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EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2021

EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2021

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Preface

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

GCR's Europe, Middle East and Africa Antitrust Review 2021 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 region, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this edition, Sweden is a new jurisdiction alongside updates from the European Commission (including a new article on the abuse of dominance), Cyprus, Denmark, France, Germany, Greece, Norway, Portugal, Russia, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Angola, Israel, Mauritius and Mozambique.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their 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 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 during 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.

Global Competition Review
London
June 2020

Portugal: Overview

Ricardo Bordalo Junqueiro and João Francisco Barreiros
VdA

In summary

This article summarises the legislative developments and the main investigations carried out during 2019 by the Portuguese Competition Authority (PCA). The PCA continues to show (1) a preference for investigating clear-cut horizontal restrictive practices and (2) a keenness to conclude investigations by reaching settlement agreements with investigated companies. Nevertheless, alleged vertical restraints and abuse of dominance also made the cut, justifying the adoption of two decisions imposing tens of millions of euros in fines. Finally, in the field of merger control, the enforcement of the prior notification and standstill obligations continued to be a top priority.

Discussion points

- PCA's role as quasi-legislator in the transposition of the ECN+ Directive
- Record amount of fines for competition wrongdoing in a single year
- Imposition of first-ever prohibition of participation in public tenders
- Hybrid cartel investigations
- Whether the rule providing that the appeal of a fining decision does not suspend the effects of that decision is against the Portuguese Constitution

Referenced in this article

- Portuguese Competition Act (Act 19/2012, of 8 May)
- ECN+ Directive (Directive (EU) 2019/1 of 11 December 2018)
- Case PRC 2017/10 – *Insurers Investigation*
- Case PRC 2012/09 – *Banking Investigation*
- Case PRC 2016/06 – *Railway Maintenance Investigation*
- Case PRC 2016/04 – *Super Bock Bebidas, SA*
- Case PRC 2016/05 – *EDP Produção de Energia, SA*
- Case PRC 2018/04 – *AIPAN*
- Case Ccent. 9/2019 – *Fidelidade/Fundo Saudeinveste*Fundo IMOFID*

While the composition of the Board of the Portuguese Competition Authority (PCA) changed during 2019 – Miguel Moura e Silva, replacing Nuno Rocha de Carvalho since August 2019, joined Maria João Melícias and PCA President Margarida Matos Rosa – the dynamism of competition enforcement that has characterised the PCA's activity, for the past two years at least, did not.

In 2019, not only did the PCA impose the highest total amount of fines ever applied in a single year for competition wrongdoing (€340.5 million), it also broke its own record of the highest fine ever applied in the context of a single case, when it decided to close the controversial investigation into an alleged practice of exchange of sensitive commercial information between retail credit institutions with a substantial total penalty of €225 million. In another case, the PCA imposed, for the first time ever, the sanction of prohibiting companies from participating in public tenders for two years.

The competition watchdog closed three of the main investigations into alleged horizontal practices – those supposedly implemented in the banking, insurance and railway maintenance sectors – by adopting fining decisions.

Additionally, it imposed a fine of €24 million on a leading beer producer in Portugal for an alleged retail price maintenance infringement, and a fine of €48 million on a public-listed energy company for an alleged abuse of dominance infringement.

As far as merger control is concerned, the PCA rendered 59 decisions, two of them following an in-depth review (as compared with a total of 48 decisions and two Phase II investigations in 2018). No decision prohibiting concentrations was issued, but a fining decision for a gun-jumping infringement in the private health sector was.

Legislative developments

As in the previous year, the PCA has continued to act not only as the investigative authority, the prosecutor and the enforcer of competition rules (ie, investigating, accusing and fining companies for competition wrongdoing), but also as a quasi-legislator.

In 2018, it was the PCA that, at the request of the Ministry of Economy, prepared a first draft of Act 23/2018, transposing the Private Enforcement Directive (Directive 2014/104/EU), which was eventually published on 5 June 2018. The year 2019 was the first full year in which the rules facilitating private claims to compensation for infringements of competition law have been in force. It is expected that this novel regime will shake things up for companies investigated by the PCA, as well as other stakeholders.

In 2019, it was again the PCA that, at the request of the Ministry of Economy, prepared a proposal for a draft act transposing the ECN+ Directive (Directive (EU) 2019/1) destined to empower the competition authorities of the EU member states to be more effective enforcers and to ensure the proper functioning of the internal market. After being the object of a public consultation, in which many participated, the draft was submitted to the Ministry of Economy in April 2020.

The PCA took the opportunity to propose amendments to the Portuguese Competition Act that are not entirely related to the transposition of the ECN+ Directive. In particular, the proposed new regime (1) expressly declares that the PCA may have access to, and copy or seize, all types of documents, including any electronic files (such as emails and instant messages), a power which, in the current state of affairs, is not undisputed in Portugal, (2) extends to 40 days the deadline to appeal

final decisions of the PCA to the Portuguese Competition Court, and (3) clarifies the authorities or courts to which companies shall appeal decisions made by the PCA during dawn raids and judicial warrants authorising dawn raids.

Additionally, the legal regime regulating Individual Practices Restrictive of Commerce, approved by Decree-Law 166/2013 of 27 December, was amended by Decree-Law 128/2019, approved on 29 August 2019. This regime prohibits, among other things, the sale of products or the provision of services at a loss. The reform is intended, *inter alia*, to bring the framework more in line with competition law, which explains why the Portuguese legislator decided to revoke the prohibition, under this regime, of the application of discriminatory prices and other commercial conditions. The amendments entered into force in January 2020.

Decisional practice

Horizontal agreements

On the cartel side, the PCA imposed hefty fines in the Portuguese banking, insurance and railway sectors. It is, once again, evident that the watchdog chooses to focus mainly on clear-cut cases, with an alleged restriction by object, and heavily promotes settlement agreements as a way to close investigations more quickly and to impose fines which, even if reduced, cannot in principle be subsequently challenged in court (pursuant to Portuguese law).

In addition, the PCA adopted a statement of objections (SO) accusing advertising companies and advertisers, two telecommunications undertakings, and large food and beverage retail chains of participation in horizontal anticompetitive behaviour. Finally, there was also time in 2019 to conduct unannounced inspections into the private healthcare, private surveillance and waste management economic sectors.

Vertical restraints, on the other hand, led the PCA to fine one of the largest beer producers in Portugal (as mentioned above).

Finally, on the unilateral front, the PCA sanctioned a public-listed company for abusing its dominant position in the market for the production of electric energy.

Fines of over €250 million imposed on companies in the financial sector

In 2019, the PCA closed the investigations into two alleged cartel infringements implemented in the Portuguese financial sector, breaking twice its own record in terms of the value of fines imposed: in the *Insurers Investigation*, the PCA imposed fines totalling €54 million and, in the *Banking Investigation*, the PCA imposed fines totalling €225 million. These were the first two investigations into practices implemented in the Portuguese financial sector to be sanctioned by the PCA.

The investigation into the alleged insurers cartel ended in July 2019 with the adoption of a prohibition decision finding five insurance companies active in Portugal, and a number of their board members and directors, guilty of participating in a price-fixing and market-sharing agreement. Pursuant to the theory of harm of the PCA, the five companies coordinated the prices presented to large corporate clients to ensure that the incumbent insurer retained its clients. The supposed practice lasted for several years and allegedly affected the cost of the insurance acquired by large corporate clients (more specifically, clients in three subsegments of the Portuguese insurance market: occupational hazards, health and motor vehicles).

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

Further to the leniency application, Fidelidade and 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 from fines for being the first whistle-blower.

The case continued against the other two companies under investigation until a final decision, fining these two companies a total of €42 million, was reached in July 2019.

The investigation into the supposed banking cartel ended in September 2019. Following a seven-year investigation that involved a significant amount of litigation (43 appeals, most relating to alleged violations of rights of defence), which was suspended for approximately one year as a result of judicial decisions, the PCA adopted a final prohibition decision.

The decision fines 14 banks in the highest combined total fine ever applied by the PCA, at €225 million. The competition watchdog concluded that the banks had, for more than 10 years (2002 to 2013), allegedly participated in a concerted practice of exchanging sensitive data regarding their offers of retail credit products, namely mortgages, consumer, and small and medium enterprises credit products.

Pursuant to the PCA's theory of harm, each bank allegedly provided to the others sensitive information about their commercial offers indicating the spreads to be applied in the near future on mortgage loans or the volume of loans made in the previous month (information which, according to the PCA, would not otherwise be available to competitors). Pursuant to the PCA's decision, as each bank knew the credit offers being made by its competitors, they were discouraged from making better offers available, thus allegedly eliminating the normal competitive pressure to the detriment of consumers.

During the investigation, two banks presented leniency applications: the first benefited from total immunity from fines, while the second one obtained a 50 per cent reduction.

Both the alleged insurers and banking cartels will continue to make headlines in 2020, since the two fining decisions have been challenged before the Portuguese Competition Court.

Railway maintenance companies banned from participating in public tenders

In March 2020, the PCA concluded its investigation into the alleged railway maintenance cartel.

This investigation 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 as one the priorities of the current PCA Board. With the aim of increasing detection of bid rigging in public procurement, the PCA signed a memorandum of understanding 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 electronic platforms relating to public procurement procedures.

In its prohibition decision, the PCA concludes that five railway maintenance undertakings, and a number of their executives, manipulated public tenders launched by Infraestruturas de Portugal designed to provide services to maintain national railway network equipment (such as gates and traffic lights).

The final decision imposes fines on the only two undertakings that challenged the thesis of the PCA, and did not settle the case, in the total amount of €1.6 million. The PCA also imposed, for the first time ever, an accessory sanction prohibiting these two companies from participating, for two years, in public contracting procedures aimed exclusively at the purchase of maintenance services for track equipment for the national rail network.

The other three undertakings decided to confess and accept part of the responsibility, putting forward settlement offers that the PCA accepted between December 2018 and June 2019, and thus facing reduced fines (respectively, €365,400, €906,458 and €300,000).

The case will resume in the Portuguese Competition Court, to which both the two companies fined by the final decision appealed.

Interaction within business associations remains under close scrutiny

The PCA has been dedicating a significant amount of resources in the past few years 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 for 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 anticompetitive wrongdoing. Consistent with the objective, in 2017 the PCA concluded three investigations regarding collusive behaviour adopted by associations (driving schools, specialist credit providers, and leasing, factoring and renting associations).

In line with this enforcement priority, the PCA has, in 2019, (1) closed one investigation into certain declarations of the president of the Northern Association of Manufacturers of Bread, Pastries and Similar Products (AIPAN) and (2) adopted an SO accusing one association of advertisers and one association of advertising companies of competition wrongdoing.

The first case, opened in 2018, focused on whether public statements made by AIPAN's president regarding the price and other commercial conditions of the sale of bread could be interpreted as promoting or enabling coordination between AIPAN's associate members.

To remedy the competition concerns raised by the PCA, AIPAN submitted a set of commitments in 2019, undertaking (1) not to issue any statements or information regarding prices or other conditions of trade that may in any way promote or enable coordination between AIPAN's members and (2) to inform its members by means of an information letter (to be published on AIPAN's website as well) that prices and other conditions of trade are to be set with total autonomy by each member. After public consultation of the proposed commitments, the PCA decided to accept them, adopting a final decision making them binding and closing the proceedings.

The second case, also opened in 2018, concerns a specific rule included in a guide for best practices in advertisement procurement supposedly approved in 2009 by both the Portuguese Association of Advertisers (APAN) and the Portuguese Association of Advertising, Communication and Marketing Agencies (APAP).

The rule in question sets out that associated advertisers shall limit procurement bids to three advertising agencies or, if the current service provider also participates, to a maximum of four. According to the PCA, the rule was turned into a commitment in 2015, with the purpose of restricting competition between undertakings, and members or customers participating in procurement tenders involving a larger number of companies would be issued with a warning.

In July 2019, the PCA issued an SO provisionally finding that both APAN (an association that represents the interests of advertisers with a total of 84 members, including Unilever, McDonald's and Seat) and APAP (an association that represents corporate communications agencies with a total of 31 members, including Fullsix Portugal, Wunderman Cato Johnson, and NIU Sistemas) infringed Portuguese competition law.

Pursuant to the Portuguese Competition Act, decisions of associations of undertakings are sanctioned with fines of up to 10 per cent of the aggregate turnover of the associated members. Additionally, each company represented in the executive bodies of the association at the time of the infringement is jointly and severally responsible for payment of the fine.

Telecommunications companies accused of fixing prices of mobile services

Before the year was over, the competition watchdog adopted a final SO, provisionally finding that two of the largest telecommunications companies active in Portugal, MEO and NOWO, allegedly participated in an anticompetitive horizontal agreement.

The accusation was issued approximately one year after the PCA conducted dawn raids at the premises of both companies (in November and December 2018). The investigation was opened in November 2018, following a leniency application.

The object of the infringement is an alleged market-sharing and price-fixing agreement regarding the sale of mobile services, whether sold separately or in packages of fixed and mobile telecommunications services. The PCA believes that the alleged cartel resulted in higher prices and poorer quality of services, as well as in geographical restrictions that harmed consumers in Portugal.

Vertical restraints

In July 2018, the PCA adopted a decision fining Super Bock Bebidas SA (a leading beer producer), one board member and one director, a combined total of €24 million for allegedly fixing minimum resale prices and other commercial conditions of its products (namely, beer, still and sparkling water, soft drinks, sangrias, wine and cider) when sold by distributors in hotels, restaurants and cafés (corresponding to approximately all consumption away from home), for more than 10 years (2006 to 2017).

The case was opened by the PCA in 2016, after receiving two complaints submitted by two former distributors of Super Bock, following which dawn raids were carried out at the undertaking's premises in 2017.

This is not the only investigation into alleged anticompetitive practices of Super Bock.

In March 2019, the PCA issued SOs accusing six large food retail groups and three beverage suppliers (including Super Bock) in Portugal of 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 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 (a supposed hub-and-spoke cartel).

Abuse of dominance

In September 2019, the PCA adopted a decision fining EDP Produção (a subsidiary of the publicly traded energy company Energias de Portugal) €48 million for an alleged abuse for five years of a dominant position in the market for secondary reserve services in mainland Portugal.

The PCA concluded that, between 2009 and 2013, EDP Produção manipulated its offer of secondary reserve services (which ensures total availability of electric energy to consumers, by balancing instantaneously the offer from generating units with the demand of households and companies). EDP Produção allegedly limited the offer from its generating units subject to the CMEC regime (contractual balance maintenance costs) regime – a mechanism created by the Portuguese government in 2004 to guarantee that, in the open market context then introduced, generating plants received a remuneration equivalent to what they would have received under the power purchase agreements signed with the system operator, REN, and still in effect – so as to increase the offer from its units in the open market, thus being paid twice, to the detriment of consumers.

According to PCA's theory of harm, through the implementation of this practice, EDP Produção – enjoying a dominant position in the market for secondary reserve services – could simultaneously obtain higher compensation payments in the context of the CMEC regime, and higher revenues from the placement in the open market of reserve services from its non-CMEC generating units.

It did so, according to the PCA, at the expense of consumers, in two ways: (1) the price of energy rose as a result of the secondary reserve energy becoming more expensive; and (2) there was also an increase in the proportion of the cost of general economic interest that contributes to CMEC compensations.

Mergers

The PCA's Merger Control Department was busier during 2019 than in the preceding year. In total, the PCA rendered 59 decisions, two of which followed an in-depth review (compared with a total of 48 decisions and two Phase II investigations in 2018).

Ranking high on the PCA's list of priorities, the enforcement of the prior notification and standstill requirements led to the adoption of one SO and, at the beginning of 2020, of a fining decision for alleged gun-jumping practices. The cases are two of the six that the PCA announced it had in its hands during 2019.

Phase II case *Fidelidade/Saudeinveste*IMOFID* (Ccent. 9/2019), summarised below, is particularly noteworthy for expressly clarifying that the PCA understands that an acquisition of control, and consequently a concentration, arises when a party that already owns the integrity of a private fund's share capital, becomes, pursuant to the transaction, also its managing body.

Two of six gun-jumping investigations move forward

Gun-jumping practices are punishable in Portugal with fines of up to 10 per cent of the total turnover of the fined company in the year preceding the decision. The detection, investigation and sanctioning of gun-jumping practices has been, and continues to be, one of the main focuses of the current Board of the PCA. In 2019–2020, two of the announced six gun-jumping cases under investigation by the PCA proceeded to the next phase.

On 17 September 2019, the PCA adopted an SO accusing Luxembourg investment company HCapital, SCA - SICAR of implementing its acquisition of sole control over Solzaima – Equipamentos para Energias Renováveis, SA (a manufacturer of biomass heating equipment) before first notifying it to the PCA and waiting for approval.

Allegedly, HCapital's acquisition of Solzaima was completed in 2016, but it was not until 2019 – supposedly after the gun-jumping investigation was opened – that HCapital decided to notify to the PCA. The concentration was cleared in March 2019 but the gun-jumping investigation continues.

In the context of the second investigation, the PCA adopted a decision in March 2020, imposing a €155,000 fine on Hospital Particular do Algarve, SA (HPA, a private hospital). In light of the disruptions caused by the covid-19 pandemic, the PCA authorised the healthcare company to pay the fine in several instalments.

The investigation into this deal led the PCA to conclude that the acquisition by HPA of sole control over private healthcare unit Hospital S Gonçalo de Lagos, SA, completed in 2017, was subject to prior notification to, and clearance by, the PCA. This understanding was based on the fact that, despite not meeting the threshold of the Portuguese Competition Act based solely on turnover figures, the transaction created or reinforced a share of at least 50 per cent in the market for the provision of private hospital services in the Algarve region. This was the first case in which the PCA adopted a fining decision for gun-jumping wrongdoing based on an interpretation of the market share threshold (which, naturally, presupposes the delimitation of the relevant product and geographical markets).

The transaction was only notified in November 2018, following an initial approach by the PCA to the parties. In May 2019, the PCA opened an in-depth investigation into the concentration. In September 2019, it adopted a decision approving the deal. The approval was, to a great extent, influenced by the fact that the parties were able to sustain a failing firm defence, providing arguments capable of demonstrating that, without the concentration, it was just a matter of time before Hospital S Gonçalo de Lagos would exit the market because of grave economic difficulties.

The gun-jumping investigation proceeded in parallel. The fining decision was adopted after a settlement proposal was submitted and, owing to this and the fact that the deal ended up being voluntarily notified a year after implementation, the eventual fine was substantially smaller.

Since 2014, the PCA has adopted two other fining decisions for gun-jumping infringements (both also reached following settlement procedures): (1) in June 2014, three undertakings (Farminveste 3 – Gestão de Participações, SGPS, Lda, Farminveste – Investimentos, Participações e Gestão, SA, and Associação Nacional de Farmácias) were fined a combined total of €118,837 for failure to notify the acquisition of ParaRede/Glintt, a company active in the information technologies sector; and (2) in December 2017, Vallis Sustainable Investments I, Holding Sàrl and Vallis Capital Partners, SGPS, SA were fined a combined total of €38,500 for failure to notify the acquisition of sole control of 32 Senses' network of dentalcare clinics.

In-depth merger investigation into Fidelidade/Fundo Saudeinveste

The merger control review procedure into concentration Fidelidade/Fundo Saudeinveste was no ordinary case. Nearly eight months after submitting a notification to the PCA, the notifying party decided to withdraw it. The proposed acquisition, however, had already been implemented on 1 October 2018.

On 21 February 2019, the PCA received the prior notification of a concentration consisting of the acquisition by Fidelidade SGOII, a company of the insurance group Fidelidade, of the exclusive control of two funds. One of the target funds was Fundo Saudeinveste, a fund already fully owned by Fidelidade focused on investment in real estate assets.

An effect of the transaction was that Fidelidade would assume the role of managing entity of the fund Saudeinveste, a role that had until then been performed by Fundger. Since it already owned all investment units of Saudeinveste, Fidelidade took the view that the transaction was not an acquisition of control within the meaning of the Portuguese Competition Act, implementing it in October 2018 before it was notified to, and cleared by, the PCA.

The PCA disagreed with Fidelidade's interpretation of the law. It found that, prior to the transaction, Fundger controlled the fund and that the assumption by Fidelidade of the role of managing entity corresponded to an acquisition of control and, thus, to a concentration subject to the prior notification requirement.

This understanding was mainly based on the facts that, pursuant to Portuguese law, the holders of units of an investment fund cannot have the power to adopt decisions, or issue recommendations or orientations, on specific investment plans, and that, on the contrary, according to the Managing Regulation of Fundo Saudeinveste, it is the managing body that has the power to conclude agreements and carry out all necessary acts for the execution of the fund's investment policy. The PCA also dismissed as irrelevant Fidelidade's argument that it had not until that date exercised its powers over Fundo Saudeinveste, emphasising that what matters is that it is now possible for it to do so.

Nearly five months after completing the transaction, Fidelidade SGOII decided to notify it 'on a cautious basis', making it clear that it strongly disagreed with the PCA's position on the existence of a concentration.

The procedure with the PCA would be marked by the opposition of a third party – Lusíadas, SGPS, SA, a company active in the provision of private hospital care services. This company had an interest in the transaction because it operated a substantial part of its economic activities in buildings owned and managed by Saudeinveste, and Fidelidade controls one of its biggest competitors in the Portuguese healthcare market, Luz Saúde.

According to Lusíadas' main theory of harm, post-transaction Fidelidade SGOII would have the capacity, under the contracts that governed the use of the assets of Saudeinveste, but also the incentive, because it controlled Luz Saúde – Lusíadas' rival – to impede the expansion of Lusíadas' activity. The PCA considered this thesis to be plausible, and, on 4 June 2019, opened a Phase II investigation.

On 9 October 2019, before the PCA reached a conclusion on the possibility of this ability and incentive affecting competition in the market, Fidelidade SGOII withdrew its notification and expressed the intention of leaving Fundger as the managing body of Fundo Saudeinveste. However, because the deal had already been implemented in October 2018, the reversal of the change in control required a new notification.

Therefore, on 25 November 2019, Fundger submitted to the PCA its notification of the proposed acquisition to Fidelidade SGOII of the sole control over Fundo Saudeinveste, a concentration that was approved in December. It remains to be seen, however, whether a gun-jumping proceeding was eventually opened by the PCA.

This case, which is noteworthy for a number of reasons, demonstrates in particular the PCA's view on the notion of 'control', and that, when in doubt about the existence of a concentration, it is crucial to initiate pre-notification contacts.

Judicial review

'Companies challenging fining decisions should pay right away'

On 17 December 2019, the Portuguese Constitutional Court judged on whether the rule providing that the appeal of a fining decision of the PCA does not suspend the effect of that decision is contrary to the Portuguese Constitution.

The Competition Act provides that appeals of fining decisions adopted by the PCA do not have suspensive effect (ie, as a rule, companies that have been 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 (1) does not infringe the right of access to justice, (2) 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 (3) is proportionate to guarantee the effective implementation of fines and prevent fined companies from appealing only to gain time.

The plenary of the Constitutional Court had already declared, in 2018, that a similar provision of the energy sector legal regime was also not against the Constitution.

Ricardo Bordalo Junqueiro
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Ricardo Bordalo Junqueiro rejoined VdA in 2018. Head of Practice Partner of the competition and EU practice, Ricardo regularly works on transactions in the electronic communications, energy, pharmaceutical, financial, media and infrastructure sectors. Ricardo also works on all regulatory matters involving electronic communications. He graduated from the Portuguese Catholic University, Faculty of Law. Ricardo holds a master of laws (LLM) in EU law from the Department of Law, University of Essex, and undertook postgraduate studies in EU competition law at King's College London, University of London. He also attended the advanced programme in regulatory economy and competition at the Portuguese Catholic University's Faculty of Economic and Entrepreneurial Sciences. Before joining VdA, Ricardo was a partner at Cuatrecasas until 2017. Between August 2013 and December 2016, he was of counsel at Cuatrecasas. Between 2002 and 2013, he worked at VdA as a lawyer in the competition and EU groups, actively participating in transactions in the electronic communications, pharmaceutical, infrastructures and postal sectors. Between 2005 and 2006, he was in charge of the VdA office in Brussels.

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