

In parallel, following the decision by the Danish competition authorities, Ørsted brought the case before the DMCC seeking annulment of the decision. The Court, however, upheld the decision, leading Ørsted to appeal its decision before the Danish Western High Court. On 24 May 2018, the Danish Western High Court decided that the competition authorities had not sufficiently proven that Elsam—now part of Ørsted—had abused its dominant position by imposing excessive prices on the wholesale market for electricity in Western Denmark.

In light of the Danish Western High Court's judgment, the DMCC ruled that there were no longer any grounds for the applicants' claim for damages, which was pending before the Court. The DMCC found that the applicants had based their claim on the decisions of the competition authorities, which had subsequently been quashed by the Western High Court. Therefore, as a result of the judgment, which had the force of *res judicata*, the DMCC held that the applicants had failed to meet the burden of proof on liability. Consequently, the action for damages was dismissed and Ørsted was acquitted.

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Portugal

MERGER

Healthcare sector—completed acquisition—gun-jumping—fine imposed

☞ Acquisitions; Failing firm defence; Gun-jumping; Independent hospitals; Merger control; Portugal; Private health industry

On March 19, 2020, the Portuguese Competition Authority (“PCA”) imposed a fine of €155,000 to Hospital Particular do Algarve, S.A. (“HPA”), a private hospital, for failure to notify a concentration in breach of Portuguese competition rules.

In the end of 2017, HPA acquired sole control over Hospital de S. Gonçalo de Lagos, S.A. (“HSGL”) without filing the transaction with the PCA, which subsequently, in 2018, opened an investigation into the alleged gun-jumping infringement. In November of that year, HPA notified the concentration, which was cleared by the competition watchdog in September 2019¹ after an in-depth review (Phase II).

Although the transaction resulted in the creation or reinforcement of at least a 50% share in the market of hospital health care by private units in the Algarve region, the PCA decided not to oppose to the merger in light of HSGL's impending insolvency, ultimately accepting the “failing firm defense”.

In the context of the gun-jumping investigation, HPA submitted a settlement proposal, confessing the facts, assuming responsibility for its conduct and waiving its right to judicially challenge the decision. As a result, and considering HPA's collaboration and the fact that the merger was voluntary filed after the investigation started, the PCA imposed a fine to HPA of only €155,000. In addition, the PCA announced that, considering the current COVID-19 outbreak, it accepts that the fine is paid in several instalments in order to avoid any negative impact on the provision of healthcare services.

This case, one of the six investigations for possible infringement of the standstill obligation that the PCA announced it had in its hands during the year of 2019, is the third decision adopted for gun-jumping infringements, but the first one where the obligation to notify to the PCA derived from the Competition Act's jurisdictional thresholds based on market shares (rather than only turnover) being met.

¹ Please refer to [2020] E.C.L.R. N6.

The other two decisions were also adopted by the PCA, in June 2014 and in December 2017, following settlement proposals from the parties.

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LEGISLATION

Draft legislation—transposition of ECN+ Directive

⚖ Competition law; Enforcement; EU law; Portugal

A proposal of the draft legislation for the transposition of the ECN+ Directive has been submitted to the Portuguese Government for approval.

Following a highly participated public consultation earlier this year on the Portuguese Competition Authority's ("PCA") proposal of the transposition of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 ("ECN+ Directive"), the PCA has now submitted its final proposal of draft legislation to the Portuguese Government.

The final draft, which imposes amendments to the Portuguese Competition Act and to the PCA's statutes, incorporates contributions made by the Working Group established by the PCA for that purpose, as well as the input received from stakeholders in workshops and during the public consultation.

In the upcoming months, the proposed transposition of the ECN+ Directive will be reviewed by the Portuguese Government and a new version will be later presented to the Parliament for debate and approval.

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PROCEDURE

Continuity of operations—Covid-19

⚖ Competition policy; Coronavirus; National competition authorities; Pandemics; Portugal; Pricing

The Portuguese Competition Authority has adopted measures to ensure the continuity of its activities during the COVID-19 outbreak. Following the declaration of the State of Emergency ("SE") made by the President of the Republic on 19 March, the Portuguese Government approved a set of measures aimed at reducing the impact of the COVID-19 outbreak. One of those measures consisted in the suspension of most of the administrative and judicial deadlines from 13 March until the end of the SE is declared by decree-law.

Regarding enforcement, while stating that competition law rules remain in force, the PCA announced its participation in the Joint Statement of the European Competition Network (ECN) on the application of competition law during the COVID-19 crisis. It declared it will show some degree of tolerance in relation to the co-operation between undertakings aimed at ensuring the supply and distribution of products of scarce availability to all consumers and the need to guarantee that products deemed essential for the protection of consumers' health remain available at competitive prices. It stressed, however, that it will not hesitate to act against undertakings taking advantage of the current pandemic through cartelization or abuse of dominant position.

The competition watchdog is committed to continuing its activities with as little disruption as possible, having also announced it transitioned to remote working and implemented new procedural rules, such as the exclusive use of email for communications with the PCA and the electronic filing of prior notifications of concentrations through the electronic means.

Since the declaration of the SE, three new concentrations were filed and two other mergers were cleared, both within the 30-business-day deadline defined in the Competition Act.

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MERGER

Proposed concentration—notification requirement—minor offence—fine imposed for non-compliance

☞ EU law; Fines; Gun-jumping; Mergers; National competition authorities; Notification; Slovenia

In January 2020, the Slovenian Competition Protection Agency (the “AVK”) published additional details with regards to the procedure in relation to the concentration of Agrokor AG and Ardeya Global Ltd.. Two proceedings regarding the same merger are currently open at the AVK, namely the administrative procedure (in which the AVK assesses whether the concentration in question is in compliance with the competition rules) and the minor offence procedure (in which the AVK fined Agrokor d.d. for failure to notify the concentration).

By entering into a contract whereby Agrokor AG (which is 100% owned by Agrokor d.d.) acquires a 100% interest in Ardeya Global Ltd. (which owns Costella d.o.o.) the obligation to notify the concentration of companies to the AVK arose in 2016 for Agrokor AG as the concentration should have been notified within 30 days as of the conclusion of the contract with the seller. Since Agrokor d.d. (despite a request from the AVK) did not notify the concentration the AVK, on 9 April 2019, instituted an administrative procedure for the assessment of compliance of the concentration with the competition rules. In order to properly assess the effects of a concentration, AVK requires as much information as it can obtain and it has therefore repeatedly, among others, requested information and an explanation from Agrokor d.d., which, despite the fine of €40,000, has still not provided all the requested information. Therefore, AVK has not yet carried out an assessment of the effects of the concentration in question.

Failure to notify the concentration or failure to notify it by the set deadline, represents a minor offence, regardless of whether the decision on concentration is later, in the administrative procedure on the effects of the concentration on the relevant market, positive or negative. Due to the fact that the concentration in question was not notified to the AVK, the AVK instituted a minor offence proceeding and imposed a fine of €53,900,000 on Agrokor d.d.. The amount of the fine in dealing with such offences depends on the revenue generated from the sale of the concentration of the participating undertaking, which should have notified the concentration, together with other companies in the group (in this case, the annual turnover of the Agrokor Group), and not the annual turnover of the target company, which in this case is Ardeya Global Ltd. together with Costella, or the transaction value.

Given the high value of the imposed fine, the AVK believes it is highly likely that the fine will not be successfully enforced, and it therefore decided to use the institution of securing of the claim by temporarily seizing ordinary shares of Mercator d.d. owned by Agrokor. The AVK decided to use the institution in order to achieve the basic purpose of imposing sanctions for minor offences, namely the enforcement of sanctions. The AVK used this