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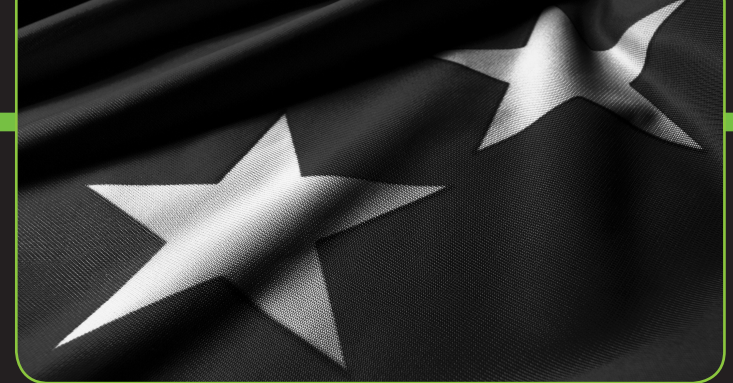
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## CASE NOTE

- The UPS/TNT merger and its taxonomy of wrongs: ambiguous procedure, poor timing and even more ineffective remedies  
*Valerio Cosimo Romano and Giuliana D'Andrea*

## NEWS SECTION

EUROPEAN COMPETITION LAW REVIEW - ISSUE 9 2017



# EUROPEAN COMPETITION LAW REVIEW

Volume 38: Issue 9 2017

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# European Competition Law Review

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European competition rules apply to undertakings, however, the Treaty of the Functioning of the European Union does not provide for a definition of this term despite the fact that this concept determines the personal scope for the application of European competition rules. In the 1970s banks claimed that they did not fall under the personal scope of European competition law due to the special nature of services provided by them, nonetheless, the Court of Justice of the European Union rejected this argument. Later banks had other arguments too but with the same purpose. The aim of this article is to give a general overview on the development of the application of European competition law on banks and the banking industry, and how it became settled case law that banks are undertakings under European Competition law through the analysis of the relevant case law of the European Commission and the European Courts.

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Constitutional Court Case (*Federation of Estate Agents v Director General (Competition) et al.* referred to in a previous ECLR news update), decided in May 2016. In its ruling, the Maltese Constitutional Court declared, inter alia, the provisions affording the Director General for Competition the authority to issue infringement decisions (art.12A of the Competition Act) and the provision affording the Appeals Tribunal the authority to review decisions (art.13A of the Competition Act) to be unconstitutional.

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Glasgow University

## Portugal

### ANTI-COMPETITIVE AGREEMENTS

*Enforcement activity—  
Inspections of premises*

🔗 Anti-competitive practices;  
Dawn raids; National  
competition authorities; Portugal

The Portuguese Competition Authority (PCA) has publicly announced that it raided 21 premises of 20 companies from January to May 2017. These numbers contrast heavily with the activity of the PCA in 2016 in terms of dawn raids: nine companies in 13 locations.

The operations involved more than 20 case handlers and 20 police officers and aimed at investigating possible restrictions on competition involving suppliers and distributors and are related to practices that directly affect the final consumer. The practices under investigation, most still subject to confidentiality, affect different economic sectors in the offer of products and services.

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Vieira de Almeida

## Portugal

### ANTI-COMPETITIVE AGREEMENTS

*Electricity distribution—EDP  
/Sonae—Non-compete  
agreement—Infringement—  
Penalties*

🔗 Anti-competitive practices;  
Electricity distribution; Fines;  
National competition authorities;  
Non-competition covenants;  
Portugal

On 5 May, the PCA fined five companies of the EDP Group (largest energy operator in Portugal) and Sonae Group (company with a diversified portfolio of businesses in retail, financial services, technology, shopping centres and telecommunications) on a total of €38.3 million for alleged anti-competitive practices in the market for distribution of electricity.

Following a two and a half year investigation, originated on complaints by consumers, the PCA found that the companies involved had agreed on a non-compete clause within the framework of a partnership set up for the purposes of launching a commercial campaign in force in 2012. According to the PCA and publicly available information, Sonae and EDP had agreed not to compete in the distribution of electricity in mainland Portugal for a period of two years.

The addressees of the decision have publicly expressed their surprise regarding the outcome of this case, in particular taking into account the fact that the PCA was aware of the commercial campaign since its implementation and has not shown any concern or raised any two questions in this regard either in the beginning of the campaign or in the following years. Both companies expressed publicly their intention to appeal the PCA's decision.

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## Portugal

### PROCEDURE

*Investigation and decision  
-making—Confidentiality—Draft  
guidelines*

☞ Confidentiality; Guidelines;  
National competition authorities;  
Portugal

On 8 May, the PCA launched for public consultation the draft guidelines on confidentiality claims. These (draft) guidelines were set up with the aim at offering guidance for the classification of information as confidential and on how to submit a confidentiality claim, based on the PCA's practice, the standing of the Portuguese courts in this matter, as well as the practice and interpretation of the European Commission and interpretation of the EU courts.

The draft Guidelines cover, inter alia, the following issues:

- Definition of “business secret”.
- Other sensitive information: exceptional cases in which the PCA accepts a confidentiality claim with respect to information other than business secrets.
- Definition of non-confidential information.
- Procedure and content for the submission of a confidentiality claim.
- Good practices for the submission of the confidentiality protection request.

The Guidelines were open to comments and observations by interested parties for 20 business days.

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*Vieira de Almeida*

**Ana Kéri**  
*Vieira de Almeida*

## Slovenia

### LEGISLATION

*Procedure—Infringements—  
Damages*

☞ Competition law;  
Co-operation; Damages; EU  
law; Joinder; National  
competition authorities; Private  
enforcement; Slovenia

In April 2017, an Act amending the Prevention of Restriction of Competition Act (Zakon o preprečevanju omejevanja konkurence (ZPOmK-1)) was adopted, which came into force on 20 May 2017 and with which the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union has been implemented in the legislation of the Republic of Slovenia.

Some of the novelties brought to our legislation with this amending Act are:

1. Default interests are due to the injured party from the day when the damage occurred until the day of payment regardless of when the claim for restitution of damages is filed.
2. Disclosure of evidence — the injured party has the right to request disclosure of evidence or data from the infringer or a third person said to have this evidence or data, if such evidence or data is needed for the purposes of the compensation claim proceeding. The infringer can request the same if the injured party or a third person is in possession of evidence or data required for the purposes of defense. The Act provides for conditions for such provision and the measures to ensure proportionality. It also provides for reasons to decline such a request, whereas a claim of the company, that such disclosure