
THE PUBLIC COMPETITION ENFORCEMENT REVIEW

SIXTH EDITION

EDITOR
AIDAN SYNNOTT

LAW BUSINESS RESEARCH

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

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THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Sixth Edition

Editor
AIDAN SYNNOTT

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EDITOR'S PREFACE

The reports from around the globe collected in this volume will be of keen interest to practitioners of competition law everywhere. Increasingly we see that effects of public competition enforcement in individual jurisdictions are felt well beyond those jurisdictions as firms become globalised and cross-border trade increases. To be sure, many jurisdictions retain important local particularities in competition law and enforcement priorities. However, as we can see from the reports collected in this volume, increasing international cooperation among competition enforcers, the widespread reach of firms' conduct and the economic circumstances of certain industries have led to a notable convergence in the cases attracting the attention of enforcers.

With respect to cartel enforcement, the reports from the European Union, Switzerland and the United States all describe efforts in those jurisdictions concerning alleged fixing of the London Inter-Bank Offered Rate (LIBOR). Last year, in a related case, the European Commission levied its largest-ever aggregate fine. The past year also saw continued efforts by regulators to police *auto parts* price-fixing cartels. For example, the United States, the European Commission and Japan each have levied significant fines on auto parts companies around the globe, and Australia continued its proceedings against several firms in this industry. The alleged *liquid crystal display* cartel continues to attract attention from (and fines imposed by) authorities around the world.

Various alleged bid-rigging schemes have attracted the attention of authorities in many jurisdictions, including Brazil, Colombia, Germany, India, Romania, Switzerland and the United States. These investigations range from the provision of subway trains to railway tracks to rubber soles for boots to firearms to road construction. Competition authorities in the United States have continued their focus on bid rigging in municipal bond and real estate foreclosure auctions. The Italian authorities investigated a joint venture between Italian and French firms formed to bid on the provision of services to art museums and archeological sites, but found no infringement.

We also see a convergence in enforcement priorities in other areas. As detailed in the chapters that follow, several jurisdictions have acted against pay-for-delay agreements in the pharmaceutical industry. Last year, the United States Federal Trade Commission

won an important Supreme Court challenge to these agreements, and the European Commission and France levied several fines on parties to such agreements. Italy has also commenced an investigation into one such agreement. The reports from Australia, India and the United Kingdom describe further enforcement efforts in the pharmaceutical industry. Argentina and Italy, like the United States and Spain, continue to investigate various professional associations for possible anti-competitive agreements.

High technology industries – and in particular concerns surrounding the behaviour of firms holding standard-essential patents – continue to get significant attention from enforcers around the world. Chinese authorities have launched an investigation into a wireless research and development company over complaints that it has charged excessive fees for the licensing of certain of its patents for technology standards for mobile phones; the European Commission is undertaking an investigation of major industry players in connection with their ownership of standard-essential patents; and United States authorities continue to actively discuss policy in this area.

Additionally, both the United States and the European Commission have had success in their actions against e-Book publishers. Several jurisdictions – including Brazil, Germany, Switzerland and Finland – have brought actions concerning resale price maintenance schemes for various products. We also note that Brazil, Japan and Spain have moved against copyright management organisations for their actions with respect to royalties. Several of the chapters that follow note the efforts of various regulators concerning interchange fees associated with credit card transactions.

Enforcement activity related to mergers remains robust, and issues surrounding consolidation in the airline industry have occupied regulators across the globe. Both the European Commission and the United States Department of Justice confronted proposed airline mergers last year, leading to different results: the European Commission continued to oppose the proposed merger of Irish airlines Aer Lingus and Ryanair, while the merger of American Airlines and US Airways was ultimately cleared by the United States authorities. Brazilian authorities approved the merger of Azul and Trip Linhas Aéreas subject to conditions. Meanwhile, as detailed in the report from India, after an analysis that will be of interest to practitioners in and observers of airline competition issues, the Indian authorities approved various agreements between Etihad Airways and Jet Airways.

Competition law continues to evolve across the globe. Indeed, the report from the United Kingdom will be of particular interest. It describes the significant changes in the competition enforcement regime there, as authority for enforcement shifts from two separate authorities, the Office of Fair Trading and the Competition Commission, to a single Competition and Markets Authority. Mexico has a proposed new Antitrust Act, which is under discussion in the Mexican Congress. In China, Mofcom has published draft Provisions on Imposing Restrictive Conditions on Concentration of Undertakings which, we read, are expected to be adopted this year. We also note that in the coming year Australia will undertake a significant review of its competition laws. The report from Brazil details the first full year of that jurisdiction's new competition regime. The report from Germany describes important amendments to the German Act Against Restraints to Competition, particularly regarding the law's application to merger review; and the report from France details new guidelines there for merger control. Numerous

jurisdictions continue to implement and refine leniency programmes designed to encourage the reporting of cartel activity.

The reports that follow detail the efforts of public competition enforcers around the globe. Also of keen interest is the keynote piece challenging the European Commission's philosophy of encouraging private enforcement of competition laws. That chapter will surely provoke much thought on the efficacy and desirability of such enforcement.

Aidan Synnott

Partner

Paul, Weiss, Rifkind, Wharton & Garrison LLP

April 2014

Chapter 20

PORTUGAL

Joaquim Caimoto Duarte and Tânia Luísa Faria¹

I OVERVIEW

The Portuguese Competition Act, Law 19/2012 of 8 May (Competition Act), in force since 2012, modified legal standards on the handling of complaints by the Portuguese Competition Authority (PCA), replacing the strict legality principle by granting the PCA significant discretion on whether to open an investigation based on certain criteria.

According to the Competition Act, the PCA will exercise its sanctioning powers whenever it is in the public interest to prosecute and punish an infringement of competition rules, taking into account the goals of its competition policy and the factual and legal elements submitted, the severity of the alleged infringement, the probability of establishing its existence and the extent of the investigation.

As an additional guarantee of transparency, at the end of each year, the PCA publishes its competition policy priorities for the following year on its website.

The PCA recently issued its statement of priorities for 2014, which will be the following:²

- a* protecting competition in the market and developing a dynamic economy;
- b* promoting a culture of competition and transparency; and
- c* strengthening its capacity to act.

The PCA's priorities in connection with antitrust activities include combating cartels and the abuse of dominant positions. In exercising its supervisory powers, the PCA will continue to monitor the energy, telecommunications and port sectors, as well as

1 Joaquim Caimoto Duarte is a counsel and Tânia Luísa Faria is a managing associate at Uría Menéndez – Proença de Carvalho.

2 Available at www.concorrenca.pt/vPT/A_AdC/Instrumentos_de_gestao/Prioridades/Documents/AdC_Prioridades_2014.pdf.

monitor non-regulated markets in which consumers may be more directly affected by competition restrictions.

According to currently available data, the total number of officials was 91 in 2010, 81 in 2011 and 84 in 2012. Approximately 25 per cent of officials are assigned to the antitrust department.³

i Enforcement agenda

The PCA's communication of priorities for 2014 states that, in connection with restrictive practices, it will continue to prioritise action against cartels through the use of the leniency programme, as well as dealing with abuses of a dominant position.

Regarding its supervisory powers, the PCA has announced that it will focus on energy, telecommunications and ports, as well as on monitoring non-regulated markets in which consumers may be more directly affected by competition restrictions.

II CARTELS

Article 9 of the Competition Act prohibits agreements that restrict competition, including cartel agreements (i.e., agreements and concerted practices between competitors whose object or effect is the restriction of competition by, *inter alia*, directly or indirectly fixing sale or purchase prices or any other transaction conditions, by limiting or controlling production, distribution or technical development or investments or by sharing markets (including bid rigging), through import or export restrictions and through anti-competitive actions against other competitors).⁴

The PCA is an independent entity responsible for the enforcement of competition law in Portugal, and conducting the administrative procedure on infringements under the Competition Act. The PCA's decisions may be appealed to the recently established Competition, Regulation and Supervision Court (appeals were previously heard by the Commercial Court of Lisbon).

In Portugal, cartels are administrative (not criminal) offences sanctioned with fines not exceeding 10 per cent of the offending undertaking's turnover in the year preceding the decision. According to general rules subsidiarily applicable to administrative offences, when more than one infringement exists, the maximum fine may be twice the abstract maximum applicable to the most serious offence, *in casu* 20 per cent of the turnover

3 See the presentation of the Chairman of the PCA's board, available at www.concorrenca.pt/vPT/Noticias_Eventos/Noticias/Documents/2013-03-12_PT_BALANCO%20MANDATO.pdf.

4 See Article 75 of the Competition Act, as well as to the PCA's Informative Communication on the Portuguese leniency programme, available at www.concorrenca.pt/vPT/Noticias_Eventos/Comunicados/Documents/DR_NOTA%20INFORMATIVA_CLEMENCIA_PosPublReguDR_03_01-2013.pdf.

of the offending undertaking.⁵ Fines imposed to date in cartel cases have generally amounted to around 5 per cent of the infringing undertakings' turnover.

The members of the board of directors of the offending undertaking, as well as any individuals responsible for the management or supervision of the areas of activity in which there has been an administrative offence, when they know of, or it is their duty to know of, an infringement committed and they have not adopted appropriate measures to end the infringement immediately, are liable for a sanction under the Competition Act, unless they are subject to a more serious sanction under a different legal provision. The fine imposed on natural persons cannot exceed 10 per cent of the individual's annual income deriving from the exercise of their functions in the undertaking concerned.

As an ancillary sanction under Article 71 of the Competition Act, a ban of up to two years on the right to take part in the procedures for contracts, whose purpose is to offer services typical of public works contracts, public service concessions, the leasing or acquisition of moveable assets or the acquisition of services or procedures involving the award of licences or authorisations by public entities, may be imposed. The ban may be imposed in cases in which the practice leading to an administrative offence punishable by a fine occurred during or due to such procedures.

Article 29 of the Competition Act establishes that the PCA may also impose behavioural or structural measures to end the prohibited practices or their effects.

Under the new Competition Act, and as regulated by the PCA, undertakings or individuals connected to the cartel may apply for immunity or a reduction of a fine if they provide information on the cartel.

The new Competition Act has also established the possibility of cases being settled, at the PCA's discretion, before a decision is issued.⁶

i Significant cases

The PCA's most significant cartel cases to date have been the *Glucose Diagnostic Strips* case (decided in 2005),⁷ the *Salt* case (decided in 2006; upheld by the Commercial Court of Lisbon in 2008),⁸ the *Flower Mills* case (decided in 2005; overturned by the Commercial Court of Lisbon subject to a new decision by the PCA in 2009)⁹ and the

5 As stated in the PCA's Guidelines on the calculation of fines, available at www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Documents/Linhas_de_Orienta%C3%A7%C3%A3o_Coimas_DEZ2012.pdf.

6 In other antitrust infringements, not connected to cartels, the PCA may decide to close an administrative procedure if it receives what it considers to be adequate remedy proposals from the undertakings. In that event, there will be no finding of an infringement under the Competition Act, but the undertakings must implement the remedies agreed with the PCA. The PCA may decide to reopen the procedure under certain circumstances within a two-year period.

7 PCA press release of 11 January 2005.

8 PCA press release of 17 July 2006.

9 PCA press release of 8 July 2009.

Catering Services case (which resulted from a leniency submission from a former director of one of the undertakings involved in the cartel).¹⁰

The most significant fines in a cartel case totalled €16 million, imposed on Abbot, Bayer, Johnson & Johnson, Menarini and Roche, in 2005, for bid rigging in several public offers for the supply of glucose diagnostic strips. The Commercial Court of Lisbon (which previously had jurisdiction over appeals of PCA decisions) joined the case with another related to similar charges, and ordered the PCA to correct specific formal irregularities. The PCA issued a new decision, imposing fines of €13.5 million.¹¹

The PCA also sanctioned a cartel involving undertakings operating in the printing and graphic sector. Several undertakings were fined for an agreement, including price fixing and market sharing, concerning the market for application form paper, after an investigation triggered by a leniency application. The fines totalled €1,797,978.51. In addition, three board members were fined €6,000 for being aware of the cartel and failing to take action to put an end to it.

The most recent cartel sanctioned by the PCA concerned the market for polyurethane foam for comfort products. This case is very relevant, since the PCA's investigation was conducted in parallel with a cartel investigation in the same market by the Spanish Competition Authority. Furthermore, the investigation was triggered by a leniency request by an undertaking that received full immunity (as well as its board members), and all the sanctioned undertakings and individuals benefited from substantial fine reductions in view of the settlement procedure. The PCA imposed fines amounting to €993,000 on two undertakings and to €7,000 on board members.¹²

Although not related to cartel cases, there have been a number of cases involving recommendations and decisions issued by trade associations. In some cases, the infringements are similar to standard antitrust cases (e.g., price fixing). In most cases involving trade associations, the investigated behaviour, nevertheless, related to recommended practices, as well as maximum prices, which were understood by the undertakings to be mandatory.

For instance, the PCA fined the Association of Navigation Agents of Portugal for alleged price-fixing practices,¹³ and stated that the National Association of Freighters had issued a decision that, in the PCA's view,¹⁴ constituted a collective refusal to deal with a specific terminal operator.¹⁵

The PCA's investigations of professional associations are also of importance. The PCA has fined several professional associations, such as the Veterinarians Association, the Dentists Association and the Doctors Association, as a result of decisions that had an

10 PCA press release of 30 December 2009.

11 PCA press release of 17 January 2008.

12 PCA press release of 12 September 2013.

13 Case PRC 2004/07.

14 Case PRC 2004/23.

15 PCA press release of 29 January 2009.

effect on the pricing of their members (including recommended and maximum prices considered mandatory by the associates).¹⁶

ii Trends, developments and strategies

Under the previous legal framework in Portugal, antitrust decisions were not generally published on the PCA's website. As such, the public's knowledge of antitrust issues was limited, to a great extent, to the press releases published by the PCA.

According to publicly available information, the sanctioning of antitrust conduct in Portugal occurs most frequently with regard to restrictive practices within trade and professional associations, including price fixing, and to bid-rigging cartels.

The PCA has resorted to the leniency programme with increasing frequency. Individual sanctions have also been imposed. In addition, the settlement mechanism established in the Competition Act was first used in 2013 and could prove to be a very useful instrument to investigate and prove cartel cases, as well as for other antitrust infringements.

The PCA has made it clear that the state must refrain from promoting arrangements between competitors, as addressed in the case concerning meetings promoted by the government of the Azores with several milk producers in which commercial conditions might have been discussed. The PCA closed the case without imposing any sanctions, but recommended that the government of the Azores end the practice and refrain from conduct that could potentially facilitate collusive behaviour in the region.¹⁷

iii Outlook

The PCA has continued to make cartel cases a priority for 2014. It has pledged to tackle cartels both through *ex officio* investigations and inquiries triggered by the application of the leniency policy.

The new procedure under the Competition Act, particularly the settlement mechanism, is likely to be used more.

The Competition Act strengthened the PCA's investigative powers, which should encourage more effective enforcement of competition law. For instance, within antitrust proceedings, the PCA may now carry out, subject to receiving a judicial search warrant, searches of not only an undertaking's premises and vehicles, but also of the homes of shareholders and members of managerial bodies and employees, if there is reason to believe that evidence of serious anti-competitive practices exists.¹⁸

Under the Competition Act, the overall limitation period for antitrust practices, including a maximum suspension of three years, has increased from eight to 10 and a half years.

16 PCA press releases of 28 June 2005 and of 12 July 2005 and press release 14/2006.

17 PCA press release of 24 June 2012.

18 Article 19 of the Competition Act.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

As previously indicated, the Competition Act prohibits agreements, concerted practices and trade association decisions, whose object or effect is a restriction of competition, including cartels (Article 9 of the Competition Act). It also prohibits undertakings in a position of dominance from abusing their position (Article 12 of the Competition Act). Abusive conduct includes imposing, directly or indirectly, unfair purchase or sale prices or other unfair trading conditions, limiting production, markets or technical development to the detriment of consumers, applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, making the execution of contracts subject to the acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts, and refusing access to another undertaking to a network or other essential facilities that it controls, when appropriate payment for such is available, in a situation where the other undertaking cannot, therefore, in fact or in law, act as a competitor of the undertaking in a dominant position in the market, upstream or downstream, unless the dominant undertaking can demonstrate that, for operational or other reasons, such access cannot reasonably be provided.

The Portuguese legal framework on restrictive practices and the abuse of dominant position is very similar to that applied at the EU level; however, the Competition Act includes provisions on the abuse of a situation of economic dependence.¹⁹ An abuse of a situation of economic dependence may include any conduct mentioned above as potentially abusive under the abuse of dominance rules, as well as the full or partial rupture of an established commercial relationship, in view of past commercial relations, trade practices in the relevant market and contractual conditions.

i Significant cases

The three major cases regarding the abuse of a dominant position all involved Portugal Telecom (PT), the former telecommunications incumbent. PT was sanctioned for discriminatory pricing, for allegedly offering more favourable prices, through special discounts, for operators within its group compared with competing retailers. It was also sanctioned for alleged margin-squeeze practices and for an alleged refusal to grant access to their underground conduit network, which was considered to be an essential facility by the PCA.²⁰ The most significant sanction applied amounted to approximately €53 million, although the appellate court considered the infringement to be time-barred.

In 2009, the PCA dismissed, subject to certain conditions, a case against the food undertaking Sugalidal, on the basis that it had found that it had allegedly abused

19 An undertaking is considered to be in a situation of economic dependence with regard to another undertaking if it does not have an equivalent alternative to contracting with that undertaking (i.e., if the good or service at issue is provided by a restricted number of undertakings and the undertaking is unable to obtain identical conditions from other commercial partners within a reasonable period).

20 PCA press release 15/2008, PCA press release 16/2009 and PCA press release 13/2007.

its dominant position in the acquisition of tomatoes for processing by requiring its suppliers to use a specific variety of seed produced by a company of its group. Sugalidal has undertaken to remove the illegal clause from its contractual arrangements and to publicise the removal.²¹

More recently, the PCA sanctioned Sport TV, an undertaking active in the supply of premium sports content for television platforms, with a fine of €3,700,000 for an alleged abuse of a dominant position concerning the practice of discriminatory commercial conditions to several pay per view operators.²²

As previously indicated, there have also been a string of important decisions regarding trade and professional association measures that the PCA considered to have been in breach of competition rules. For instance, in 2011, the National Association of Parking Lot Companies was fined nearly €2 million for its recommendation regarding pricing criteria in response to the introduction of new legislation on parking lots,²³ and in 2010, the Portuguese Chartered Accountants Association was fined for alleged restrictions in the market for the training of certified accountants.

In connection with vertical restrictions, the PCA closed a procedure against Bayer regarding a clause in its standard contract with wholesalers, according to which wholesalers were allegedly obliged to carry Bayer products, exclusively, for five years.²⁴ Bayer removed the clause from the contracts and submitted the amendments to the PCA as a remedy. More recently, the PCA fined Lactogal, a dairy company, €341,098 for resale price maintenance practices (minimum price fixing) in the on-trade distribution market for dairy products, considering it a vertical agreement.²⁵

ii Trends, developments and strategies

The cases concerning abuse of a dominant position by PT faced many judicial obstacles. In fact, the decision applying a fine of €38 million against PT for refusing to provide competitors access to what the PCA considered to be an essential facility – PT's underground conduit network – was overturned on appeal. Furthermore, the appellate court considered the most significant sanction applied within this context – €53 million – to be time-barred.²⁶

The Sport TV decision is under appeal before the Portuguese courts.

iii Outlook

The PCA has stated that cases involving an abuse of dominant position will continue to be a priority in 2014. The PCA recognises the high number of appeals against its decisions (including decisions overturned by the courts) and intends to strengthen the technical quality of the decisions and of its representation before the Portuguese courts.

21 PCA press release of 15 October 2009.

22 PCA press release of 26 March 2013.

23 PCA press release of 19 January 2011.

24 PCA press release 16/2007.

25 PCA press release of 19 July 2012.

26 PCA press release 13/2007.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The new Competition Act applies to all areas of the economy, including regulated sectors. The PCA has been monitoring several sectors in recent years, and the PCA's supervisory powers have been strengthened.

i Significant cases

The most significant cases involving undertakings operating in regulated sectors include the three abuse of dominance cases involving PT, discussed above. The existence of regulations in the telecommunications sector did not impede the application of competition rules.

The PCA has conducted sectoral investigations and released reports on several markets over the years, including studies on consumer mobility within the retail banking market, on liquid fuel and bottled gas retail markets, on electronic communications and on relations between large food retailers and their suppliers.²⁷

ii Trends, developments and strategies

As previously mentioned, the PCA has stated that it will focus on the energy, telecommunications and port sectors in 2014, as well as monitor non-regulated markets in which consumers may be more directly affected by competition restrictions.

iii Outlook

As indicated, the PCA's supervisory powers have been strengthened by the Competition Act and now include, apart from requiring information from undertakings or associations of undertakings, the possibility of carrying out inspections and audits. Inspections and audits are performed after notice has been given to the undertaking in question. A judicial search warrant is not required.

V STATE AID

Article 65 of the Competition Act establishes that aid provided by the state or any other public body may not restrict, distort or appreciably affect competition, in whole or in a substantial part of Portuguese territory. The PCA may issue recommendations on any public assistance provided and monitor the implementation of those recommendations, for which purpose it may request information from any bodies. The recommendations are published on the PCA's website.

The PCA's powers in this matter are very limited, as the European Commission is the entity with jurisdiction to assess the compatibility of state aid with the European Union's rules on state aid.

²⁷ See www.concorrenca.pt/vPT/Estudos_e_Publicacoes/Estudos_Economicos/Paginas/Estudos-Economicos.aspx.

i Significant cases

The most important ruling on state aid involving Portugal was the European Court of Justice's (ECJ) ruling on appeal of the *Azores* case.²⁸ In this case, the ECJ ruled on the issue of applying the criterion of territorial selectivity in cases involving autonomous regions (such as the Azores region), setting the necessary conditions for the autonomous region to be considered as the benchmark, as opposed to the national territory as a whole.

ii Trends, developments and strategies

The most high-profile cases decided by the European Commission regarding state aid granted by Portugal involve assistance from the state to shipyards in Viana.²⁹

Furthermore, the capitalisation programmes of Portuguese banks have followed the applicable state aid rules in cooperation with the European Commission.³⁰

iii Outlook

The European Commission has assessed the state aid measures under the capitalisation programmes of Portuguese banks in view of its rules on state aid for banking recapitalisations during the crisis. The temporary nature of the measures implies that banks will be forced to develop plans to maintain the necessary level of capitalisation without state assistance.

VI MERGER REVIEW

The PCA has exclusive jurisdiction to enforce the merger control rules established in the Competition Act. Only concentrations, as defined in Article 36 of the Competition Act, which meet one of the notification thresholds established in Article 37(1), are subject to merger control review. The basis of the concept of concentration lies in the notion of change of control on a lasting basis, and the definition of 'control' adopted in Article 36(3) of the Competition Act is similar to that used in the European Merger Control Regulation (i.e., the possibility of exercising decisive influence on an undertaking).

The Competition Act, unlike the EU Merger Regulation and the laws of most Member States (except for Spain), establishes alternative turnover and market share notification thresholds, even though a *de minimis* rule was introduced in 2012.

In brief, undertakings must notify a concentration if any of the following conditions is met:

- a* the combined aggregate turnover in Portugal of all the undertakings exceeds €100 million, provided that the individual turnover in Portugal of each of at least two of the undertakings concerned exceeds €5 million; or
- b* the concentration results in the acquisition, creation or increase of a market share in Portugal equal to or greater than 50 per cent; or

28 Case C-88/03 *Portugal v. Commission*.

29 See the EC press release, available at http://europa.eu/rapid/press-release_IP-13-33_en.htm.

30 See, *inter alia*, the EC press release, available at http://europa.eu/rapid/press-release_IP-13-31_en.htm.

- c the concentration results in the acquisition, creation or increase of a market share in Portugal equal to or greater than 30 per cent and less than 50 per cent, provided that the individual turnover in Portugal of at least two of the undertakings concerned exceeds €5 million.

The time limit for the PCA to issue a decision is 30 business days for normal phase I proceedings and 90 business days as from the initial notification for cases requiring in-depth investigations. These time limits can be suspended if additional information is requested from the parties and, in general, at the parties' request or if commitments are offered, or if the parties are invited to comment on the PCA's draft decision.

The PCA has also approved new filing forms, including, for the first time, a simplified form, to be used in concentrations that, in principle, in view of certain requirements (e.g., no overlap or limited joint market shares), will not raise competition concerns.³¹

Since the enactment of the Competition Act currently in force, similarly to the EU Merger Regulation, the parties no longer have a specific deadline to notify (unlike previously, where parties had seven business days to do so). The parties nevertheless are obliged to suspend the implementation of the concentration until the PCA has issued a clearance decision. Breach of this obligation entails a fine of no more than 10 per cent of the turnover of the undertaking in breach. Pursuant to the Competition Act, any act or transaction implementing the concentration prior to clearance from the PCA is legally unenforceable (*ineficaz*).

The most important exception to the referred standstill obligation is the possibility to implement public bids, provided that, in general, the acquirer does not exercise the voting rights in the target entity until clearance is obtained.

The Competition Act now adopts the significant impediment of effective competition (SIEC) test for the assessment of concentrations instead of the dominance test that was previously used.

The merger control decisions are subject to judicial appeal and also to a special administrative appeal in the case of prohibition (applicable only when the benefits to the national economy outweigh the disadvantages to competition resulting from a merger that was prohibited).

i Significant cases

The PCA has extensive experience in merger cases, having reviewed and decided an average of around 50 cases a year; it has issued only five prohibition decisions in merger control cases since its incorporation in 2003.³²

In relation to these prohibitions, it is worth noting that the Minister of Economy, further to a special administrative appeal provided for in the PCA's articles

31 PCA Regulation 60/2013.

32 Case 37/2004 – *Barraqueiro/Arriva*, Case 45/2004 – *Petrogal/Esso*; Case 22/2005 – *VIA Oeste (Brisa)/Auto-Estradas do Oeste/Auto-Estradas do Atlântico*, Case 12/2009 – *TAP/SPdH* and Case 41/2009 – *Ongoing/Prisal/Media Capital*.

of association, overturned the PCA's prohibition decision concerning a merger in the highway management sector.³³ One of the PCA's prohibitions, in the media sector, was determined by the negative binding opinion issued by the media sector regulator (since this decision was binding under the merger control framework).³⁴

With regard to merger remedies, in 2011, the PCA issued the Guidelines on Merger Remedies, in line with EU law and practice.³⁵ It also imposed structural and behavioural remedies on several occasions. The PCA imposed, for instance, behavioural remedies in the concentration between two Portuguese commercial airlines.³⁶ The remedies in the clearance decision included the availability of slots at the Lisbon and Oporto airports, the limitation of the number of flights for certain routes, as well as limitations on the prices charged. Regarding structural remedies, the decision practice of the PCA is also noteworthy. Remedies in two concentrations in the transportation sector included the divestment of one of the parties' operations in the inter-urban route where competition concerns were identified in the *TRPN/Internorte* case³⁷ and the approval of an up-front buyer solution in the *Powervial/Laso*Auto-Laso*Probilog*Laso Ab* case.³⁸

In connection with sanctioning of undertakings that failed to file a concentration, early in 2013 the PCA imposed fines amounting to €149,278.79 for failure to notify a concentration in the pharmaceutical sector.³⁹

ii Trends, developments and strategies

The Portuguese merger control framework has been further aligned, after the entry into force of the new Competition Act in 2012, with the EU merger control framework. In particular, the harmonisation with EU law has entailed the adoption of the SIEC substantive test and the elimination of the deadline previously established for notification.

The market share notification threshold was maintained in the new Competition Act, although this was combined with a *de minimis* turnover threshold.

iii Outlook

The adoption of a simplified filing form and also the practical implementation of the pre-notification contact stage will enable a swifter assessment and earlier decisions with regard to non-complicated matters.

The recent changes in the new legal framework for merger control in Portugal are positive, and it will be interesting to see exactly how they are implemented.

33 Case 22/2005 – *VIA Oeste (Brisa)/Auto-Estradas do Oeste/Auto-Estradas do Atlântico*.

34 Case 41/2009 – *Ongoing/Prisa/Media Capital*.

35 Available at www.concorrencia.pt/SiteCollectionDocuments/Noticias_e_Eventos/Comunicados/Comunicado201109_DOC_2-Linhas_de_Orientacao.pdf.

36 Case 57/2006 – *TAP/PGA*.

37 Case 49/2010 – *TRPN/Internorte*.

38 Case 16/2011 – *Powervial/Laso*Auto-Laso*Probilog*Laso Ab*.

39 PCA press release of 9 January 2013.

VII CONCLUSIONS

i Pending cases and legislation

The major legislation reform regarding competition issues was the enactment of the new Competition Act in 2012, which now also includes the legal framework for leniency. Along with this change, the PCA has published guidelines and regulations on issues such as the calculation of fines, leniency, pre-notification and filing forms.

In general, antitrust cases are confidential and are not made public until a final decision is issued, even though the PCA, according to its priorities for 2014, intends to increase the transparency of its decisions. However, due to the high public profile of this case and the extensive coverage of the press regarding the inspection that took place in the offices of the major banks operating in Portugal, the PCA published a press release stating that it is currently investigating indicia of illegal information exchanges in the banking sector.⁴⁰

The new Competition Act was, to a significant extent, the result of the memorandum of understanding (MoU) on specific economic policy conditionality concerning the granting of financial assistance to Portugal.⁴¹ This MoU highlighted the need for more effective enforcement of competition rules in Portugal by the PCA, as well as the amendment of the former competition law to make it consistent with European Union competition legislation.⁴²

The Competition Act currently in force strengthens the PCA's powers of investigation in the area of anti-competitive practices, particularly with regard to setting priorities and collecting evidence. It also appears that the PCA has been given mechanisms that help reduce litigiousness and the length of proceedings on anti-competitive practices (i.e., the possibility of reaching settlements and ending certain less serious antitrust proceedings with the parties giving commitments to solve the competition concerns at stake).

Moreover, the recent creation of the Competition, Regulation and Supervision Court and its role as the appellate court in competition matters would seem to facilitate the creation of a body of case law focused on competition issues (apart from the case law already established by the former appellate court).

40 Available at www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201309.aspx?lst=1&Cat=2013.

41 The MoU, which was published on 17 May 2011, details the general economic policy conditions regarding the granting of financial assistance to Portugal. The European Financial Stabilisation Mechanism and the European Financial Stability Facility financial support were provided to Portugal on the basis of a policy programme negotiated with the Portuguese authorities by the European Commission in liaison with the European Central Bank and the International Monetary Fund.

42 See Paragraphs 7.9 and 7.17 of the MoU, available at http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf.

Appendix 1

ABOUT THE AUTHORS

JOAQUIM CAIMOTO DUARTE

Uría Menéndez – Proença de Carvalho

Joaquim Caimoto Duarte is a counsel in the Lisbon office of Uría Menéndez-Proença de Carvalho, where he heads the EU and Portuguese competition practice area.

He has advised on matters in various sectors, including pharmaceuticals, air transport, motor vehicles, energy, telecommunications, media and large retailer industries.

He is regularly involved in mergers and infringement proceedings for abusive conduct and restrictive agreements before the European Commission, the Portuguese competition authorities and the Court of Justice of the European Union. He also has considerable experience in advising firms on agreements, strategic alliances and state aid.

TÂNIA LUÍSA FARIA

Uría Menéndez – Proença de Carvalho

Tânia Luísa Faria is a managing associate in the Lisbon office of Uría Menéndez-Proença de Carvalho. She joined the firm in 2004, having worked both in the Lisbon and Brussels offices. She is also a teaching assistant at the University of Lisbon.

Her practice area is EU and Portuguese competition law, covering, in particular, merger control issues, cartels and abuses of dominant position. She acts for clients in various sectors, including financial institutions, telecommunications and media, air transport, energy, retail distribution and other industrial sectors, and regularly advises leading multinational companies in the pharmaceutical sector.

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

Edifício Rodrigo Uría
Rua Duque de Palmela 23

1250 097 Lisbon
Portugal
Tel: +351 21 030 86 00
Fax: +351 210 30 86 01
joaquim.caimotoduarte@uria.com
tanieluisa.faria@uria.com
www.uria.com