Chambers
AND PARTNERS

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PORTUGAL: An Introduction to Competition/European Law

Chambers Overview for Competition / European Law: Portugal

Following a historical fall in 2020 (-8.4%) due to the negative effects of the pandemic on economic activity, the Portuguese economy registered a growth of 4.9% in 2021, which makes this recovery the fastest in the most recent crises.

At the same pace that the Portuguese economy was showing signs of recovery, the Portuguese Competition Authority (“PCA” or “Authority”) continued with its highly active competition enforcement policy, making 2021 a year with several highlights.

While receiving and handling more than 550 complaints, 2021 continued some trends from the past.

For example, hub-and-spoke practices in the food and retail sector remained at the spotlight of the PCA’s activity. In three different cases, several grocery retailers and three suppliers (beverage companies Super Bock and Sogrape, as well as Bimbo Donuts) were fined €134.8 million for alleged participation in price fixing schemes of retail prices. This global fine represents 97% of the total fines applied by the PCA in 2021.

In November 2021 the Authority issued another statement of objections targeting grocery retailers and a supplier of food, home and personal care products for alleged price fixing in supermarkets. Given the number of ongoing cases, hub-and-spoke practices are expected to continue to be one of the PCA’s enforcement trends in 2022.

Three sanctioning decisions were also adopted against (i) the National Association of Land Surveyors (ANT), fined €50,000 for price fixing in the market of land surveying services (settlement), (ii) Natus Medical Incorporated, fined €100,000 for vertical conduct in the medical device sector (settlement), and (iii) Blueotter and EGEO, fined €2.9 million for allegedly implementing a non-compete agreement in the waste management sector.

Four statement of objections for purportedly illegal horizontal conduct were adopted in sectors such as security and surveillance, addressable TV advertising, private healthcare and sports, the latter being the first case concerning labour markets, involving Portuguese Professional Football League and 31 football teams for implementing an allegedly anti-competitive no-poach agreement at the beginning of the COVID-19 pandemic when all football competitions were suspended.

2021 was a year of unproblematic **mergers** in Portugal. The PCA adopted 53 Phase 1 clearance decisions. However, the simple nature of the transactions should not relax companies of their duty to notify them under merger control rules, as **gun-jumping** cases are on the the radar of the PCA and rising. The PCA made public four gun-jumping investigations and the adoption of three fining decisions imposed to Fidelidade – Sociedade Gestora de Organismos de Investimento Coletivo, SFI Group Gestión de Participaciones Minoritarias and AOC Health. The fines amount in these cases was not particularly high as the PCA understood that there were several mitigating circumstances applicable to the cases, including the fact that, in all of them, the parties voluntarily notified the mergers (even though post-implementation), companies settled (in two of them) and, in one of the cases raising competition concerns, there was voluntary restoration of the pre-existing situation after abandonment of the merger.

The year closed with a statement of objections issued against Santa Casa da Misericórdia de Lisboa (Lisbon's Holy House of Mercy) for implementing a transaction before filing and clearance following an *ex officio* procedure initiated by the PCA.

The **Portuguese Competition Court** was also very active. Trials in two high profile cases were initiated in 2021, regarding an alleged information exchange case involving 11 banks in Portugal that are disputing a total fine of €225 million, as well as an abuse of dominant position case involving EDP Produção, which was fined €48 million. EDP Produção allegedly restricted its supply on the secondary balancing market, having caused a price increase on this market and in the compensation paid to it under the CMEC regime (Custos para a Manutenção do Equilíbrio Contratual).

Three decisions from this specialized court should also be noticed. First, a decision confirming the PCA's fine of €24 million applied to beverage supplier Super Bock for fixing minimum resale prices and other resale conditions in the HORECA channel. Differently, this court partially annulled the PCA's decision condemning Fergrupo and Somafel for alleged bid-rigging in the railway maintenance sector imposing fines and an ancillary ban on the right of these companies to participate in certain public procurement tenders. The court reduced the amount of the fines and annulled such an ancillary penalty.

Finally, in a price fixing case involving the Portuguese Association of Driving Schools (APEC) the Competition Court reduced the fines applied by the PCA but, on appeal, an unprecedented ruling by the Lisbon Court of Appeal increased the fines set by the former.

December brought several **legislative and institutional developments.**

Although several changes to the Competition Act are under discussion in Parliament within the context of the transposition of ECN+ Directive, the Portuguese Competition Act has been amended in the meantime, affecting particularly the tourist accommodation sector.

In the context of EU debates on digital platforms, article 9 of the Portuguese Competition Act (the national equivalent to article 101 of the TFEU) now expressly includes under its prohibited practices list the case of best-price clauses agreed between intermediaries operating through digital platforms and providers of tourist resorts or homestays' goods or services.

The PCA implemented revised Merger Notification Forms, reducing and simplifying the information and establishing fully an electronic merger control procedure. Aligned with this digitalization trend, a new electronic platform for the submission of documents in the context of antitrust proceedings (STEP) was also launched, aiming to streamline stakeholders' interaction with the PCA.

Private enforcement of competition law is recently and steadily rising in Portugal, highly driven by consumer protection associations like Ius Omnibus.

Several class actions were filed before the Portuguese courts, seeking impressive amounts for damages against, *inter alia*, the following companies: EDP Produção (CMECs case), Apple (misleading advertisement regarding iPhone 7-12 models' resistance to liquids), Stellantis/Fiat Chrysler Automobiles and Daimler/Mercedes-Benz (illegal devices that manipulated pollutant emissions).

Following the PCA's settlement decision involving ANT, the Competition Court approved the first settlement reached with a consumer protection association, under which ANT agreed to compensate the consumers in the amount of 5% of the gross price paid for the services rendered.

Follow-on cases relating to the Commission's decision in the Trucks case (AT. 39824) are still ongoing before the Competition Court.

The challenges of the COVID-19 pandemic continued to translate into a growth of **state aid cases** and demanded increased attention to a fast-developing decisional practice of the European Commission. Most notable cases refer to the state aids to the national airline TAP Portugal and regional airline SATA Air Açores. TAP closed the year obtaining an approval of its restructuring plan, comprising €2.55 billion of restructuring aid, together with COVID-19 damage compensation state aids totalling €178.4 million. The Commission had already cleared the granting of COVID-19 damages to TAP and SATA earlier in the year, in the amounts of €462 million and €12 million, respectively. A formal investigation was also opened to the notified restructuring plan of SATA Air Açores.

In addition, the EC approved 13 Portuguese state aid schemes in 2021 to support enterprises affected by the pandemic, particularly micro and SMEs, and to preserve employment most of which were directed to the outermost regions of the Azores, with a total budget of circa €255 million, and Madeira, with a total budget of circa €22.3 million.