

supplier cannot fulfil its obligation due to objective reasons (as in this case, the pandemic), any sanction applied to the supplier in this regard must be considered unfair. The NCA does agree that the supplier must inform the grocery chain operator about the existence of extraordinary circumstances as soon as possible. Furthermore, the supplier must be able to demonstrate that all reasonable measures were taken to fulfil the respective contractual obligations and that the failure to fulfil the contract was a direct consequence of the pandemic.

Interestingly, the NCA also concluded that even where the supplier has entered into an agreement with a third party (not directly with a grocery chain operator), for example, a provider of distribution services, it is still the responsibility of the grocery chain operator to “ensure that service providers used by grocery chains comply with the Law”, and that the grocery chain operators are “directly liable for actions of its [...] service providers selected by them”.

The underlying message of the Report seems to be a call for equitable sharing of risks and rewards during a period of extraordinary challenges.

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MERGERS

Concentration—ceramic coatings sector—commitments submitted—transaction cleared

👉 Ceramics; Commitments; Mergers; National competition authorities; Portugal

Proposed acquisition of Ferro Corporation by Pigments Spain cleared by the Portuguese Competition Authority (PCA) with commitments

On 28 December 2020, the PCA announced it had cleared the proposed acquisition of Ferro Corporation by Pigments Spain, SL, subject to commitments by the acquiring undertaking. The concentration, which had been notified to the PCA on 12 June 2020, consists of the proposed acquisition of sole control by Pigments Spain, SL, a Spanish company, over undertakings and assets currently owned by Ferro Corporation (Ferro Assets), which is also active in the provision of coatings to the ceramic industry. In October 2020, the PCA opened an in-depth investigation of the merger, since the market investigation suggested that the entity resulting from the transaction could have the ability and incentive to adopt input foreclosure strategies, which could create significant barriers to competition, specifically in the production and supply of enamels, enamelled paints and digital paints, which are deemed to be indispensable inputs to the ceramic floor and tile industry. Pigments Spain submitted commitments, which included the sale to a third party of some of the assets to be acquired from Ferro Corporation in Portugal, to alleviate the PCA’s competition concerns. The competition watchdog considered that the commitments were sufficient, proportionate and adequate and, at the end of December, cleared the transaction.

This transaction was the only concentration authorised by the PCA with commitments in 2020, a year which was also marked by one prohibition decision (referring to a merger in the public passenger road transport market) and several investigations for gun jumping. The latter resulted in the

imposition of a fine of €155,000 for gun jumping on a private Portuguese hospital and the issuing of a statement of objections against a company which is part of the Portuguese financial and insurance group Fidelidade.

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NATIONAL COMPETITION POLICY

*Competition priorities for 2021—
cartels and restrictive
practices—digital economy—
professional mobility and
corporate innovation*

☞ Anti-competitive practices;
Cartels; Competition policy;
Coronavirus; E-commerce;
National competition authorities;
Pandemics; Portugal

First things first: the Portuguese competition watchdog releases its Competition Policy Priorities for 2021

On December 30, the Portuguese Competition Authority (PCA) published its Competition Policy Priorities for 2021 (Priorities). According to the Priorities, the PCA will maintain its focus on the fight against cartel and other restrictive practices, as it intends to consolidate the momentum of its investigations. The PCA will also remain particularly vigilant in its mission of detecting and punishing any other abuses or anti-competitive practices (such as price fixing or market sharing agreements) that may exploit the current situation which, being weakened by the pandemic, affects all levels of the supply chain, including e-commerce. For its 2021 resolutions, the PCA targeted, once again, the digital environment, which was already an enforcement priority in 2020. This comes as no surprise following both the creation in 2020 of an inter-departmental digital task force and, as a result of the COVID-19 pandemic, the boost given to e-commerce and the digitalisation of the economy which, as declared by the PCA, are likely to shift some of the anti-competitive abuse and collusion risks towards e-commerce. Therefore, the PCA will continuously and closely monitor the digital economy (also a policy priority of the European Commission). In this regard, the PCA noted that it will provide support to the Portuguese Presidency of the Council of the European Union on competition matters. On another topic but with the same vigilant promise, the PCA announced economic recovery as one of its top priorities. Accordingly, it intends to focus on and promote the elimination of any structural and legal barriers (already identified by the 2018 OECD/PCA study, for a set of liberal professions) by amending the legislative and regulatory framework, in particular those provisions governing professional mobility and corporate innovation.

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COMPETITION LAW REFORM

Competition law—supply agreements—possible reform to the regulation of parity clauses—detail presently unknown

☞ Anti-competitive practices; Budgets; EU law; National competition authorities; Portugal; Purchase and supply agreements

Expect the unexpected: 2021 State Budget grants the Government the power to amend the Portuguese Competition Act and the legal regime for individual restrictive trade practices

It seems like 2021 is going to be certainly an eventful one for the Portuguese competition law community due to the State Budget for 2021, as surprising as it sounds. The draft State Budget contained two provisions authorising the Government to amend the competition rules and the legal regime for the individual restrictive trade practices, in a way which contradicts the European rules as well as the consolidated decisional practice of the European Commission, the PCA and of the courts. More specifically, the Portuguese Parliament authorises the Government to modify the Portuguese Competition Act by regulating parity clauses in contractual relations between suppliers and their intermediaries. However, the draft State Budget law did not contain any explanation as to why it included competition matters, nor why the competition watchdog was not consulted on the provisions in question. The PCA publicly stated it should have been consulted and it issued, before the final approval of the State Budget, its negative opinion (as the provisions at stake are likely, *inter alia*, to restrict competition, preventing operators from setting more attractive prices to consumers). Although the PCA expressed the view that the provisions should have been removed from the final draft of the Governments Budget Law, the Portuguese Parliament only made small immaterial tweaks to both of the (controversial) provisions. Will the Portuguese Competition Act be amended in the near future? Stay tuned for more developments.

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ANTI-COMPETITIVE PRACTICES

Abuse of a dominant position—services provided by online marketplace platform—preferential treatment to own products—fine—reduction for corrective measures

☞ Abuse of dominant position; E-commerce; Fines; National competition authorities; Online intermediaries; Romania

The Romanian Competition Council fines Dante International SA for abuse of a dominant position

The Romanian Competition Council (RCC) has imposed a fine of approximately RON 32.2 million (€6.7 million) on Dante International SA (Dante) for abuse of a dominant position on the market for intermediation services by online marketplace type platforms, as a result of an investigation initiated in 2017.

Dante is a Romanian company that operates one of the biggest e-markets in Romania, eMAG Marketplace (www.eMAG.ro).

The RCC found that, during the period 2013–2019, Dante abused its dominant position by displaying its own products more favourably to the detriment of the products of its partners that traded on the platform and were its direct competitors.

The RCC stated that as a result of the anti-competitive behaviour of Dante, the offers of the affiliated partners of eMAG.ro were limited, which led to the distortion of the real competition between the product offerings on the platform.