate insolvency process.

The combined use of the leniency and settlement programs seems to show the PCA's preference for streamlining procedures through cooperation with the investigated undertakings rather than facing protracted judicial battles.

Retail franchising under scrutiny

On the vertical agreements side, the highlight was the termination of an investigation into franchise system of DIA Portugal. At stake was the alleged definition of resale prices within the system.

DIA is a discount store chain active in Portugal through over 300 franchisees. Following two intense years of investigation that included several inspections and inquiries, the PCA closed the case in June 2016 pursuant to the submission of commitments by DIA.

In brief, DIA made the following commitments: to address a letter to each of its franchisees stating that it limits itself to recommended resale prices and defined maximum sale prices, thereby leaving franchisees free to charge lower resale prices; to keep a copy of such letter on permanent display on its website; and not to enter into new franchise agreements with clauses that may hinder franchisees' ability to define resale prices.

SO mailed to postal operator

In what is likely the highest-profile ongoing abuse of dominance probe in Portugal, in August 2016 the PCA issued a statement of objections against CTT – Correios de Portugal (CTT), the former postal incumbent, for allegedly abusing its dominant position.

According to the PCA, CTT has allegedly refused its competitors access to its distribution network, supposedly the only network for distribution of traditional mail with nation-wide coverage. In the PCA's view, by doing so CTT foreclosed the market for the provision of traditional mail services in Portugal as its competitors need access to the network to be able to compete in such market. According to the PCA, the market is worth close to €400 million per year.

In its initial investigation the PCA found CTT's supposed actions to be serious as they occurred in the context of the liberalisation of the postal services market in Portugal in 2012.

At the time of writing, the case is ongoing as the PCA is yet to adopt a final decision.

The (high) price to pay for not competing

In May 2017 the PCA imposed a fine of €38.3 million on the SONAE and EDP groups in a probe reportedly started by complaints from consumers. SONAE, a Portuguese conglomerate, is a major player in the retail and real estate sectors in Portugal. EDP is the former incumbent in the electricity sector and remains a key player therein.

The alleged restriction consisted of a non-compete agreement signed in the context of a joint commercial campaign in 2012. The parties agreed not to enter each other's markets, with SONAE committing not to compete in the market for electric energy in mainland Portugal for a two-year period. These practices took place in the context of the liberalisation of the market for electric energy and natural gas in Portugal.

A lengthy legal battle before the judiciary is expected as both undertakings have publicly announced their intention to appeal against the decision. Such appeals will give the judiciary the opportunity to set the boundaries of non-compete agreements in Portuguese competition law.

Mergers

The Portuguese economy finally seems to be retrieving from the slackening caused by the economic and financial crisis. As a result, M&A activity is increasing and is steadily rising back to the pre-crisis levels. In 2016, 64 concentrations were notified to the PCA. Two cases deserve a closer look.

Complex takeover in the payment systems sector

In September 2016, SIBS notified the acquisition of exclusive control over a set of assets consisting in the merchant acquiring business of Unicre. SIBS, a group jointly owned by most of the major banks operating in Portugal, is active in payment means and is primarily known for operating Multibanco, the Portuguese payment subsystem. Unicre was also ultimately owned by some of the major banks operating in Portugal (thus having many shareholders in common) and is also active in the payment services sector, in particular in merchant acquiring (the acquired business) as well as payment cards issuance. In December 2016 the PCA decided to start a Phase II investigation due to concerns that the merger would affect competition in the market for merchant acquiring services in physical POS payment terminals since SIBS is active in related activities in the payment cards sector. Five entities, including competitors and customers, presented comments.

At the time of writing, after more than six months of in-depth investigation, the PCA is yet to adopt a decision in the procedure. This is a case worth following as it will certainly have a significant impact: depending on the outcome, it will result in either a major change in the Portuguese payment systems sector, or the first prohibition decision adopted by the PCA in over three years.

Air carrier in and out of the public domain

As part of the memorandum of understanding signed within the context of the Economic Adjustment Program in 2011, Portugal committed to proceed with the privatisation of a number of state-owned enterprises. A number of high-profile privatisations have in the meantime materialised, notably TAP Air Portugal (TAP), the flag carrier airline of Portugal. In June 2015, 61% of the share capital of TAP was awarded to Atlantic Gateway, a consortium comprising David Neeleman (owner of Brazilian airline Azul) and the Portuguese transport group Barraqueiro. The transaction was notified to the PCA in August 2015 and cleared in Phase I in October 2015.

Nonetheless, in the following month, a new government came into office and immediately announced its intention to bring 50% of TAP's share capital back to the public domain. Months-long negotiations ensued until finally the government and Atlantic Gateway agreed to partially reverse TAP's privatisation and adopt joint control of the company.

Accordingly, in July 2016 the Portuguese government and Atlantic Gateway notified the acquisition of joint control over TAP. The transaction was eventually approved by the PCA in Phase I.

Judicial review

The second half of 2016 and the first few months of 2017 provided music to the PCA's ears in terms of judicial review.

In October 2016, the Competition Court fully confirmed the €150,000 fine imposed on Peugeot Portugal for providing false, inaccurate or incomplete information in a reply to a request for information in the context of an antitrust investigation. This was the first fine ever imposed by the PCA on such grounds.

The Competition Court gave the PCA more good news in October as it upheld the watchdog's 2005 decision prohibiting the acquisition of joint control over Arriva Transportes da Margem Sul – a an undertaking active in the road public transportation of passengers to Lisbon's south bank – by the Arriva and Barraqueiro groups. It bears emphasis that the judicial review in this case took over 11 years, which does not speak highly of the current effectiveness of judicial review in merger control cases.

Appeal Court grants 92% reduction in fine imposed over market data

In December 2015, the PCA imposed a fine of €10.34 million on four entities of the Associação Nacional de Farmácias group (ANF) for abuse of a dominant position in the markets for Portuguese pharmacies' data, and for commercialisation of market studies based on such data. The case was reportedly triggered by a complaint filed by IMS Health in 2009. The ANF was active at the two levels of the value chain since at least 2009. The PCA found that between 2010 and 2013 the ANF induced a margin squeeze as the prices it charged for pharmacies data would not allow (when compared to the prices charged for market studies) a competitor to operate in the (downstream) market for commercialisation of market studies based on such data.

The ANF subsequently appealed to the Competition Court, which, nonetheless, in October 2016 confirmed the PCA's finding that the undertaking had abused its dominant position by squeezing rivals' margins. However, the Court set the fine at €6.89 million as it reassessed the part of the market affected by ANF's behaviour.

The ANF went on to appeal to the Lisbon Court of Appeal, which, in June 2017, handed a ruling confirming the PCA's finding that the ANF had abused its dominant position. Nonetheless, the Court reduced the amount of the fine by approximately 92%, setting the fine at €815,000.

Public information suggests that the sizeable fine reduction did not stem from the annulment of the substantive conclusions reached by the PCA, but rather from the fact that the Court concluded that the group's holding company was not liable for the infringement. The holding company was handed the highest fine as it was the entity with the most significant turnover.

It appears that the judiciary upheld the PCA's findings regarding the ANF's conduct, thus leaving the door open for potential damages actions in the future.

€4.1 million fine confirmed in the bottled LPG market

Following a statement of objections issued in May 2014, the PCA adopted in February 2015 a decision to fine three subsidiaries of Galp Energia, a market leader in the Portuguese energy sector, €9.29 million for abuse of dominance in the Portuguese market for bottled liquefied petroleum gas (LPG). This market is estimated at €330 million per year. The practices of Galp Energia consisted in the prohibition of passive sales through the allocation of a certain territory to each of its distributors and the restriction of sales outside of it. The practices were considered to limit intra-brand competition and consequently to seriously restrict competitive pressure on distributors. The practices occurred in mainland Portugal as well as in Azores and Madeira, and lasted for at least 15 years in the case of one of the subsidiaries.

Galp Energia subsequently appealed to the Competition Court, which confirmed the PCA's decision in January 2016. However, it reduced the fine to €4.1 million as the PCA failed to prove that Galp Energia had also breached article 101 TFEU.

Galp Energia went on to challenge the Competition Court's ruling. However, in January 2017 the Lisbon Court of Appeal, acting as court of last instance, confirmed the PCA's decision and kept the amount of the fine at €4.1 million.

State aid

The financial crisis hit the Portuguese financial system hard, with four banks being recapitalised since 2012, one bank being resolved in 2014 and another one in 2015.

In July 2014, Banco Espírito Santo (BES), one of the largest private banks in Portugal, came under intense pressure after announcing losses amounting to €3.57 billion; this ultimately led to the suspension of securities transaction on 1 August 2014, after its shares nosedived by 49.7%. Simultaneously, the bank ceased to fulfil the solvency ratios, and thus the ECB suspended its access to the Eurosystem's liquidity and urged the bank to repay close to €10 billion. Events progressed at lightning speed, and following a weekend of intense speculation, BES was ultimately resolved during the night of Sunday 4 August 2014, so as to curtail systemic risks. The resolution encompassed transferring BES's sound assets to a the bridge-bank Novo Banco (NB), which was capitalised by the Portuguese Resolution Fund with €4.9 billion. This was the first resolution of a European bank to take place after the publication of the Bank Recovery and Resolution Directive.

In August 2014, Portugal notified to the European Commission State aid measures to resolve BES. In that context, Portugal offered a set of commitments, namely selling NB within 24 months.

Thus, in December 2014, the Bank of Portugal (BoP) made attempts to sell NB on market terms through an open, transparent, non-discriminatory and competitive selling process. Despite the submission of three binding offers, all attempts eventually botched and in September 2015 the sale process was put to a halt. Portugal negotiated with the European Commission an extension of the deadline to sell NB, which was approved in December 2015.

In January 2016, the BoP went on to launch a second selling process which culminated in an agreement with Lone Star, a private equity firm, in March 2017. Under the agreement, Lone Star acquires 75% of NB's shares in exchange for a capital injection of €1 billion at the closing of the transaction and a further capital injection of €250 million within three years.

Public information indicates that Portugal will have to notify the aid attributed in the context of such agreement. At the time of writing it is unclear whether such notification has already been submitted.



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

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

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



Pedro Saraiva
Vieira de Almeida & Associados

Pedro Saraiva holds a law degree from the Catholic University of Portugal and was an exchange student at Fundação Getúlio Vargas Law School in Rio de Janeiro, Brazil. He further holds a postgraduate degree in European Union Law from the Faculty of Law of the University of Lisbon and an LLM in European Law from the College of Europe, Bruges, Belgium.

He joined VdA in 2015 and is currently a junior associate in the competition and EU area of practice where he has been actively involved in several transactions in a wide range of sectors, notably telecommunications and post, ports, transportation, banking and insurance. He regularly advises clients in a broad range of antitrust subjects before both the PCA and the European Commission.

Before joining the firm he was a blue-book trainee at the online and postal services unit at the European Commission's Directorate-General for the Internal Market and Services, and a trainee legal adviser at the European sanctions unit of the Ministry of Foreign Affairs of Portugal.



Av. Duarte Pacheco
26, 1070 - 110 Lisbon
Portugal
Tel: +351 21 311 3392
Fax: +351 21 357 00 09

Miguel Mendes Pereira
mig@vda.pt

Pedro Saraiva
pss@vda.pt

www.vda.pt

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The competition practice of VdA comprises two partners and eight associates. Its track record includes the successful defence of Portugal Telecom in all the abuse of dominance cases argued before the Competition Authority and the courts, as well as advice to the Portuguese government in the state aid case concerning the €7.5 billion recapitalisation of Portuguese banks. Telecoms, media, pharmaceuticals and banking are among the industries in which clients work with VdA on a daily basis. The practice has invariably been commended by colleagues and clients over the years.

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