
THE PUBLIC COMPETITION ENFORCEMENT REVIEW

EIGHTH EDITION

EDITOR
AIDAN SYNNOTT

LAW BUSINESS RESEARCH

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

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THE PUBLIC
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ENFORCEMENT
REVIEW

Eighth Edition

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EDITOR'S PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention.

Cartel enforcement remains robust, particularly by the European Union and the United States, although the number of new enforcement decisions adopted by the EU dropped significantly in 2015. Other jurisdictions, including Greece and France, also report a decrease in the magnitude of fines or numbers of decisions rendered in cartel actions. China, however, saw a slight increase. In 2015, Australia, Brazil, China, Cyprus, the European Union, Germany and the United States have opened, continued or settled enforcement actions against automotive parts cartelists. Brazil, China, Germany, Spain, and Switzerland have each seen enforcement activity related to the distribution of automobiles. Additionally, several jurisdictions investigated food-related cartels in 2015, including dairy products (France and Spain), chocolate (Canada), eggs (Australia), poultry (France), bakeries (Finland), and sugarcane (Colombia).

In the area of restrictive agreements, several European jurisdictions (France, Germany, Italy and Sweden) moved against an online travel booking platform for its use of 'most-favoured nation' clauses with respect to the rates offered by hotels to the platform. However, as we see in the chapters that follow, the German authority did not accept the commitments made by the platform to the other jurisdictions, and required a more stringent remedy. These actions follow on a similar enforcement action in the United Kingdom in 2014. In addition, Brazil, France, and Sweden have examined taxi services. We also continue to see several examples of actions against manufacturer-imposed restrictions on retailer behaviour, particularly against resale price maintenance, including actions in Argentina (bleach), Colombia (rice), Switzerland (musical instruments), and the United Kingdom (refrigerator and bathroom suppliers). The apparent concern with resale price maintenance in these jurisdictions might be seen to contrast with the dearth of public enforcement actions against these arrangements in the United States, which itself may reflect a change in the interpretation of the relevant law by United States Supreme Court several years ago.

Merger review and enforcement activity remains robust, and the chapters that follow note activity in many sectors, including in the telecommunications area in the United

States, Spain, Greece, France, Croatia and Finland. We also see several reports of merger investigations in the healthcare area, including activity in Australia, Spain and the United States. Several of the reports, including the reports from the United States, Belgium and Germany, note enforcement activities arising out of merger process violations, such as the failure to properly report transactions.

Many jurisdictions continue to develop their approach to implementation of competition laws enacted in recent years. Of particular interest is the essay entitled 'The Damages Directive, in search of a balance between public and private enforcement of the competition rules in Europe,' which discusses the implementation of the 2014 European Commission Damages Directive.

Aidan Synnott

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Chapter 23

PORTUGAL

*Joaquim Caimoto Duarte, Tânia Luísa Faria and Maria Francisca Couto*¹

I OVERVIEW

The Portuguese Competition Act, Law 19/2012 of 8 May (the Competition Act), which has been in force since 2012, modified the legal standards for the handling of complaints by the Portuguese Competition Authority (PCA), giving the PCA greater discretion to decide when 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, the facts that are known to it, the severity of the alleged infringement, the probability of proving its existence and the scope of the investigation that is required.

To increase transparency, at the end of each year, the PCA publishes its strategic priorities regarding competition policy for the following year on its website.

The PCA recently issued its statement of priorities for 2016, which will be the following:²

- a* protecting and promoting competition in the Portuguese economy;
- b* strengthening its presence in the relevant international fora;
- c* increasing personnel and infrastructure efficiency;
- d* diversifying resources and maximising their use;
- e* ensuring fast and technically accurate decisions; and
- f* providing public services of excellence.

1 Joaquim Caimoto Duarte is a counsel, Tânia Luísa Faria is a managing associate and Maria Francisca Couto is a trainee lawyer at Uría Menéndez – Proença de Carvalho.

2 Available at http://www.concorrenca.pt/vPT/A_AdC/Instrumentos_de_gestao/Prioridades/Documents/AdC_Prioridades_2016.pdf.

These strategic priorities are aimed at enabling the attainment of operational goals, including, among others: increasing the detection, investigation and punishment of antitrust activities; ensuring the effective and rapid control of merger transactions; consolidating internal controls in the decision-making process; reducing the time limits for evaluation and investigation; and improving the handling and follow-up of complaints.

i Enforcement agenda

The PCA's statement of priorities for 2016 indicates that, in exercising its sanctioning powers, the PCA will continue to focus on combating cartels and will increasingly use its powers of entry, search and seizure. In exercising its supervisory powers, the PCA will continue to promote *ex officio* investigations, in order to identify possible anticompetitive practices, particularly in the area of public procurement. Finally, in order to nurture a culture of competition in the Portuguese economy, the PCA will also have an active role before the government in the ambit of the transposition of Directive 2014/104/EU, of 26 November (Private Enforcement Directive).³

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 anticompetitive actions against other competitors).⁴

The PCA is an independent entity responsible for the enforcement of competition law in Portugal and conducting administrative infringement procedures under the Competition Act. The PCA's decisions may be appealed to the 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 there is more than one infringement, the maximum fine may be twice the abstract maximum applicable to the most serious offence, which in a cartel would be 20 per cent of the turnover of the offending undertakings.⁵ Fines imposed to date in cartel cases have generally amounted to around 5 per cent of the infringing undertaking's turnover.

3 Idem.

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.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Documents/DR_NOTA%20INFORMATIVA_CLEMENCIA_PosPublReguDR_03_01-2013.pdf.

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_Orientação_Coimas_DEZ2012.pdf.

The members of the board of directors of the offending undertakings, 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 to be sanctioned under the Competition Act, unless they are subject to a more serious sanction under a different legal provision. The fine imposed on individuals 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 tendering processes for 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 as a result of those processes.

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 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 about the cartel.

The Competition Act also establishes 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 and upheld by the Commercial Court of Lisbon in 2008),⁸ the *Flower Mills* case (decided in 2005, overturned by the Commercial Court of Lisbon and subject to a new decision of the PCA in 2009),⁹ the *Catering Services* case (which resulted from a leniency submission from a former director of one of the undertakings involved in the cartel),¹⁰ the *Flexible Polyurethane Foam* case (decided in 2013),¹¹ and the *Cleaning Companies* case (decided in 2011 and upheld by the Lisbon Court of Appeal in 2014).¹²

The largest fines in a cartel case totalled €16 million and were imposed on Abbot, Bayer, Johnson & Johnson, Menarini and Roche in 2005 for bid rigging in several public offers presented in the context of tendering processes for the supply of glucose diagnostic

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 case, there will be no 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 the next two years.

7 PCA press release of 11 January 2005.

8 PCA press release of 17 July 2006.

9 PCA press release of 8 July 2009.

10 PCA press release of 30 December 2009.

11 PCA press release of 12 September 2013 (19/2013).

12 PCA press release of 14 October 2014 (14/2014).

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.¹³

The PCA also sanctioned a cartel involving undertakings operating in the printing and graphics sector. Several undertakings were fined for a price-fixing and market-sharing agreement concerning the market for application form paper after an investigation triggered by a leniency application. The fines totalled €1.798 million. 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.

In 2013, the PCA sanctioned a cartel in the market for polyurethane foam for comfort products. This case is very important, since the PCA's investigation was conducted in parallel with a cartel investigation in the same market by the Spanish Competition Authority. The investigation was triggered by a leniency request by an undertaking that received full immunity (as well as for 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.¹⁴

Furthermore, in the area of public procurement, the PCA has also sanctioned five undertakings for anticompetitive practices in public tenders for the supply and assembly of prefabricated dwellings that would be used to enable the normal course of school activities during the reconstruction of certain schools, under a governmental public works initiative named Parque Escolar. In this case, the undertakings involved have waived their right to appeal against the PCA's decision, in order to benefit from a 10 per cent reduction of their fines. Therefore, the fines imposed by the PCA to the five undertakings amounted to €831,810.¹⁵

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 was 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,¹⁶ and stated that the National Association of Freighters had issued a decision that, in the PCA's view,¹⁷ constituted a collective refusal to deal with a specific terminal operator¹⁸ and 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.¹⁹

The PCA's investigations into professional associations are also of interest. The PCA has fined several national professional associations, such as the Veterinarians Association, the

13 PCA press release of 17 January 2008.

14 PCA press release of 12 September 2013 (19/2013).

15 PCA press release of 10 August 2015 (18/2015).

16 Case PRC 2004/07.

17 Case PRC 2004/23.

18 PCA press release of 29 January 2009.

19 PCA press release of 19 January 2011.

Dentists Association, the Doctors Association and the Chartered Accountants Association, as a result of decisions that had an effect on their members' pricing (including recommended and maximum prices considered mandatory by the members).²⁰

ii Trends, developments and strategies

Under the previous legal framework in Portugal, antitrust decisions were not generally published on the PCA's website and the current access to the antitrust decisions is still very limited in cases for which there are pending judicial appeals related to such decisions. As such, the public's knowledge of antitrust issues is limited, to a great extent, to the press releases published by the PCA. Notwithstanding, the PCA is attempting to become more transparent, and recently the issuance of statements of objections and information regarding the carrying out of unannounced inspections have been publicised through press releases.

According to publicly available information, the sanctioning of antitrust conduct in Portugal has occurred more 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 used again in 2015) 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 also 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 acting in any way that could potentially facilitate collusive behaviour in the region.²¹

iii Outlook

The PCA will continue to make cartel cases a priority for 2016. In fact, in its priorities for the current year,²² the PCA has clearly emphasised that it will focus on combating cartels, devoting particular attention to the area of public procurement and also to agreements that might have an immediate and direct effect on final consumers. Therefore, the PCA has again highlighted that one of its priorities is the need to consolidate the investigative and response capacities of its Anti-Cartel Unit. In particular, the PCA intends to consolidate not only search and seizure procedures, but also the subsequent procedures of the handling and examination of evidence, in order to reduce the average duration of proceedings.

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,

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

21 PCA press release of 24 June 2012.

22 Available at http://www.concorrenca.pt/vPT/A_AdC/Instrumentos_de_gestao/Prioridades/Documents/AdC_Prioridades_2016.pdf.

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 anticompetitive practices exists.²³

Indeed, the PCA is determined to make use of all of these powers to tackle cartels, having pledged to intensify the exercise of its search and seizure powers, whenever there is reasonable indication of an infraction, irrespective of whether that indication has originated in *ex officio* investigations or is following a complaint. In 2015, as far as we are aware, the PCA carried out two dawn raids, encompassing the premises of eight undertakings.²⁴ In 2016, the PCA has so far confirmed that it has carried out searches of the premises of several undertakings related to the alleged exchange of market information in the specialised credit sector.²⁵

The PCA will continue to promote the leniency policy as an essential instrument for cartel identification, particularly through the imposition of heavy and dissuasive fines in cartel cases, in order to stress the advantages of such a regime. The PCA's online whistle-blowing system will also be renewed, enabling the more efficient screening of complaints.

Additionally, in 2015 the PCA has issued two statements of objections for allegedly anticompetitive practices, one against 15 banking institutions²⁶ and another against five companies in the office equipment sector.²⁷

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

As previously indicated, the Competition Act prohibits agreements, concerted practices and trade association decisions, including cartels, whose object or effect is to restrict competition (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 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 another undertaking access to a network or other essential facilities that it controls, when appropriate payment for access is offered, 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 positions is very similar to that applied at the EU level; however, the Competition Act also

23 Article 19 of the Competition Act.

24 PCA press releases of 27 February 2015 (03/2015) and of 14 July 2015 (14/2015).

25 PCA press release of 29 January 2016.

26 PCA press release of 5 June 2015 (11/2015).

27 PCA press release of 16 October 2015 (24/2015).

includes provisions on the abuse of a situation of economic dependence.²⁸ An abuse of a situation of economic dependence may include any of the types of conduct previously mentioned and identified 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 major cases regarding the abuse of a dominant position involved Portugal Telecom (PT), the former telecommunications incumbent. In fact, PT was sanctioned for discriminatory pricing for allegedly offering more favourable prices, through special discounts, to operators from its group compared to competing retailers. It was also sanctioned for alleged margin-squeezing practices and for an alleged refusal to grant access to its underground conduit network, which the PCA considered to be an essential facility.²⁹ The most significant sanction imposed 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 allegedly abused its dominant position in the market for purchasing tomatoes for processing by requiring its suppliers to use a specific variety of seed produced by a company of its group. Sugalidal undertook to remove the illegal clause from its contractual arrangements and to publicise the removal.³⁰

The PCA also sanctioned Sport TV, an undertaking active in the supply of premium sports content for television platforms, with a fine of €3.7 million for an alleged abuse of a dominant position consisting of applying discriminatory commercial conditions to several pay-per-view operators.³¹

The PCA has also sanctioned a professional association for an abuse of a dominant position. In 2010, the Portuguese Chartered Accountants Association was fined for alleged restrictions imposed in the market for the training of certified accountants.

More recently, the PCA has sanctioned the National Association of Pharmacies and three other undertakings of the same group (Farminveste SGPS, Farminveste – Investimentos, Participações e Gestão, SA and HMR – Health Market Research, Lda) with a fine amounting to €10.34 million for abuse of a dominant position in the markets for both pharmaceutical commercial data and market studies based on pharmaceutical commercial data.³²

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.³³ Bayer removed

28 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., when the good or service at issue is provided by a limited number of undertakings and the undertaking would be unable to obtain identical conditions from other commercial partners within a reasonable period).

29 PCA press releases of 1 September 2008, of 2 September 2009 and of 2 August 2007.

30 PCA press release of 15 October 2009.

31 PCA press release of 20 June 2013.

32 PCA press release of 31 December 2015 (31/2015).

33 PCA press release 2 October 2007.

the clause from the contracts and proposed an amended contract to the PCA as a remedy. The PCA has also fined the dairy company Lactogal €341,098 for resale price maintenance practices (minimum price fixing) in the on-trade distribution market for dairy products, considering it a vertical agreement.³⁴

More recently, the PCA has sanctioned Petrogal, Galp Açores and Galp Madeira (all of which are part of the Galp Energia group and active in the liquefied petroleum gas sector) with fines amounting to €9.29 million for exclusive distribution agreements that allegedly restricted passive sales;³⁵ this decision has already been confirmed by the Competition, Regulation and Supervision Court (although the Court has reduced the fines to €4.1 million).³⁶

ii Trends, developments and strategies

The cases concerning PT's abuse of its dominant position faced many judicial obstacles. In fact, the decision imposing a fine of €38 million against PT for refusing to provide competitors access to what the PCA considered an essential facility – PT's underground conduit network – was overturned on appeal. The appellate court also considered the most significant sanction applied in this context – €53 million – to be time-barred.³⁷

At the end of 2014, for the first time the PCA submitted commitments to public consultation in the context of two antitrust cases. In the case against Controlinveste Media, the commitments were designed to mitigate alleged anticompetitive practices in the marketing of television and multimedia broadcasting rights. The publication of these proposals marked the PCA's first public consultation on proposed commitments,³⁸ which was subsequently accepted and deemed mandatory by the PCA.³⁹

For the first time, the PCA has also sanctioned undertakings for having provided false or misleading information, in the context of a request by the PCA for information. In the first case, the PCA imposed a fine of €150,000 on Peugeot Portugal.⁴⁰ Then, the PCA imposed a fine of €100,000 on CP Carga⁴¹ and, lastly, a fine of €150,000 on Ford.⁴² Nevertheless, CP Carga has appealed against that decision to the Competition, Regulation and Supervision Court, which upheld the appeal.⁴³

In 2015, the PCA has addressed several vertical antitrust concerns in the automobile sector. For instance, in the case against Peugeot Automobiles, this undertaking offered commitments designed to address the PCA's concerns about the alleged existence of a warranty extension agreement that prevented consumers from getting their cars repaired in independent garages. The published proposals were submitted to public consultation and were then accepted and deemed mandatory by the PCA.⁴⁴ Similar commitments were offered

34 PCA press release of 19 July 2012

35 PCA press release of 3 February 2015 (01/2015).

36 PCA press release of 4 January 2016 (01/2016).

37 PCA press release 2 August 2007.

38 PCA press release of 17 December 2014 (15/2014).

39 PCA press release of 3 June 2015 (10/2015).

40 PCA press release of 22 June 2015 (12/2015).

41 PCA press release of 16 July 2015 (15/2015).

42 PCA press release of 21 September 2015 (21/2015).

43 PCA press release of 16 December 2015 (29/2015).

44 PCA press releases of 30 December 2015 (17/2014) and of 23 March 2015 (07/2015).

by Ford Lusitana⁴⁵ and SIVA (importer and distributor of the automobile manufacturers Audi, Volkswagen and Skoda).⁴⁶ The commitments proposed were also accepted and deemed mandatory by the PCA.⁴⁷

iii Outlook

For 2016, the PCA aims to increase transparency in its antitrust investigations. It is expected to continue its efforts to promote access to its decisions and the decisions of courts of appeal, and to disseminate accurate and complete information on competition rules. Moreover, as previously mentioned, the PCA's online whistle-blowing system will be renewed, enabling the more efficient screening of complaints.

Additionally, the PCA will continue to promote the adoption of commitments, whenever important procedural gains can be anticipated.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The 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 were the three abuse of dominance cases brought against PT, discussed above. The existence of regulations in the telecommunications sector did not impede the application of competition rules.

The PCA has conducted sector-wide investigations and released reports on several markets over the years, including studies on consumer mobility within the retail banking market, on the liquid fuel and bottled gas retail markets, on electronic communications and on relations between large food retailers and their suppliers.⁴⁸

ii Trends, developments and strategies

The PCA will continue to conduct market studies and surveys in various sectors of the economy in order to better identify possible anticompetitive conducts. As previously mentioned, the PCA will focus primarily on controlling possible concerted practices in public procurement.

During 2015, the PCA has closely monitored the port sector and, as a result of a market study on the sector, it has submitted to public consultation some recommendations to enhance competition.⁴⁹ In its priorities for 2016, the PCA has included the monitoring of certain key sectors, namely the telecommunications and the gas sectors.

45 PCA press release of 27 July 2015 (16/2015).

46 PCA press release of 2 December 2015 (28/2015).

47 PCA press releases of 18 September 2015 (20/2015) and of 23 February 2016 (05/2016).

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

49 PCA press release of 13 July 2015 (13/2015).

iii **Outlook**

As indicated, the PCA's supervisory powers have been strengthened by the Competition Act and include, apart from requiring information from undertakings or associations, 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 all or a substantial part of Portugal. 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 party. 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. In any case, the PCA follows the European Commission's activities closely, having identified the monitoring of state aid matters as one of its international cooperation goals.⁵⁰

i **Significant cases**

One of the most important ruling on state aid involving Portugal was the European Court of Justice's (ECJ) ruling on the appeal in the *Azores* case.⁵¹ The ECJ ruled on the application of territorial selectivity criteria in cases involving autonomous regions (such as the Azores region), and set the necessary conditions to be met for an autonomous region to be considered as the benchmark as opposed to the national territory as a whole.

We also highlight, as one of the most high-profile cases decided by the European Commission regarding state aid granted by Portugal, which involved assistance that the state gave to shipyards in Viana.⁵²

The Portuguese banking sector, in the last few years, has also been object of several state aid decisions. In 2014, the European Commission found that the resolution plan of the Portuguese bank BES was in line with EU state aid rules (the European Commission assessed the plan under its rules on state aid to banks in the context of the financial crisis and acknowledged that a disorderly resolution of BES could create a serious disturbance in the Portuguese market).⁵³ In December 2015, following the Bank of Portugal's decision to put

50 See the presentation of the chairman of the PCA's board, available at: www.concorrenca.pt/vPT/Noticias_Eventos/Intervencoes_publicas/Documents/VFapresentação%20COFAP%2018%20fev%202015_VF.pdf.

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

52 See the European Commission press release available at http://europa.eu/rapid/press-release_IP-13-33_en.htm.

53 See the European Commission press release available at http://europa.eu/rapid/press-release_IP-14-901_en.htm.

the Portuguese bank Banif into resolution, the European Commission approved Portuguese plans to provide about €2.25 billion of state aid to cover the funding gap in the resolution of Banif, deeming that it was in line with EU state aid rules.⁵⁴

ii Trends, developments and strategies

The banking sector in Portugal has been particularly subject, in the last few years, to state aid procedures. Further to the above-mentioned resolution cases, it should be mentioned that the capitalisation programmes for Portuguese banks⁵⁵ and the creation of the Portuguese Finance Development Institution⁵⁶ have followed the applicable state aid rules as established in cooperation with the European Commission.

iii Outlook

Apart from the financial sector, that may continue under state aid motorisation, regional aid is going to be particularly relevant within the next few years. In 2014, the European Commission approved, under EU state aid rules, Portugal's state aid plan for 2014–2020. These guidelines set out the conditions under which Member States can grant state aid to businesses for regional development purposes and are expected to foster growth and greater cohesion in the single market.

Under the aid map currently in force, regions accounting for 69.01 per cent of Portugal's population will be eligible for regional investment aid at maximum aid intensities ranging from 25 per cent of the eligible costs of the relevant investment projects in mainland Portugal, over 35 per cent in Madeira, and up to 45 per cent in the Azores.⁵⁷

It is also possible that aid to projects related to innovation, the environment and energy may be more frequent. For instance, in 2015, the European Commission found a Portuguese scheme aimed at promoting renewable energy technologies to be in line with EU state aid rules, in particular in view of its 2014 Guidelines on State Aid for Environmental Protection and Energy.⁵⁸

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

54 See the European Commission press release available at http://europa.eu/rapid/press-release_IP-15-6380_en.htm.

55 See the European Commission press release available at http://europa.eu/rapid/press-release_IP-09-818_en.htm?locale=en.

56 See the European Commission press release available at http://europa.eu/rapid/press-release_IP-14-1214_en.htm.

57 See the European Commission press release available at http://europa.eu/rapid/press-release_IP-14-666_en.htm.

58 See the European Commission press release available at http://europa.eu/rapid/press-release_IP-15-4836_en.htm.

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;
- 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
- 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 view of certain parameters (e.g., no market overlap or limited joint market shares), will not raise competition concerns.⁵⁹

Since the enactment of the Competition Act currently in force, and similarly to the EU Merger Regulation provisions, 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 unenforceable.

The most important exception to the referred standstill obligation is the possibility to implement public takeover 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 to assess concentrations instead of the dominance test that was previously used.

Merger control decisions are subject to judicial appeal and to a special administrative appeal if the merger is blocked (although such an appeal would only be upheld if the benefits to the national economy outweigh the disadvantages to competition resulting from the prohibited merger).

59 PCA Regulation 60/2013.

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 six prohibition decisions in merger control cases since its incorporation in 2003.⁶⁰

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 of association, overturned the PCA's prohibition decision concerning a merger in the highway management sector.⁶¹ One of the PCA's prohibitions in the media sector was based on a binding negative opinion issued by the media sector regulator (since this decision was binding under the merger control framework).⁶²

With regard to merger remedies the PCA's Guidelines on Merger Remedies are in line with EU law and practice. The PCA has also imposed structural and behavioural remedies on several occasions. For instance, it imposed behavioural remedies in the concentration between two Portuguese commercial airlines (TAP and PGA).⁶³ The remedies in the clearance decision included freeing up slots at Lisbon and Oporto Airports, limiting the number of flights operated by the merged airlines on certain routes, as well as limitations on the prices charged. In 2015, behavioural remedies were also imposed upon two concentrations (involving the same acquiring undertaking, part of the EDP Group, which was previously the incumbent supplier of electric energy in Portugal) in the market for the production of electric energy. In both cases, the acquirer undertook to maximise the production of energy in order to avoid any negative impact in the market, in particular, a potential increase in wholesale prices.⁶⁴

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* case,⁶⁵ and the approval of an upfront buyer solution in the *Powervial/Laso*Auto-Laso*Probilog*Laso Ab* case.⁶⁶ More recently, in the *Arena Atlântida/Pavilhão Atlântico*Atlântico* case, a merger involving the acquisition of Pavilhão Atlântico (the main indoor arena in Lisbon), one of the shareholders of the acquiring undertaking committed to divest its shareholding in a ticketing services company, since the PCA had identified the shareholding as a vertical restraint to competition.⁶⁷

60 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/Prisa/Media Capital*; Case 4/2013 – *Controlinveste*Zon Optimus*PT/Sport TV*Sportinveste*PPTV*.

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

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

63 Case 57/2006 – *TAP/PGA*.

64 Cases 9/2015 – *EDP Renewables/Ativos ENEOP* and 55/2015 – *EDP Renewables/Sociedades Ventinveste*.

65 Case 49/2010 – *TRPN/Internorte*.

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

67 Case 38/2012 – *Arena Atlântida/Pavilhão Atlântico*Atlântico*.

As regards the imposition of sanctions on undertakings that failed to file a concentration, early in 2013 the PCA imposed fines amounting to €149,278.79 for the failure to notify a concentration in the pharmaceutical sector (this decision was appealed based on formal grounds and was reissued by the PCA in 2014).⁶⁸

ii Trends, developments and strategies

The simplified filing form and pre-notification contacts have been increasingly used, enabling a swifter assessment and earlier decisions regarding uncomplicated matters.⁶⁹ The PCA is expected to continue to promote the use of the simplified filing form, as well as pre-notification contacts in order to deliver swifter decisions and enhance transparency in the market.

Also, as regards referral requests by the PCA, it is worth noting that the European Commission has recently refused a request from PCA to refer the *Altice/PT* merger case. This merger case involved the acquisition of the Portuguese telecommunications operator PT Portugal by the multinational cable and telecommunications company Altice and the European Commission concluded that, given its extensive experience in assessing cases in this sector and the need to ensure consistency in the application of merger control rules in the fixed telecommunications sector across the European Economic Area, it was better placed to deal with the case.⁷⁰

iii Outlook

It seems that the PCA's merger control decisions are being increasingly subject to judicial review. In 2015, the Portuguese Competition, Regulation and Supervision Court has rejected, on the one hand, the appeal by Media, Zon Optimus and Portugal Telecom related to the PCA's decision to initiate an in-depth investigation of this concentration and, on the other, these undertakings claim that the concentration had been tacitly approved.⁷¹ Also in 2015 this court confirmed the PCA decision in the *Arena Atlântida/Pavilhão Atlântico*Atlântico* case.⁷² The PCA's clearance, after an in-depth investigation, of the *SUMA/EGF* concentration (a merger decision related to a privatisation in the waste sector), is currently being disputed

68 PCA press release of 9 January 2013, available at http://www.concorrenca.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201302.aspx?lst=1&Cat=2013. Decision issued in 2014 available at http://www.concorrenca.pt/vPT/Controlo_de_concentracoes/Decisoes/PCC/Documents/PCC201201_final_net.pdf.

69 See the PCA press presentation available at http://www.concorrenca.pt/vPT/Noticias_Eventos/Intervencoes_publicas/Documents/apresentação%20COFAP%2018%20fev%202015_v3.pdf.

70 See the European Commission press release available at http://europa.eu/rapid/press-release_IP-15-4805_en.htm.

71 Press release available at http://www.concorrenca.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201502.aspx?lst=1&Cat=2015.

72 Court decision available at http://www.concorrenca.pt/vPT/Praticas_Proibidas/Decisoes_Judiciais/contraordenacionais/Documents/AAE_1_13_TCRS1jul2015.pdf.

in the courts. So far, the Portuguese Competition, Regulation and Supervision Court has already rejected, in two separate proceedings, the adoption of interim measures to temporarily suspend the effects of the decision.⁷³

VII CONCLUSIONS

The PCA continues to actively pursue the goal of protecting and promoting competition in the Portuguese economy. It is becoming more dynamic and has invested in its technical capacity, having reorganised its antitrust division (including an Anti-Cartel Unit and a special unit for other restrictive practices).

Currently the PCA's focus is on combating cartels and anticompetitive practices, and 2016 has already started with dawn raids related to investigations of specialised credit markets.

Additionally, in 2016 the PCA is expected to promote advocacy activities, in order to enhance the transparency of its actions and raise awareness of the advantages of effective competition for the Portuguese economy.

⁷³ Press release available at http://www.concorrenca.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201527.aspx?lst=1&Cat=2015

Appendix 1

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