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Portugal: Overview

Miguel Mendes Pereira

Vieira de Almeida & Associados

After the entry into force of a new Competition Act in 2012, 2013 saw a new president and a new board of the Portuguese Competition Authority (PCA) being appointed. In 2014 the government approved the new by-laws of the Competition Authority, further to the adoption of a framework law applicable to all regulators. The past few years show that the Authority took up the challenge of totally renewing its institutional armour as it celebrated its 10th anniversary in 2013. It is now fully geared up and curiosity runs high to see how much die-hard enforcement will benefit from these changes.

In the antitrust field, football broadcasting rights and exchange of information in the banking sector were in the spotlight.

On its turn, merger activity resumed as the general economic situation improved and Portugal successfully completed its Economic Adjustment Program agreed in 2011 with the European Commission, the European Central Bank and the International Monetary Fund.

Privatisations proceed according to schedule, most notoriously with the privatisation of TAP Air Portugal.

Institutional developments

The main legislative development in the competition field was the approval of the PCA's new by-laws. The impact of the new legislation, however, is to be felt mainly within the Authority since most of the new provisions concern purely internal matters.

The new by-laws aim at increasing the independence of the PCA by means of, inter alia, clarifying and consolidating its financing mechanisms. The demand for greater independence and increased legal certainty as regards its financing resulted from the Economic Adjustment Programme which Portugal agreed with the International Monetary Fund, the European Central Bank and the European Commission.

The main question for practitioners was whether the new bylaws would maintain the heavily criticised possibility of the government overturning a merger prohibition decision adopted by the PCA. The possibility was indeed maintained by means of an extraordinary appeal lodged with the Minister for Economic Affairs. The decision, however, must be taken by the Council of Ministers.

Case law

Antitrust

Commitments in football broadcasting rights and advertising

In December 2014, the PCA used for the first time the possibility offered by the 2012 Competition Act to submit commitments in an antitrust case to public consultation. The possibility for the PCA to close an antitrust case on the basis of commitments without declaring the existence of an infringement is itself a novelty brought about by the 2012 Competition Act.

The PCA opened in 2013 an investigation on the contractual model used by the Controlinveste Group to license broadcasting and multimedia rights for football matches of the First and Second

Portuguese Football Leagues, as well for advertising within the stadiums. The PCA considered that the agreements implied the risk of foreclosing the markets as the result of excessive duration and first refusal rights.

Controlinveste committed not to include in future agreements clauses providing for:

- exclusivity for more than three years;
- a first refusal right for seasons beyond the term of the agreement; and
- the suspension of the contract resulting in practice in a duration of the agreement beyond three years.

As regards agreements in force which did not comply with the commitments, Controlinveste granted football clubs of the First and Second League:

- the right to terminate ongoing contracts as from the end of the 2015/2016 season without any penalty;
- the right to waive the first refusal right; and
- the right to revoke the suspension clauses.

In June 2015 the PCA accepted the commitments and closed the case.

Commitments by Peugeot in guarantee case

In June 2013, the PCA opened an investigation on the contracts offered by Peugeot Portugal to its customers, pursuant to which they would lose the right to the manufacturer's guarantee in case they took their cars for maintenance or repair to independent repair shops. In December 2014 the PCA submitted Peugeot's commitments to public consultation.

Peugeot committed to:

- change all the agreements and documents preventing customers from taking their cars to independent repair shops for maintenance or repair operations without losing the right to the manufacturer's guarantee; and
- convey to its network of dealers and licensed repair shops the inexistence of restrictions to the possibility of customers taking their cars to independent repair shops for maintenance or repair operations and the subsistence of the manufacturer's guarantee in all cases.

In March 2015 the PCA accepted Peugeot's commitments and closed the case.

€9.3 million fine in the bottled LPG market

Following a statement of objections issued in May 2014, the PCA adopted in February 2015 a decision fining three subsidiaries of Galp Energia, a market leader in the Portuguese energy sector, €9.29 million for abuse of dominance in the Portuguese market for bottled liquefied petroleum gas (LPG). This market is estimated at €330 million per year. The practices of Galp Energia consisted in

the prohibition of passive sales through the allocation of a certain territory to each of its distributors and the restriction of sales outside it. The PCA considered that those practices limited intra-brand competition and consequently seriously restricted competitive pressure on distributors. The practices in question occurred in mainland Portugal as well as in the Azores and Madeira, and lasted for at least 15 years in the case of one of the subsidiaries.

SO issued to 15 banks

In March 2013, the PCA carried out dawn raids at 15 banks on grounds of suspicions related to exchanges of sensitive information. The investigation was triggered by a leniency application from the London offices of Barclays, followed by a second leniency application by Montepio.

According to press reports, the following banks are under investigation: Barclays, Santander Totta, Banco Espírito Santo, Caixa Geral de Depósitos, Banco Comercial Português, BPI, BIC, Montepio, Banif and Caixa de Crédito Agrícola. This was the first dawn raid publicly reported since the new Competition Act entered into force in July 2012.

The Competition Authority sent statements of objections to the banks in June 2015. A major legal battle is expected to take place around access to file and the search and seizure powers of the PCA, which the new Competition Act has strengthened in some respects. Serious constitutional questions hang over the seizure of e-mails which the 2012 Competition Act did not solve.

Mergers

The economic and financial crisis took its toll on mergers and acquisitions in Portugal throughout these past years. However, the 'clean exit' of Portugal in 2014 from the Economic Adjustment Program agreed in 2011 with the European Commission, the European Central Bank and the International Monetary Fund, and the significant improvement in the conditions of access by the country to financial markets led to an overall enhancement of the economy. Business activity picked up and the first sign thereof was the increase in the number of M&A operations. The merger control department of the PCA became busy once again and the number of decisions increased accordingly. Two cases in particular deserve a more detailed comment.

Private health care services: the battle for Espírito Santo Saúde

Further to the resolution of Banco Espírito Santo in August 2014 and the insolvency proceedings of the Espírito Santo Group, a number of business units of the group were put on the market for sale, including Espírito Santo Saúde (ESS), a leading private health-care provider in Portugal which had been listed in the Portuguese Stock Exchange in February 2014, a scarce five months before the battle started.

The battle for ESS involved three public acquisition offers and a private offer, and was fought by four groups: José de Mello Saúde (JMS), another leading private health-care provider in Portugal, the Mexican conglomerate Ángeles, the American group Unitedhealth and Fidelidade, a major Portuguese insurer which had been bought just a few months before by the Chinese Fosun group for €1,65 billion. Both JMS and Unitedhealth were present in the Portuguese health-care markets, but only JMS could face serious competition concerns by the PCA owing to its network of hospitals, which would lead to significant overlaps. The Mexican group Ángeles had no presence in Portugal and Fidelidade was present only in the upstream market for the provision of insurance services.

Two other entities ended up playing a decisive role: the PCA and the Securities Commission.

The PCA faced requests from several parties to clarify its position in respect of the definition of the relevant markets for the provision of health-care services. Previous decisions by the PCA were far from clear as regards two decisive points: first, whether public and private health-care providers belonged to the same relevant market (ie, whether public health-care facilities should be taken into consideration when calculating market shares), a question the answer to which could imply a dramatic difference in terms of the outcome of the competitive assessment. Second, which parameters should be used to calculate market shares: number of facilities, number of beds, number of medical interventions (surgeries, etc) or turnover. Further questions loomed as to whether health-care services should be considered according to the sort of admission granted to patients (day patients, inpatients or outpatients) and whether services should be regarded individually or in bundles according to common requirements in terms of equipment. The PCA did not manage to clarify its position beforehand but could limit itself eventually to reply only to the less problematic questions since its final decision only concerned Fidelidade which faced mostly vertical rather than horizontal issues.

On its part, the Securities Commission had a decisive intervention when, in the midst of three public acquisition offers and one private offer, it was required to rule on how to reconcile the pace of the offers in the Stock Exchange with the standstill obligation pending approval by the PCA. The Securities Commission would not suspend all offers until the PCA ruled on the concentrations at stake, causing the parties most likely to face remedies imposed by the PCA to drop out of the race, as was the case with JMS. The Securities Commission also ruled out the private offer by Unitedhealth, leaving only Fidelidade and Ángeles in the race. The €5.01 per share offered by Fidelidade/Fosun eventually prevailed.

On 19 December 2014 the PCA cleared the acquisition of ESS by Fidelidade.

Outdoor advertising: JCDecaux carves out Portugal

On 2 May 2014, JCDecaux, the worldwide leading player in outdoor advertising, notified the PCA of its intention to acquire sole control of Cemusa, the Spanish company which holds, among others, the concession for outdoor advertising in New York city. In Portugal the companies were, respectively, number 1 and 2 in the market. The transaction was notified in Portugal and in Spain.

A fierce opposition to the transaction was conveyed to the PCA by complainants, most notoriously by the Association of Portuguese Advertisers and by MOP, the third player in the Portuguese market. Their main argument was that the merger would lead to market shares above 70 per cent in some instances.

JCDecaux tried to convince the PCA that all possible means for advertising (from billboards to the internet, from newspapers to TV or radio) were part of the same relevant market. Following the same line defined by itself, the European Commission and other national competition authorities in previous cases, the PCA remained sceptical and on 7 August 2014 opened an in-depth investigation.

In order to address the concerns expressed by the PCA, JCDecaux submitted two packages of remedies on 10 February and 10 March 2015, neither of which was accepted by the PCA. On 18 March 2015, JCDecaux withdrew the notification. Given that the deal had been approved in Spain by the Spanish Competition Authority and was pending approval from US authorities,

the withdrawal was regarded as a carve-out of the Portuguese subsidiary of Cemusa from the global transaction.

Portugal Telecom changes hands

In yet another turn caused, at least in part, by the insolvency of the Espírito Santo Group, the control over Portugal Telecom (PT) changed hands twice in less than two years. A mega merger that was supposed to combine PT's assets with those of Brazilian Oi aborted in the midst of acrimony and French group Altice seized the opportunity.

On 20 April 2015, the European Commission approved the acquisition of PT by Altice. However, the Commission was concerned that the merger would reduce competition in several telecommunications markets in Portugal as it would have removed a strong competitor from these markets. To address these concerns and avoid overlaps, Altice committed upfront to sell its other existing assets in Portugal: Cabovisão, a pay-TV provider, and Oni, a smaller telecom operator.

The Commission refused to refer the merger to the PCA under article 9(2) (a) and (b) of the EU Merger Regulation given the need to ensure consistency in the application of merger control rules to telecom mergers throughout the EU.

Judicial review

Abuse in the premium sports channels market

In June 2013, Sport TV was fined €3.7 million for abuse of its dominant position in the Portuguese market for premium sports television channels. The PCA considered that Sport TV had put in place a remuneration system for the distribution of its channels that seriously discriminated between different pay-TV operators between 2005 and 2011.

Sport TV subsequently appealed to the Competition, Regulation and Supervision Court (Competition Court), which in June 2014 confirmed the PCA's decision, though reducing the fine to €2.7 million. Sport TV appealed yet again and on 11 March 2015 the Lisbon Court of Appeal, serving as court of last instance, dismissed the appeal in its entirety and confirmed both the abusive nature of the conduct and the fine.

The recently created Portuguese Observatory for Competition announced in March 2015 that it had brought a (unprecedented) class action against Sport TV, which seems to indicate that the company's challenges are far from over.

Association of Chartered Accountants

On 28 February 2013, the ECJ delivered a preliminary ruling on the question of whether mandatory training by an association of professionals could infringe competition rules.

The PCA considered that a regulation issued by the Association of Chartered Accountants (OTOC) constituted an infringement of both national and EU competition rules insofar as it constituted a decision of an association of undertakings that had as its object or effect the restriction of competition within the internal market.

Under the contested regulation, chartered accountants had to attend paid-for mandatory training classes and OTOC reserved the right to exclusively supply one-third of the required training. At the same time, OTOC also determined discretionary criteria for the selection of other training providers and for the approval of their training courses. OTOC was fined €90,000 by the PCA.

The decision by the PCA was subject to a sequence of appeals until the Lisbon Court of Appeal eventually referred a number of questions to the ECJ. The ECJ found that the disputed regulation indeed eliminated competition in favour of OTOC in a substantial part of the relevant market, and imposed discriminatory conditions on the remaining providers of training courses. The Lisbon Court of Appeal subsequently confirmed the ruling of the first instance court on 7 January 2014 and the Constitutional Court eventually rejected the appeal which was the last judicial remedy available to OTOC.

Merger in sports broadcasting

The Competition Court upheld the decision by the PCA to prohibit the entry of Portugal Telecom in the capital of Sport TV which is controlled by two Portuguese media groups (Controlinveste Media and NOS). Sport TV is the leading provider for pay-TV premium sports channels in Portugal.

Back in March 2013 the PCA decided to open an in-depth investigation further to the notification of the new joint control scheme of Sport TV as projected by the parties. The PCA considered the commitments submitted by the parties as insufficient and in July 2014 prohibited the transaction as it considered that it could lead to customer foreclosure, input foreclosure and coordinated effects in the markets for sports broadcasting, premium sports pay-TV channels and downstream markets.

In the action brought before the Competition Court, the companies sought to have the decision by the PCA to initiate a Phase II investigation declared void as they considered that the PCA had missed a deadline and that consequently the transaction had been tacitly approved. In January 2015 the action was dismissed in its entirety by the Competition Court.

Privatisations

As part of the memorandum of understanding entered into with the European Commission, the European Central Bank and the International Monetary Fund in 2011, Portugal committed to proceed with the privatisation of a number of state-owned enterprises. The privatisations tend to be closely scrutinised by the European Commission under merger control, state aid and occasionally (as is the case with airlines) antitrust or ownership rules.

In December 2013, the incumbent postal operator CTT was privatised by means of the disposal of 70 per cent of the state's holding at a highly successful IPO. In 2014 was EGF's (waste management) turn and TAP Air Portugal, the airline, was awarded in June 2015 to a consortium made up by David Neeleman, owner of Brazilian airline Azul, and the Portuguese transport group Barraqueiro. At the time of writing, the operation was still to be formally concluded.



Miguel Mendes Pereira
Vieira de Almeida & Associados

Miguel Mendes Pereira has a law degree from the Faculty of Law of the University of Lisbon, an LLM in European legal studies from the College of Europe, Bruges, Belgium, and a master's in European legal sciences from the Faculty of Law of the University of Lisbon. He is a lecturer at the Faculty of Law of the University of Lisbon in EU law and competition law (postgraduates).

He joined VdA in 2011 and is currently a partner in the competition and EU area of practice. He is also active in the field of copyright, electronic communications, media and advertising.

Before joining the firm, he was a partner at Abreu Advogados (2008 to 2011), lead legal counsel at the Portuguese Competition Authority (2006 to 2008), legal secretary at the chambers of the Portuguese judge at the General Court of the EU in Luxembourg (2004 to 2006), administrator at the Directorate-General for Competition of the European Commission in Brussels (2000 to 2004), head of legal affairs at Lusomundo and Warner Lusomundo (1997 to 2000) in Lisbon and an associate lawyer, as well as trainee, with Athayde de Tavares, & Associados (1992 to 1997) also in Lisbon.

He is the author of various articles and publications, including the 2009 'Commentary to the Portuguese Competition Act', and speaks regularly at conferences and seminars.

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



Av. Duarte Pacheco, 26
1070-110 Lisbon
Portugal
Tel: +351 21 311 34 00
Fax: +351 21 357 00 09

Miguel Mendes Pereira
mig@vda.pt

www.vda.pt

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The competition practice of VdA comprises two partners and six associates. Its track record includes the successful defence of Portugal Telecom in all the abuse of dominance cases argued before the Competition Authority and the courts, as well as the advice to the Portuguese government in the state aid case concerning the €7.5 billion recapitalisation of Portuguese banks. Telecoms, media, pharmaceuticals and banking are among the industries where clients work with VdA on a daily basis. The practice has invariably been commended by colleagues and clients over the years.

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