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**EUROPE,  
MIDDLE EAST  
AND AFRICA**

**ANTITRUST REVIEW 2020**

# **EUROPE, MIDDLE EAST AND AFRICA**

## ANTITRUST REVIEW 2020

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# Contents

## Europe

### European Union

**Economics: Overview** ..... 1

David N Mishol, Joshua White, Claudio Calcagno and Giuseppe Buglione  
*Analysis Group*

**Cartels and Leniency** ..... 15

Elvira Aliende Rodriguez, Geert Goeteyn, Patricia Sánchez-Calero  
 and Caroline Prétel  
*Shearman & Sterling LLP*

**Financial Services** ..... 29

Vincent Brophy, Tom Bainbridge and Benjamin Falkenberg  
*Cadwalader, Wickersham & Taft LLP*

**Joint Ventures** ..... 52

Catriona Hatton and David Cardwell  
*Baker Botts LLP*

**Merger Control** ..... 64

Kyriakos Fountoukakos, Dafni Katrana and Samuel Hall  
*Herbert Smith Freehills LLP*

**Pharmaceuticals** ..... 84

Jérémie Jourdan, James Killick, Assimakis Komninos, Strati Sakellariou-Witt  
 and Axel Schulz  
*White & Case*

## Cyprus

**Commission for the Protection of Competition** ..... 97

Loukia Christodoulou  
*Chairperson*

## Contents

### Denmark

**Overview** ..... 103

Olaf Koktvedgaard, Søren Zinck and Frederik André Bork

*Bruun & Højle*

**Merger Control**..... 117

Olaf Koktvedgaard, Søren Zinck and Frederik André Bork

*Bruun & Højle*

### France

**Competition Authority** ..... 128

Isabelle de Silva

*President*

**Merger Control**..... 131

Mélanie Thill-Tayara and Laurence Bary

*Dechert LLP*

### Germany

**Federal Cartel Office** ..... 140

Andreas Mundt

*President*

**Merger Control**..... 145

Silvio Cappellari and Stephanie Birmanns

*SZA Schilling, Zutt & Anschutz*

**Private Antitrust Litigation** ..... 156

Albrecht Bach and Christoph Wolf

*Oppenländer Rechtsanwälte*

### Greece

**Overview** ..... 169

Cleomenis Yannikas

*Dryllarakis & Associates*

## Norway

<b>Competition Authority</b> .....	<b>180</b>
------------------------------------	------------

Lars Sørgard

*Director general*

## Portugal

<b>Competition Authority</b> .....	<b>184</b>
------------------------------------	------------

Margarida Matos Rosa

*President*

<b>Overview</b> .....	<b>190</b>
-----------------------	------------

Miguel Mendes Pereira and João Francisco Barreiros

*VdA*

## Romania

<b>Overview</b> .....	<b>201</b>
-----------------------	------------

Mihaela Ion, Silviu Stoica and Vanessa Nistor

*Popovici Nițu Stoica & Asociații*

## Russia

<b>Federal Antimonopoly Service</b> .....	<b>216</b>
---	------------

Igor Artemiev

*Head*

## Spain

<b>National Authority for Markets and Competition</b> .....	<b>228</b>
---	------------

José María Marín-Quemada

*Chairman*

## Contents

### Switzerland

<b>Overview .....</b>	<b>233</b>
-----------------------	------------

Daniel Emch, Anna-Antonina Gottret and Stefanie Schuler

*Kellerhals Carrard*

### Turkey

<b>Cartels .....</b>	<b>243</b>
----------------------	------------

Gönenç Gürkaynak and Öznur İnanılır

*ELIG Gürkaynak Attorneys-at-Law*

<b>Dominance.....</b>	<b>254</b>
-----------------------	------------

Gönenç Gürkaynak and M Hakan Özgökçen

*ELIG Gürkaynak Attorneys-at-Law*

<b>Merger Control.....</b>	<b>266</b>
----------------------------	------------

Gönenç Gürkaynak and K Korhan Yıldırım

*ELIG Gürkaynak Attorneys-at-Law*

### United Kingdom

<b>Cartel Enforcement.....</b>	<b>277</b>
--------------------------------	------------

Frances Murphy, Joanna Christoforou and Michael Zymler

*Morgan Lewis & Bockius UK LLP*

<b>Merger Control.....</b>	<b>295</b>
----------------------------	------------

Peter Harper and Kate Newman

*Eversheds Sutherland*

### Ukraine

<b>Merger Control.....</b>	<b>311</b>
----------------------------	------------

Denis Lysenko, Sergey Denisenko and Yevgen Blok

*Aequo Law Firm*

## Middle East and Africa

### Angola

<b>Overview .....</b>	<b>319</b>
-----------------------	------------

Miguel Mendes Pereira and João Francisco Barreiros

*VdA*

### COMESA

<b>Competition Commission .....</b>	<b>328</b>
-------------------------------------	------------

Willard Mwemba

*Director of Mergers and Monopolies*

### Israel

<b>Overview .....</b>	<b>333</b>
-----------------------	------------

Tal Eyal-Boger, Ziv Schwartz and Shani Brown

*FBC – Fischer Behar Chen Well Orion & Co*

### Mauritius

<b>Competition Commission .....</b>	<b>349</b>
-------------------------------------	------------

Deshmuk Kowlessur

*Executive director*

### Mozambique

<b>Overview .....</b>	<b>359</b>
-----------------------	------------

Miguel Mendes Pereira and João Francisco Barreiros

*VdA*



# Preface

*Global Competition Review* is a leading source of news and insight on competition law, economics, policy and practice, enabling subscribers to stay apprised of the most important developments worldwide.

GCR's *Europe, Middle East and Africa Antitrust Review 2020* is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Americas and the Asia-Pacific, this book provides an unparalleled annual update from competition enforcers and leading practitioners, on key developments in both public enforcement and private litigation.

In addition to updates on the European Commission, Cyprus, Denmark, France, Germany, Greece, Norway, Romania, Portugal, Russia, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Israel, Mauritius and Mozambique, this edition features a chapter on Angola, which launched its Competition Regulatory Authority in early 2019.

In preparing this report, *Global Competition Review* has worked with leading competition lawyers and government officials. The latter group provides crucial perspective on the thinking behind cutting-edge matters such as the intersection of privacy, data and antitrust; 'phygital' retail distribution that combines brick-and-mortar with online sales; screening tools to detect collusion in public procurement; and much more.

The lawyers' and officials' knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all of the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to *Global Competition Review* will receive regular updates on any changes to relevant laws over the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact [insight@globalcompetitionreview.com](mailto:insight@globalcompetitionreview.com).

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June 2019

# Portugal: Overview

Miguel Mendes Pereira and João Francisco Barreiros

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The investigation of cartels has been a high priority for the Portuguese Competition Authority (PCA) for the past couple of years. The fight against restrictive effects of horizontal agreements in sectors dealing with consumers' goods has been an important sign of the watchdog's activity, and an effective way of promoting it in the media and public events.

Vertical restraints made an unexpected appearance when the PCA accused one of the largest beer producers in the country of fixing resale prices of beverages in hotels, restaurants, and cafés. There was also time for ticking the abuse of dominance's box, with a statement of objections (SO) being issued against the energy company EDP Produção in September.

There is no doubt that this was a busy year for the antitrust teams at the PCA, as well as for practitioners and companies on the other side of the barricades. Hovering over all this frenzy, however, is the question of whether the PCA's steadfastness in accusing and fining has come at the expense of the rules governing legal procedure and in particular companies' defence rights. A large number of appeals in this respect are now pending at the Competition, Regulation and Supervision court.

In the field of merger control, the PCA adopted 48 decisions, with only two of them requiring the opening of an in-depth investigation. Gun jumping climbed a few positions in the priority ladder and during 2018 the PCA opened five investigations concerning failure to notify.

## Legislative and institutional developments

Act 23/2018, transposing the Private Enforcement Directive (Directive 2014/104/EU), was published on 5 June 2018. The first draft of the bill was prepared by the PCA at the request of the Ministry of the Economy and was submitted to a public consultation, which was widely participated. With the rules facilitating private claims to compensation for infringements of competition law now fully in force, it remains to be seen how they will be used by both claimants and defendants and interpreted by national judges.

In 2017, the PCA saw its enforcement monopoly at risk. A report commissioned by the government on the reform of the financial supervision model addressed the relationship between different regulators with powers over the financial sector. One of the proposed measures was the

creation of the Board of Financial Supervision and Stability to ensure that information exchange and coordination followed a single set of rules. The working group suggested that the new agency should be given specific powers in the field of competition law, namely the investigation of anticompetitive practices in financial markets. These proposals were met with scepticism by a number of practitioners, to whom the coexistence of two agencies with overlapping or complementary powers appeared confusing. As expected, the Board of the PCA also expressed dissatisfaction at the prospect of losing part of its powers. However, the draft legislation passed in March 2019 by the Portuguese government does not empower the new agency with any specific attribution on the field of competition law, making it clear that the PCA will continue to be the sole antitrust enforcer in the country.

Finally, it is noteworthy that in September 2018 the PCA and the National Authority of Medicines and Health Products – IP (Infarmed) signed an inter-agency MoU aimed at promoting their cooperation. This protocol will allow both entities to detect more efficiently market failures and competitive distortions in the Portuguese pharmaceutical sector. The MoU establishes a regular exchange of information on the supervision and monitoring of the sale and consumption of medical products. In particular, as of September 2018, the PCA started having facilitated access to the evolution of prices, patent periods, introduction of medicines, development of biosimilars and shortages of medicines, in order to be able to ascertain whether market anomalies may be related with the existence of anticompetitive practices.

## Decisional practice

### Antitrust

On the cartel side, the PCA was active in the insurance and railway sector, whilst vertical restraints took the PCA to the beverages sector. On the unilateral front, the PCA accused a company for abusing its dominant position in the market for the production of electric energy.

### *Hybrid cases in the insurance and railway maintenance markets*

In 2018, the PCA accused five insurance companies and five railway maintenance companies of entering into price-fixing and market-sharing agreements with competitors. Both cases are still ongoing, despite fines already having been imposed under settlement procedures, making these the first two hybrid settlement cases at the PCA since 2016.

In August 2018, the PCA adopted a SO against five insurance companies active in Portugal – Seguradoras Unidas, Fidelidade, Multicare, Lusitania, and Zurich – accusing them of having entered into a price-fixing and market-sharing agreement in three sub-sectors of the 'large clients' segment of the Portuguese insurance market: occupational hazards, health, and motor vehicles. In addition to the companies, 14 of their executives are also accused of being involved in the alleged infringement, some of them members of the board. The agreements are deemed to have lasted approximately seven years and had an impact on the cost of the insurance acquired by large corporate clients.

The case dates back to May 2017, when the PCA opened the investigation following a leniency application submitted by Seguradoras Unidas. In June and July of the same year, the PCA carried out dawn raids, following which also Fidelidade and Multicare, both part of the same economic group, presented a joint leniency application to the PCA.

Further to the leniency application, Fidelidade/Multicare offered to settle the case with the PCA. In December 2018, the PCA announced that the companies had decided to admit their involvement in the alleged cartel and that it had decided to accept their settlement offer. Fidelidade and Multicare, as well as their executives, walked away with a fine of approximately €12 million, reduced under both the leniency and settlement procedures.

At the beginning of 2019, the PCA announced that it had decided to close the case against Seguradoras Unidas, granting it full immunity for being the first whistle-blower. The investigation will continue against the other two companies under investigation (*Lusitania* and *Zurich*). It is expected that a final decision in this case is reached in the course of 2019.

In the railway case, the PCA issued a SO in September 2018 against five railway maintenance undertakings part of the groups Mota-Engil, Comsa, Somague, Teixeira Duarte, and Vossloh, and to six of their executives, accusing them of manipulating public tenders launched by Infraestruturas de Portugal.

The PCA's provisional findings seem to indicate that between 2014 and 2016 the undertakings manipulated their proposals in order to artificially determine the winner of the tenders, as well as to set the prices of the services in question above their competitive level. The tenders were designed to provide maintenance services for the equipment of the national railway network (e.g., gates, traffic lights, etc).

Companies Sacyr Neopul S.A. and Mota-Engil, as well as their managers, decided to confess and accept part of the responsibility, putting forward settlement offers which the PCA accepted in December 2018 and April 2019, respectively. Sacyr Neopul walked away with a fine of €365,400 and Mota-Engil with a fine of €906,458.

The case was opened in October 2016, following a complaint submitted by a public entity within the context of the 'Fighting Bid-Rigging Campaign' launched by the PCA. The fight against collusion in public tenders has been consistently outlined by the current Board of the PCA as one of its priorities. To the effect of increasing detection of bid-rigging in public procurement, the PCA signed a MoU with the Institute of Public Procurement, Real Estate, and Construction, further to which the PCA is granted direct and permanent access to information available on the electronic platforms related to public procurement procedures.

### *PCA dawn raids for suspicions of cartel*

In the last quarter of 2018 the PCA carried out dawn raids in eight premises belonging to seven different undertakings active in the food retail, advertisement, and telecommunication sectors.

The first dawn raid occurred at the premises of an association of the retail food sector located in Oporto, following suspicions of price-fixing. The two other dawn raids were carried out at the premises of one association of advertisers and one association of advertising agencies in connection with a best practices guide deemed to restrict competition in tenders for the choice of advertising agencies.

The PCA has been dedicating a significant amount of resources to the enforcement of competition law within the context of associations of undertakings. At the end of 2016, the PCA published on its website a guide on the promotion of competition for associations of undertakings ('Guide for Business Associations'). The guide explains, through practical examples deriving from the

PCA's own decisional practice, how and why associations of undertakings can be liable for anti-competitive wrongdoing. Consistent with the objective, in 2017 the PCA concluded three investigations regarding collusive behaviour adopted by associations (driving schools, specialised credit providers, and leasing, factoring and renting associations).

In December 2018, the PCA confirmed that it had also carried out unannounced inspections in five locations of four telecommunication companies, following suspicions of practices harmful to consumers' freedom of choice.

### *PCA investigates alleged Hub and Spoke cartels*

In March 2019, the PCA issued SOs against six large food retail groups and three beverage suppliers in Portugal for allegedly participating in arrangements aiming at artificially determining the prices of certain products.

According to PCA's provisional findings, large supermarket groups Modelo Continente, Pingo Doce, Auchan, Intermarché, Lidl and E. Leclerc used their commercial relationships with beverage suppliers Central de Cervejas, Super Bock and Prime Drinks to fix the retail prices of the products produced by the latter (eg, beer, flavoured water, soft drinks, wine) above their competitive levels. The PCA found that the retailers did not communicate directly with each other but used bilateral contacts with the producers to align retail prices to final consumers.

These are the first *Hub* and *Spoke* cases ever opened by the PCA.

### *Vertical restraints: PCA accuses company of fixing resale prices*

In August 2018, the PCA issued a SO against Super Bock, a leading beverages producer, as well as six managers and members of the board, for allegedly fixing minimum resale prices of its products (namely, beer, packaged water, soft drinks, wine and cider) in hotels, restaurants and cafés.

The case was opened in 2016, following two complaints by former distributors.

The PCA provisionally found that the alleged restrictive practice consisted in the imposition of resale prices and trade margins to its distributors. The PCA believes the supposed infringement lasted between 2006 and 2017.

### *Abuse of dominance: one case closed, another moves forward*

In July 2018, the PCA closed an abuse of dominance investigation into CTT dating back to early 2015. In 2016, the PCA issued an SO against CTT, the leading standard mailing services provider in the country, accusing it of refusing to give access to its standard mail delivery network to competing postal operators.

In order to address the competition concerns of the PCA, in December 2017 CTT submitted a set of commitments aimed at expanding the scope of its Postal Network Access Offer to competing operators. Notably, CTT committed to broaden the scope of postal services included in the Access Offer to publishing, priority and registered mail services, as well as to set prices due for access below retail prices for final customers, so other players could compete.

The PCA accepted the commitments and made them binding to CTT.

Some months later, the PCA issued a SO against EDP Produção, a publicly-traded subsidiary of Energias de Portugal active in the energy sector. According to the PCA, EDP Produção abused its dominant position in the secondary balancing reserve segment of the national electric system, by limiting the supply of its power plants benefitting from a special, public compensation regime, in order to provide the service through its market-based power plants, thereby obtaining a double compensation. Pursuant to the accusation, this abuse of dominance led to prices increases in the electricity paid by Portuguese consumers.

## Mergers

In 2018, the PCA rendered 48 merger decisions, of which only one following a Phase II investigation. In fact, even though a great share of the merger control activity of the PCA in 2018 was allocated to two Phase II cases (*SIBS/Ativos Unicre* and *Altice/Media Capital*), only the former transaction survived remedy discussions with the Portuguese watchdog.

Enforcement of the prior notification and standstill requirements was also a focus of the Mergers Department. One year after rendering its first ever decision fining companies for failure to notify transactions subject to the prior notification requirement (in 2017, the PCA fined private-equity fund Vallis for not notifying its acquisition of 32 Senses' network of dentalcare clinics), the PCA investigated during 2018 five cases of possible gun-jumping.

### *PCA clears three-to-two merger in LPG distribution market*

On 28 September 2017, Rubis notified to the PCA the acquisition of assets which are part of the LPG distribution business of Repsol in the Portuguese autonomous regions of Azores and Madeira.

In the Portuguese archipelagos, LPG is distributed through pipelines, in bulk, but mostly in bottles. Currently, there are three operators active on the islands: Galp, Repsol, and Rubis. As a result of the merger, the number of operators in the markets would shrink to two.

On 23 January 2018, concerned with the reduction of competitive constraints, the PCA decided to open a Phase II investigation. In September 2018, the PCA cleared the transaction, subject to the structural remedies submitted by Rubis. Rubis put forward a solution that eliminates the overlap between the parties' activities in both insular regions: the divestment to a suitable purchaser of a portion of the business that was part of the proposed transaction.

Pursuant to the PCA, the commitment allows the existing market structure to remain the same, by guaranteeing the presence of a third, alternative LPG supplier.

### *Altice gives up acquiring leading free-to-air channel TVI*

On 11 August 2017, Altice filed the notification of a proposed concentration by which it proposed to indirectly acquire, through its subsidiary MEO, most of the share capital of Grupo Media Capital (GMC) from Vertix. On 15 February 2018, seven months after the notification, the PCA decided to open an in-depth investigation.

Altice is a multinational cable and telecommunications company that in 2015 acquired MEO, a Portuguese telecommunications and multimedia operator with activities extending across all telecommunications segments in Portugal. The proposed transaction would result in the vertical integration of MEO with GMC, a company active in the communications, advertisement and

entertainment industries. GMC controls, among others, Plural Entertainment, the main producer of television content in Portugal and the TVI free-to-air channel, the television network leader in terms of audience share and the main platform for advertisement in Portuguese free-to-air television.

The proposed transaction would thus combine one of the leading providers of telecommunications, pay-TV and multiple-play services (MEO) with the leading provider of television content and free-to-air TV channels in Portugal (Media Capital).

The PCA concluded that there were strong indications that the acquisition of Media Capital by Altice could give rise to significant impediments to effective competition in several markets. These concerns were amplified by competitors NOS, Vodafone, Impresa, ARTelecom, Nowo, and Cofina, all of which intervened in the process as interested third parties.

One of the main arguments put forward was that the merged entity would be capable of engaging in total or partial input foreclosure strategies, by denying or making more difficult the access to content, to television and radio channels, as well as to advertisement space. Post-transaction, the merged entity could have the ability to deny the access of MEO's competitors in the downstream markets for pay-tv and multiple-play services, namely NOS and Vodafone, to the television channel TVI, one of the most-watched television channels in Portugal. Similarly, MEO could deny or make more difficult the access by downstream competitors to the advertisement slots of TVI.

In the course of its in-depth investigation, behavioural remedies were put forward by Altice, but were not accepted by the PCA. Shortly after, Altice decided to withdraw the notification.

## Judicial review

### *Constitutional Court: 'Companies challenging fining decisions should pay right away'*

On 6 March 2018, the Portuguese Constitutional Court judged on whether the rule providing that the appeal of a fining decision of an administrative entity does not suspend the effect of said decision is contrary to the Portuguese Constitution.

In the case at hand, the Court ruled on a provision of the energy sector legal regime, which, like the Portuguese Competition Act, establishes that appeals of fining decisions adopted by public entities do not have suspensive effect (i.e., as a rule, the companies fined are not allowed to wait for a judgment of the appealing court confirming the fine before having to pay it).

Sitting as a full court, the Constitutional tribunal found that the contested rule (i) does not infringe the right of access to justice, (ii) does not infringe the constitutional principle of presumption of innocence, since fining procedures are not criminal procedures and so the scope of the principle is more limited, and (iii) is proportionate in order to guarantee the effective implementation of fines and prevent fined companies appeal only to gain time.

The plenary of the Constitutional Court did not render a judgment on the same rule in the competition legal regime, but if one day is required to do so, it looks like it has no reasons to decide differently than it did in this particular case.

## State aid

### *Bank recapitalisations following financial crisis*

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 per cent. 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, to curtail systemic risks. The resolution encompassed transferring BES's sound assets to a 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.

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 fell through and in September 2015 the sale process was halted. Portugal negotiated an extension of the deadline to sell NB with the European Commission, which was granted in December 2015.

In January 2016, the BoP went on to launch a second selling process that culminated in an agreement with Lone Star, a private-equity firm, in March 2017. Under the agreement, Lone Star acquires 75 per cent 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, as well as the commitment to implement an in-depth restructuring of the bank. In turn, the Portuguese Resolution Fund agreed to (i) inject capital of up to € 3.89 billion, in case NB's capital ratio falls below a threshold due to losses on a legacy asset portfolio, and to (ii) subscribe Tier 2 capital instruments, if the issuance cannot be completed successfully from private means.

By decision of 11 October 2017, the European Commission approved the sale of NB. It concluded that BES' shareholders already contributed fully to the costs of BES resolution, as required by the burden-sharing rules, and that the restructuring plan submitted by Portugal and Lone Star was sufficiently far-reaching and included several measures to prevent distortion of competition.

Banco Comercial Português (BCP), the largest private Portuguese bank, challenged the decision of the Commission approving the sale of Novo Banco to Lone Star at the EU General Court in December 2018. BCP calls into question the compatibility of the contingent capital agreement entered into between the Portuguese Resolution Fund and Lone Star with EU State aid rules and with Directive 2014/59/EU on bank recovery and resolution.



*Commission investigates implementation of Madeira Free Zone aid scheme*

In July 2018 the European Commission announced an in-depth investigation of the compatibility of the functioning of the Madeira Free Zone with the Commission 2007 and 2013 decisions approving it under state aid rules.

The Madeira Free Zone (Zona Franca de Madeira, ZFM) was created in 1987 to promote the economic development of the outermost region Madeira, by attracting investment and creating jobs. With these objectives in mind, Portugal put in place a regional aid scheme that grants corporate income tax reductions and certain exemptions from local taxes on corporate profits derived from economic activities exercised in Madeira.

The European Commission approved, between 1987 and 2014, many versions of the ZFM regional aid scheme under EU State aid law. However, one of the requirements for the compatibility of the aid scheme was always that the aid measures are granted exclusively to companies generating economic activity and creating real jobs in the ZFM.

The Commission is now showing signs of concern that the Portuguese authorities may have failed to respect some of these basic conditions, established in the 2007 and 2013 decisions. In particular, the European Commission is not sure whether Portugal complied with the requirements that the company profits benefitting from the tax reductions originated exclusively from activities developed in Madeira, and whether some beneficiary companies actually created jobs in the region.

The opening of the in-depth investigation gives Portugal and interested third parties an opportunity to submit comments.



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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.



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He joined VdA in 2017 and is currently a trainee in the competition and EU practice, where he has been actively involved in several transactions in a wide range of sectors, notably the telecommunications, banking, insurance and air transportation sectors. He regularly advises clients in a broad range of antitrust subjects before both the Portuguese Competition Authority and the European Commission.

Before joining the firm, he was a trainee in the competition law team of the European Commission's Legal Service. João also worked in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP, both as a trainee and as an associate lawyer. During his studies in Lisbon, he concluded a traineeship at the merger control department of the Portuguese Competition Authority.



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