

This point is clarified by the Court to mean that the net gain to the generic manufacturer can have no other explanation “than the commercial interest of the parties to the agreement not to engage in competition on the merits” unless the agreement is shown to have sufficient pro-competitive effects “capable of giving rise to a reasonable doubt that it causes a sufficient degree of harm to competition” ([111]).

Restrictions by effect. To assess the restrictive effect of a practice, the state of competition which exists as a result of the practice must be assessed against the (counterfactual) state which would have occurred in the absence of the agreement ([118]). In an assessment of a “pay for delay” agreement, the relevant counterfactual does not require determination of the likelihood of success of the generic manufacturer’s challenge to the patent claims ([119]). Success of such a challenge is merely one factor to be considered. Rather, the counterfactual assesses the generic manufacturer’s conduct had the agreement not been in place ([120]). This assessment does not require the finding of success of the patent challenge or that the parties would have entered into a less restrictive agreement ([120]–[122]).

Abuse of a dominant position Exercising the rights associated with intellectual property, including settling patent litigation, is not in itself an abuse of a dominant position ([150]). However, conduct that is designed to strengthen a position of dominance, when such conduct is intended to exclude competitors from the market is abusive. GSK’s conduct involved a contractual strategy to delay market entry of generic Paroxetine, to the detriment of the national health service and the taxpayer ([155]–[157]). As this contractual strategy involved several agreements, the Court reasoned that the strategy’s effects exceeded the sum of the anti-competitive effects of all agreements ([157]). However, the Court notes (following its case law), it is open to the dominant undertaking in question to establish that its behaviour can be justified by countervailing benefits to the consumer ([165]–[171]), thus retaining an objective justification defence.

Because of its consolidation and clarification of the Court’s case law on a number of significant points, *Generics (UK)* is an important case, and will likely remain significant for years to come.

Dr Bruce Wardhaugh

School of Law, University of Manchester

Portugal

GENERAL

Portuguese Competition Authority—antitrust fines—Statement of objections—dawn raids—gun-jumping

☞ Anti-competitive practices; Dawn raids; Fines; Gun-jumping; Investigations; National competition authorities; Portugal; Statements of objections

Portugal: Competition Authority imposes record fines totaling €340 million in 2019

As far as antitrust enforcement in Portugal goes—and as much as anything else—2019 was an eventful year. It was a busy year not only for the Portuguese Competition Authority (PCA), but also for companies, practitioners, and national courts.

In the beginning of 2020, the PCA published a summary of its main achievements of 2019. The following are noteworthy.

Imposition of antitrust fines totaling €340.5 million. The PCA adopted seven decisions imposing fines in the total amount of €40.5 million for the alleged (i) exchange of sensitive commercial data between banks; (ii) insurance cartel; (iii) railway maintenance cartel; (iv) abuse of dominant position in the energy sector; and (v) resale price maintenance practice in the food retail sector. The Portuguese enforcer also adopted a commitments decision bringing to an end the investigation into alleged anti-competitive practices implemented within an association of bread maker companies. Some of these decisions were issued in the context of settlement procedures.

Adoption of Statement of Objections. In 2019, several investigations moved to the next stage following the adoption by the PCA of a Statement of Objections. The competition watchdog accused (i) companies active in food retail sector of allegedly fixing prices via a hub-and-spoke exchange of information; (ii) advertising agencies and advertisers of supposedly establishing a rule preventing other advertising agencies of participating in procurement tenders; and (iii) telecom companies MEO and NOWO of participating in a possible market-sharing and price-fixing cartel with respect to the sale of mobile services (sold separately or in packages), a case which was apparently opened following a leniency application. The PCA claims to have received, in 2019, three leniency applications.

Three dawn raids. There was also time to kick off new investigations: in 2019, the PCA carried out unannounced inspections in the premises of several companies active in the health, waste management and private surveillance sectors.

Six investigations into gun-jumping practices. The fight against gun-jumping practices has been one of the priorities of the PCA, and it shows. In 2019 alone, the PCA claims to have opened six investigations into potential gun-jumping practices and failure to notify mergers. In one of these, the PCA issued a Statement of Objections against HCapital, SCA – Sicar for the acquisition of control over Solzaima in 2016 without filing a prior notification to, and waiting for the approval of, the PCA.

Since 2017, the PCA's investigations have moved at an unprecedented fast pace. It is expected that in 2020 the watchdog's activity will continue to be characterized by this "fast and furious" rhythm.

Cláudia Coutinho da Costa
Vieira de Almeida

João Francisco Barreiros
Vieira de Almeida