



The European, Middle Eastern and African Antitrust Review 2019

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The European, Middle Eastern and African Antitrust Review 2019

A Global Competition Review Special Report

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GLOBAL COMPETITION REVIEW

The European, Middle Eastern and African Antitrust Review 2019

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Global Competition Review is delighted to publish 2019 edition of *The European, Middle Eastern & African Antitrust Review*, one of a series of three special reports that have been conceived to deliver specialist intelligence and research to our readers – general counsel, government agencies and private practice lawyers – who must navigate the world’s increasingly complex competition regimes.

Like its sister reports, *The Antitrust Review of the Americas* and *The Asia-Pacific Antitrust Review*, *The European, Middle Eastern & African Antitrust Review* provides an unparalleled annual update, from competition enforcers and leading practitioners, on key developments in the field.

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 of 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 over the coming year.

Global Competition Review

London

June 2018

Portugal: Overview

Miguel Mendes Pereira and João Francisco Barreiros
Vieira de Almeida

For the Portuguese Competition Authority (PCA), 2017 marked its 15th anniversary. It was also the first full year of the mandate of its president Margarida Matos Rosa, who was appointed in November 2016.

The current PCA board has put the detection, investigation and sanctioning of restrictive practices (in particular on an ex officio basis) at the top of the PCA's priorities. Fully consistent with this goal, the watchdog was particularly active on the antitrust front during 2017. From January until July 2017, 36 undertakings were raided, most of them in the retail distribution sector. The fight against bid-rigging in public procurement and the promotion of antitrust compliance by associations of undertakings also deserved the PCA's attention.

In the field of merger control, gun jumping topped the list. In 2017, for the second time ever, the PCA imposed a fine in connection with the breach of the stand-still obligation. While the number of merger notifications and decisions decreased vis-à-vis 2016, the PCA was still quite busy with three challenging deals which resulted in Phase II investigations, in the sectors of payment systems, free-to-air TV and gas distribution.

The International Competition Network Annual Conference was hosted by the PCA in May 2017 in Porto. The event was attended by over 500 high-level representatives from approximately 100 jurisdictions and international organisations, including European Commissioner for Competition Margrethe Vestager.

Institutional developments

The new board of the PCA has promised to step up the pace of enforcement in Portugal. The available information to date shows that it has generally succeeded in doing so during 2017.

The PCA committed to launch, ex officio, 15–20 per cent of all new antitrust investigations in 2017. In order to achieve this goal, it signed a memorandum of understanding in November 2017 with the Institute for Public Procurement, Real Estate and Construction, whereby the PCA is granted direct and permanent access to the national public procurement database as of 2018. In Portugal, public procurement procedures are fully processed on electronic platforms. Direct access to this information will not only increase detection of bid-rigging in public procurement but also presumably make investigations swifter. So much so that in April 2018 the PCA's chairwoman, Margarida Matos Rosa, announced that the PCA was investigating six cases under this new arrangement (including one related with railway maintenance).

In June 2017, the PCA launched the online Complaint Portal. The purpose of the portal is to assist the public in reporting anti-competitive behaviour, namely cartels, abuses of dominance and gun jumping cases. Accordingly, it ensures that all complainants remain anonymous. The portal provides information on the type of practices prohibited by the Portuguese Competition Act, as well as about the leniency programme.

Before the end of 2017, the PCA saw its enforcement monopoly at risk. A report commissioned by the government on the reform of the financial supervision model addressed the relationship between different regulators with powers over the financial sector. One of the proposed measures is the creation of the Board of Financial Supervision and Stability to ensure that information exchange and coordination follow a single set of rules. The working group suggests that the new agency should be given specific powers in the field of competition law, namely the investigation of anticompetitive practices in financial markets. These proposals have been met with scepticism by a number of practitioners, to whom the coexistence of two agencies with overlapping or complementary powers appears confusing. As expected, the board of the PCA has also expressed dissatisfaction at the prospect of losing part of its powers. Developments in 2018 are expected.

Legislative developments

On 20 April 2018, Portugal finally transposed the Private Enforcement Directive (Directive 2014/104/EU) (the Directive). The first draft of the bill was prepared by the PCA at the request of the Ministry of the Economy and was submitted to a public consultation, which was widely participated.

In the meantime, on 15 November 2017, the first request for a preliminary ruling concerning the applicability of the Directive was submitted by the Lisbon Civil Court to the EU Court of Justice. The case concerns the application of the Directive to an action filed in Portugal by Cogeco Communications against Sport TV Portugal, by which the applicant seeks compensation for damages, following a decision of the PCA applying a fine for abuse of dominance to Sport TV in connection with its policy for the sale of premium sports content to pay-TV platforms. The referral seeks to clarify whether the Directive applies to proceedings started before the expiry of its transposition period with reference to facts that occurred prior to its entry into force.

In May 2017, the PCA launched a public consultation on draft guidelines on how to treat confidentiality claims, a topic that has constituted matter of concern for practitioners in Portugal for a while. The treatment of confidential information in antitrust proceedings has been at the root of many disputes between investigated undertakings and the PCA, most notably over access to file. The final version of the guidelines had not yet been disclosed by the end of April.

Case law

Antitrust

The PCA has been dedicating a significant amount of resources 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 on the promotion of competition for associations of undertakings. 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. In 2017, the PCA concluded three investigations regarding collusive behaviour adopted by associations and by its members, which are briefly described below.

In addition, the PCA conducted two sector inquiries into the bottled gas and natural gas markets, the reports of which were published in 2017. In both reports, the PCA identifies significant barriers to entry and expansion in the markets for the distribution of gas.

PCA fines price-fixing cartel in the driving school market

On 28 September 2017, the PCA adopted a decision imposing a fine on the Portuguese Association for Driving Schools (APEC) and its president, in the total amount of €413,776, for restricting competition in the market for driving schools by fixing a minimum price for driving licenses.

The investigation was launched following a complaint and involved the raid of some of the members of APEC. The PCA found evidence that substantiated the alleged infringement, and on 27 July 2017 adopted a statement of objections. Two months later, after analysing the responses of the addressees, the PCA adopted its decision. It found that the illegal price-fixing conduct had started in 28 September 2016 and that it had been implemented by more than 170 schools, thereby preventing the members of the APEC from setting more competitive prices. As a result, the conduct deprived consumers of a wider choice and of the ability to negotiate prices.

The PCA concluded that by setting minimum prices, APEC had significantly harmed competition in the market for driving licenses in the Great Lisbon and Setúbal areas. It fined APEC but also its president, having found that the latter knew about the practice and did not take any action to either prevent or stop it.

Associations of undertakings commit to limit information exchanges

In the last quarter of 2017, the PCA closed two investigations against two associations and their respective members, in respect of alleged exchanges of sensitive information between competitors.

In April 2015, the PCA opened proceedings against the Portuguese Association of Specialised Credit Providers (ASFAC) and 37 of its members. The investigation revealed the existence of a system for the exchange of information related to several products and services, organised by ASFAC and involving the associated companies.

Also in April 2015, the PCA opened proceedings against the Portuguese Association of Leasing, Factoring and Renting (ALF) and its members. The investigation revealed that ALF had directly promoted among its members the use of a system for the exchange of sensitive strategic information related to several products and services.

The type of information, its date, the level of disaggregation and the target of the exchanged information led the PCA to conclude that the systems developed by both ASFAC and ALF had likely reduced uncertainty in the markets, allowing participants to act in the possession of sensitive information about competitors, as well as to frequently monitor their strategic behaviour.

In response to these concerns, both associations presented commitments aimed at reducing the strategic value and the restrictive potential of the information exchange. They committed not to disclose recent individualised data to its members and to provide the exchanged data to any entity which requests them in order to prepare for market entry.

The PCA made the commitments binding on ASFAC by decision of 6 November 2017 and on ALF by decision of 21 December 2017.

In both cases, the investigations concerning the association members were closed for lack of evidence.

Sector inquiries reveal significant barriers in bottled and natural gas markets

Further to two sector inquiries on the distribution of gas in Portugal, the PCA published in 2017 two follow-on reports. The first report was published in March 2017 and focuses on the industry of bottled liquefied petroleum gas (LPG). The second one was published in October 2017 and focuses on the supply of natural gas to industrial consumers. The PCA characterises both markets as highly concentrated, with Galp being the main player in both. High barriers to entry and to expansion are yet another feature. The PCA found that this scenario may be hindering the performance and competitiveness of the supply of gas to Portuguese customers and industries.

The report of the PCA on the bottled LPG market shows that the industry is concentrated in a small number of market players (Galp, Rubis, Repsol, OZ Energia and Prio), whose positions in the market are consolidated, stable and remain generally unthreatened. Since September 1990, only two companies entered the market, Repsol and Prio. All these factors led the PCA to conclude that there is a lack of competitive pressure in the market.

Galp, as the market leader, enjoys a position of relative power: it owns the two sole refineries in the country and holds the majority of the storage capacity in the country. In addition, together with Repsol and Rubis, Galp owns the entire share capital of the Sines and Perafita storage facilities, two out of the three most important storage infrastructures in Portugal. Storage is one of the key factors for competition in the sector and its price varies depending on access to maritime imports.

Concerned with the high level of concentration, the PCA issued a series of recommendations in its report. Notably, it suggests that the government extends the status of public interest granted to the storage facilities of CLC – Companhia Logística de Combustíveis – SA to the facilities of Sigás (in Sines) and Pergás (in Perafita), thereby guaranteeing the negotiated access of all players.

The sector inquiry on the distribution of natural gas indicates that the competitiveness of Portuguese industries may be suffering from high barriers to entry and to expansion in the market for the supply of natural gas. Gas represents an important share of the cost structure of Portuguese industries and the price in Portugal is consistently among the highest of the 28 member states of the EU.

The PCA found that there is a high degree of concentration in the market, with two main operators accounting for more than 70 per cent of the market: Galp, the historic importer of natural gas in Portugal, which is still the market leader, and EDP. Other barriers include the general increase in network access costs and import costs in 2013–2014, which coincided with the strengthening of the trading activity of EDP, and the lack of integration between the Portuguese and Spanish markets (resulting, among others, in the double application of transmission network access tariffs in the cross-border trade between the two countries).

The combined effect of these bottlenecks was the restriction of the ability of retailers to import natural gas through pipelines at competitive prices and the limitation in the use of the Sines liquefied natural gas (LNG) terminal, which in turn affected the price paid for natural gas by industrial clients and, consequently, the performance of the Portuguese natural gas system as a whole.

In order to remedy these concerns, the PCA made a series of recommendations, including:

- the strengthening of intergovernmental cooperation between Portugal and Spain; and
- the adoption of measures by the Portuguese Energy Services Regulator (ERSE) aimed at fostering the use of the LNG terminal in Sines by small-scale operators.

Mergers

In 2017, 47 transactions were notified to the PCA and a total of 51 decisions were adopted: 49 clearance decisions, one decision of inapplicability of the Portuguese Competition Act and one decision closing proceedings after the parties withdrew the notification.

A great share of the merger control activity of the PCA in 2017 was allocated to three Phase II cases: *SIBS/Ativos Unicre*, *Rubis/Ativos Repsol* and *Altice/Media Capital*.

Possible monopoly in payment services

The first case concerned the acquisition of exclusive control by SIBS over a number of assets of UNICRE. Both parties are active in the payment services and the issuance of payment cards sectors.

In December 2016, the PCA expressed concerns about a possible monopoly in the Portuguese payment systems sector further to the concentration and consequently opened a Phase II investigation. In July 2017, after more than six months of in-depth investigation, the parties chose to withdraw the notification, claiming that the demands of the PCA to clear the deal were disproportionate.

According to press reports, SIBS and UNICRE strongly disagreed with the PCA on a number of issues, including a narrow definition of the relevant geographic market.

Three-to-two merger in LPG distribution market under in-depth scrutiny

On 28 September 2017, Rubis notified to the PCA the acquisition of assets which are part of the LPG distribution business of Repsol in the Portuguese autonomous regions of Azores and Madeira.

In the Portuguese archipelagos, LPG is distributed through pipelines, in bulk, but mostly in bottles. Currently, there are three operators active on the islands: Galp, Repsol and Rubis. As a result of the merger, the number of operators in the markets would shrink to two.

On 23 January 2018, concerned with the reduction of competitive constraints, the PCA decided to open a Phase II investigation. Clearance will depend on whether the PCA considers that the operation, as notified or as a result of commitments possibly offered by Rubis, is likely to create significant barriers to competition in the relevant markets.

Vertical integration between major telecom player and media leader heats up

On 11 August 2017, Altice filed with the PCA the notification of a proposed concentration by which it proposed to indirectly acquire, through its subsidiary MEO, most of the share capital of Grupo Media Capital (GMC) from Vertex. On 15 February 2018, seven months after notification, the PCA decided to open an in-depth investigation.

Altice is a multinational cable and telecommunications company which in 2015 acquired MEO, a Portuguese telecommunications and multimedia operator with activities extending across all telecommunications segments in Portugal. The proposed transaction would result in the vertical integration of MEO with GMC, a company active in the communications, advertisement and entertainment industries. GMC controls:

- Plural Entertainment, the main producer of television content in Portugal;
- the free-to-air TVI channel, the television network leader in terms of audience share and the main platform for advertisement in Portuguese free-to-air television;
- radio stations Rádio Comercial, M80, Cidade FM, Smooth FM, and Rádio FM;
- the internet-based TVI Player platform; and
- IOL, one of the leading web portals in Portugal.

The proposed transaction would thus combine one of the leading providers of telecommunications, pay-TV and multiple-play services, MEO, with the leading provider of television content and free-to-air TV channels in Portugal, Media Capital.

The PCA concluded that there are strong indications that the acquisition of Media Capital by Altice could give rise to significant impediments to effective competition in several markets. These concerns were amplified by competitors NOS, Vodafone, Impresa, ARTelecom, Nowo and Cofina, all of which intervened in the process as interested third parties.

Both the National Communications Authority, the communications regulator, and the Regulatory Entity for Social Communication, the media regulator, identified a number of potential concerns capable of significantly impeding effective competition in different electronic communications markets. One of the main arguments put forward was that the merged entity would be capable of engaging in total or partial input foreclosure strategies, by denying or making more difficult the access to content, to television and radio channels, as well as to advertisement space. Post-transaction, the merged entity could have the ability to deny the access of MEO's competitors in the downstream markets for pay-tv and multiple-play services, namely NOS and Vodafone, to the television channel TVI, one of the most watched television channels in Portugal. Similarly, MEO could deny or make more difficult the access by downstream competitors to the advertisement slots of TVI. These concerns likely correspond to the PCA's preliminary theories of harm. In the course of its in-depth investigation, the PCA will certainly discuss with the parties potential remedies. The case is closely followed in the Portuguese parliament by the main political parties and a final decision is expected in the course of 218.

PCA fines Vallis for failure to notify merger

On 27 December 2017, the PCA fined Vallis Sustainable Investments I, Holding Sàrl and Vallis Capital Partners, SGPS, SA – private-equity funds operating in the Iberian market – for failure to notify its acquisition of the 32 Senses' network of dental care clinics to the PCA. The PCA found that the transaction met the jurisdictional thresholds provided for by the Portuguese Competition Act and that, as such, its implementation was conditional on a prior clearance decision.

The parties ultimately notified the concentration during the proceedings. They confessed the facts and assumed their liability for the failure to notify. The PCA imposed a fine in the amount of €38,500.

In determining the amount of fine, the PCA took into consideration Vallis group's turnover in 2016, and other relevant facts, namely that:

- the failure to notify was reported by the parties;
- the parties voluntarily notified the transaction and that accordingly all of Vallis' voting rights on the target were suspended;
- the transaction did not raise any competition concerns; and

- the parties fully cooperated with the PCA during the investigation.

This is the second time that the PCA imposed fines on undertakings for failing to notify mergers subject to prior notification. The first occurred on 26 June 2014, when the PCA fined three undertakings in the pharmacy sector (Farminveste 3 – Gestão de Participações, SGPS, Lda, Farminveste – Investimentos, Participações e Gestão, SA and Associação Nacional de Farmácias).

Judicial review

Lisbon Court of Appeal confirms reduction of fine on envelope producers

On 17 October 2017, the Lisbon Court of Appeal confirmed the PCA's decision of November 2016 fining five paper envelope producers and distributors. On appeal, the Competition, Regulation and Supervision Court (TCRS) had already confirmed the PCA's decision, although it reduced the fine imposed on one of the applicants, Firmo.

The PCA investigation revealed that between 2007 and 2010, Tompla, Antalis, Papelaria Fernandes and Firmo – approximately 60 per cent of the market – colluded in the Portuguese market for paper envelopes, by aligning bidding prices to artificially determine the winner of tenders launched by customers.

Tompla and Copidata, both part of the same economic group, blew the whistle and were accordingly granted immunity under the leniency programme. Papelaria Fernandes was not punished either, on the account that at the time of the decision, it had no business turnover. Therefore, only Antalis and Firmo were fined by the PCA, €440,000 and €160,000 respectively.

The fine imposed on Firmo was reduced by the TCRS to €50,000, but Firmo appealed further. The Lisbon Court of Appeal adopted a final decision on the case, confirming the reduced fine.

Court confirms fine on Ford Lusitana for providing incomplete information

On 13 October 2017, the TCRS confirmed the decision of the PCA of 15 September 2015 imposing a €150,000 fine on Ford Lusitana SA for providing incomplete information.

The PCA sent Ford Lusitana a request for information regarding the limitations to contracts extending motor-vehicle warranties. Ford Lusitana replied with information and documentation regarding the warranties it provided. However, the PCA found out later that Ford Lusitana had failed to deliver documentation regarding some of its warranty contracts. In April 2015, the PCA opened proceedings against Ford Lusitana for providing false, inaccurate or incomplete information, which culminated in a fine of €150,000. A similar fine was imposed on the same year to Peugeot Portugal Automóveis, SA, which was also found by the PCA to withhold certain requested information.

On appeal, the TCRS dismissed Ford Lusitana's arguments, confirming that the applicant had provided incomplete information in response to the request of the PCA. The Court considered that the company had acted with *dolus eventualis* and was aware of its illegal conduct.

State aid

The financial crisis hit the Portuguese financial system hard, with four banks being recapitalised since 2012, one bank being resolved in 2014 and another one in 2015.

In July 2014, Banco Espírito Santo (BES), one of the largest private banks in Portugal, came under intense pressure after announcing losses amounting to €3.57 billion; this ultimately led to the suspension of securities transaction on 1 August 2014, after its shares nosedived by 49.7 per cent. Simultaneously, the bank ceased to fulfil the solvency ratios, and thus the ECB suspended its access to the Eurosystem's liquidity and urged the bank to repay close to €10 billion. Events progressed at lightning speed, and following a weekend of intense speculation, BES was ultimately resolved during the night of Sunday 4 August 2014, to curtail systemic risks. The resolution encompassed transferring BES's sound assets to a bridge-bank, Novo Banco (NB), which was capitalised by the Portuguese Resolution Fund with €4.9 billion. This was the first resolution of a European bank to take place after the publication of the Bank Recovery and Resolution Directive.

In August 2014, Portugal notified to the European Commission State aid measures to resolve BES. In that context, Portugal offered a set of commitments, namely selling NB within 24 months.

Thus, in December 2014, the Bank of Portugal (BoP) made attempts to sell NB on market terms through an open, transparent, non-discriminatory and competitive selling process. Despite the submission of three binding offers, all attempts eventually botched and in September 2015 the sale process was put to a halt. Portugal negotiated with the European Commission an extension of the deadline to sell NB, which was approved in December 2015.

In January 2016, the BoP went on to launch a second selling process which culminated in an agreement with Lone Star, a private-equity firm, in March 2017. Under the agreement, Lone Star acquires 75 per cent of NB's shares in exchange for a capital injection of €1 billion at the closing of the transaction and a further capital injection of €250 million within three years, as well as the commitment to implement an in-depth restructuring of the bank. In turn, the Portuguese Resolution Fund agreed to:

- inject capital of up to €3.89 billion, in case NB's capital ratio falls below a threshold due to losses on a legacy asset portfolio; and
- subscribe Tier 2 capital instruments, if the issuance cannot be completed successfully from private means.

By decision of 11 October 2017, the European Commission approved the sale of Novo Banco under state aid rules. It concluded that BES' shareholders already contributed fully to the costs of BES resolution, as required by the burden-sharing rules, and that the restructuring plan submitted by Portugal and Lone Star was sufficiently far-reaching and included several measures to prevent distortion of competition.

With the sale of NB to Lone Star, also approved by the Commission under the EU Merger Regulation, the 2014 resolution of BES reached its final stage.



Miguel Mendes Pereira
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He is the author of various articles and publications, including the *Commentary to the Portuguese Competition Act* (2009), and speaks regularly at conferences and seminars.

His work has also been recognised by the most important international rankings, including *Chambers Europe*, *The Legal 500* and *Who's Who Legal*, all of which rate Miguel Mendes Pereira as a leading and recommended lawyer.



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He joined Vieira de Almeida in 2015 and is currently a trainee in the competition and EU practice, where he has been actively involved in several transactions in a wide range of sectors, notably telecommunications and air transportation. He regularly advises clients in a broad range of antitrust subjects before both the Portuguese Competition Authority and the European Commission.

Before joining the firm, he was a trainee in the competition law team of the European Commission's Legal Service. João also worked in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP, both as a trainee and as an associate lawyer. During his studies in Lisbon, he concluded a traineeship at the merger control department of the Portuguese Competition Authority.



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