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In-Depth: Public Competition Enforcement (formerly The Public Competition Enforcement Review) is an annual survey of the most important and relevant developments in public competition law enforcement in the most significant jurisdictions worldwide. Among other things, it examines the practical implications of recent enforcement activity regarding cartels, restrictive agreements, abuse of dominance, state aid and merger control.

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 LEXOLOGY

Explore on Lexology 

Portugal

Tânia Luísa Faria, Margot Lopes Martins and Guilherme Neves Lima

Uría Menéndez

Summary

INTRODUCTION

YEAR IN REVIEW

CARTELS

ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

STATE AID

MERGER REVIEW

OUTLOOK AND CONCLUSIONS

ENDNOTES

Introduction

The Portuguese Competition Authority (PCA) is the independent administrative body in charge of the public enforcement of competition law in all sectors of the Portuguese economy, without exception. In force since 2012, the Portuguese Competition Act (Act) modified the legal standards governing the PCA's handling of complaints, giving the authority greater discretion to decide when to open an investigation based on certain criteria. To increase transparency, at the end of each year, the PCA publishes on its website its strategic priorities regarding competition policy for the following year.

The PCA recently issued its statement of priorities for 2024^[2] and pledged to:

1. reinforce its capacity for detecting and investigating cartels, as well as reinforcing the scrutiny and monitoring of possible abuses of dominance and gun-jumping practices;
2. keep up with the phenomenon of the digital transition, increasing international cooperation with regard to the latest legislative and regulatory changes implemented in the sector;
3. develop and implement innovative forensic IT tools; and
4. optimise its own internal resources.

The PCA's statement of priorities for 2024 indicates that the authority will continue to focus its investigations on digital sectors. Following the creation of its digital task force in 2020, the PCA will further develop its digital sectors-related activity. Indeed, in November 2023, the PCA issued an Issues Paper, on Competition and Generative Artificial Intelligence, also mentioned in its enforcement agenda for 2024, which signals that this sector continues to be a priority.^[3] Additionally, the PCA states that it will reinforce its international cooperation for enforcement in the digital sector, namely regarding what concerns the implementation of the Digital Markets Act.^[4]

In this context, the PCA has stated that it shall prioritise maximising its forensic IT tools, equipping itself with the tools and the necessary data to implement new methods of investigating anticompetitive practices and the detection of gun jumping practices, which are more effective and capable of providing a robust response in terms of procedures for collecting relevant data for investigation, such as web scrapping or screening. Finally, the PCA emphasised that it will continue to focus on combating cartels, as well as abuse of dominant position and gun jumping practices, both through its investigatory tools, bolstered by the transposition of the ECN+ Directive, as well as preventive public awareness measures..

Year in review

The year 2023 brought very relevant developments for competition law enforcement in Portugal.

First, and after going through the normal public review process, a new President of the PCA, Professor Nuno Cunha Rodrigues, was approved by the government in March 2023, thus ending Margarida Matos Rosa's term, which was marked by a record-breaking increase in public enforcement efforts and levied fines.

Secondly, also in March, the Constitutional Court issued a relevant decision on email seizure. On 16 March 2023, the Constitutional Court determined, in Ruling No. 91/2023, that it was unconstitutional for the PCA to seize emails without a search and seizure warrant issued by a criminal court. According to the Act, in general, dawn raid warrants can be issued by both a public prosecutor or by a criminal court, with the exception of certain dawn raids – for example, at medical offices or banks – which have to be issued by a criminal court. As such, and in light of the Constitutional Court's decision, emails seized without a warrant issued by a criminal court are liable to be deemed as prohibited evidence. On 26 May 2023, the Constitutional Court issued a second decision, Ruling No. 314/2023, confirming the understanding laid out in its March decision.

Despite not having general force – only a third decision in the same sense would render the relevant article of the Act as unconstitutional in all proceedings – these decisions had a relevant impact, making the framework of the PCA's investigative powers less clear, in particular, in what concerns the boundaries between an email and a mere electronic document. In this context, in April 2023 the Competition Court suspended three proceedings regarding judicial appeals of three of the PCA's past sanctioning decisions, with the aim of presenting to the ECJ three preliminary ruling requests, all with similar questions, regarding the compatibility of the PCA's email apprehension powers, in the absence of a warrant from a criminal court, with European law.^[5]

For these reasons, 2023 was a rather atypical year. Among other factors, some degree of internal reorganisation of the PCA, in addition to the impact of the decisions by the Constitutional Court, as well as the complexity of the cases at hand, probably had an impact in terms of the issuance of less sanctioning decisions in restrictive practices cases in comparison with previous years. Nonetheless, according to public information, there are relevant investigations ongoing and in December, the PCA published its new Guidelines on the conduction of infringement procedures, which shows its willingness to continue with its enforcement efforts.^[6]

In contrast with this outlook, regarding what concerns merger control, the PCA was very active, with a record-breaking number of clearance decisions.

Cartels

Article 9 of the Act prohibits agreements that restrict competition, including cartel agreements, namely 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.^[7]

In December 2021, Decree-Law No. 108/2021 added a new subparagraph to Article 9 that is applicable within the scope of the supply of accommodation, goods or services in tourist resorts or local accommodation establishments. As a result, the amended Article 9 prohibits clauses or conditions to the effect that the other contracting party or any other entity may not offer, either on a digital platform or in premises in physical space, prices or other sales conditions more advantageous than those offered by a digital platform intermediary for the same goods or services. In other words, this new amendment (introduced by a decree-law and therefore approved by the government) specifically prohibits all parity clauses, including narrow parity clauses, in contractual relations between undertakings active in the accommodation tourism sector and intermediaries operating on online platforms.^[8]

The PCA's decisions may be appealed to the Competition, Regulation and Supervision Court (Competition Court). The decisions of the Competition Court may also be appealed at a second level, to the Lisbon Court of Appeal, which has an autonomous section dealing with intellectual property and competition, regulation and supervision.

In Portugal, cartels are administrative (not criminal) offences, and therefore constitute misdemeanours, sanctioned with fines not exceeding 10 per cent of the offending undertaking's worldwide turnover in the year preceding the decision, even though criminal law principles apply to this type of infringement. Some argue that 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 undertaking.^[9] In any event, the maximum fine cannot be higher than the amount that would result from the application of the same calculation on the turnover of the year preceding the infraction.

Where the members of the board of directors of offending undertakings (and any individuals responsible for the management or supervision of the areas of activity in which an administrative offence has been committed) know of, or should know of, an infringement and have not adopted appropriate measures to end the infringement immediately, they will be liable to be sanctioned under the Act, unless they are subject to a more serious sanction under a different legal provision. The fines imposed on individuals cannot exceed 10 per cent of the annual income the individuals derive from the exercise of their functions in the undertaking concerned.

As an ancillary sanction under Article 71 of the Act, a ban of up to two years may be imposed in respect of the right to take part in tendering processes for public works contracts, public service concessions, the leasing or acquisition of movable assets or the acquisition of services or procedures involving the award of licences or authorisations by public entities. 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 Act establishes that the PCA may also impose behavioural or structural measures to end the prohibited practices or their effects.

Under the Act, and as implemented by the PCA, undertakings or individuals connected to the cartel may apply for immunity or a reduction of the fine if they provide valuable information about the cartel.

The Act also establishes the possibility of cases being settled before a decision is issued, at the PCA's discretion.

i Significant cases

Since 2019, the PCA has demonstrated increasing interest in prosecuting anticompetitive practices, and unprecedented sanctions have been imposed. According to publicly available information, between 2020 and 2022, the authority issued 26 sanctioning decisions with fines totalling approximately €1 billion, 17 statements of objections, as well as conducting dawn raids in at least 10 investigations and receiving eight leniency requests. Indeed, according to public information, in 2022, eight leniency applications were submitted, making 2022 the year with the most leniency applications in Portugal, which could be explained by the development of this mechanism and the increasing level of penalties. However, and as previously mentioned, 2023 was an atypical year, with the PCA issuing three sanctioning decisions regarding cartel infringements, with a total of fines of around €20 million, and only two statements of objections.^[10]

In September 2019, the PCA levied what were at the time the largest-ever fines in a horizontal competition case – totalling €225 million and imposed on 14 companies active in the banking sector. Although not assessed as a cartel, the proceedings were initiated subsequent to a leniency application and the PCA concluded that the defendants had exchanged sensitive competitive information regarding retail banking credit products. This case was appealed and is currently being assessed by the Competition Court and the European Court of Justice under a preliminary ruling request.^[11]

Subsequently, in a series of horizontal competition cases in the food retail sector, the main retail food chains in Portugal, various suppliers and, in some cases, individuals were sanctioned, between 2020 and 2023, for alleged price-fixing through hub-and-spoke arrangements, with total fines of €692.5 million, including the highest individual fine of €260 million.^[12]

Throughout 2022, the PCA followed through on its previous commitment to investigate restrictive practices in the labour market and in the context of public tenders. In this area, it sanctioned 31 sport enterprises, acting in Portugal's first and second professional football leagues, for a no-poach agreement during the covid-19 pandemic, with fines totalling €11.3 million, which constituted the PCA's first decision ever in the labour market.^[13] In addition, the PCA imposed fines totalling €41.3 million on seven private security companies for bid rigging.^[14]

The PCA has also been focusing on practices in the health sector, fining five private hospital groups, together with the Portuguese Private Hospitals Association, a total of €150 million for collective bargaining activity leading to a boycott of ADSE, a collective health insurance programme for civil servants. In addition, in 2023, besides the latest decision in the retail food hub-and-spoke cartels series, the authority issued two infringement decisions. The first follows the two settlement decisions for an infringement in the teleradiology services market, and is directed at the remaining three non-settling parties involved in the infringement. In this investigation the PCA imposed a total of €6,9 million in fines, as well as a one-year tender ban, which was the third time the PCA has applied this sanction.^[15] The second also pertains to an infringement, for the supply of electricity transportation cables, with the PCA imposing a total of €2 million in fines.^[16] In 2023, the PCA issued

two statements of objections related to ongoing investigations for price-fixing, one in the condominium management services market and another in the audiovisual production services market by a business association.^[17]

ii Trends, developments and strategies

During the past few years, the PCA has intensified its enforcement practice, taking an increasingly proactive approach both in its use of investigative tools and its application of the competition rules in general. The higher number of ongoing investigations and unannounced inspections, and the significantly higher level of fines, are all evidence of this increased level of activity. According to publicly available information, the sanctioning of antitrust conduct in Portugal has been more frequent with regard to bid-rigging cartels and to restrictive practices by trade and professional associations, including price-fixing.

However, and as mentioned above, 2023 was less visibly productive in the trend of continuous bolstering of the PCA's public enforcement efforts.

Nevertheless, it should be noted that, in the past years the leniency and the settlement mechanisms established in the Act have proven to be very useful instruments for the PCA in investigating and proving cartel cases, as well as other antitrust infringements.

In 2022, the PCA also changed its fine calculation policy in applying its guidelines, increasing significantly the basic fine amount, which led to the application of fines close to the 10 per cent turnover threshold, for instance in the private hospitals case, the supermarket investigations and the alleged private securities cartels.

iii Outlook

Despite the PCA continuing to make cartel cases a priority for 2024, it is uncertain how the PCA will address the legal consequences of the Constitutional Court's decisions, both on past and ongoing investigations. In this context, it should be noted that the lower courts have been trying to interpret the Constitutional Court's decisions regarding what concerns the judicial appeals of past sanctioning decisions, indicating that these elements of proof can be deemed as prohibited evidence, with sanctioning decisions supported on them being liable to be found null and void.

In parallel, on April 2023 the Competition Court suspended three proceedings regarding judicial appeals of three of the PCA's past sanctioning decisions with the aim of presenting to the ECJ three preliminary ruling requests, all with similar questions, regarding the compatibility of the PCA's email apprehension powers, in the absence of a warrant from a criminal court, with European law.^[18] Even though the manner in which the requests are worded can be considered as not directing the ECJ to provide a definitive answer to the matter, there is the expectation that the ECJ's decisions on these cases may provide the PCA with the necessary reasoning and legal support to continue its enforcement efforts. In this context, it will be interesting to see how the matter is further developed by the PCA and the ECJ.

The PCA's priorities include maximising its forensic IT tools, equipping itself with the tools and the necessary data to implement new methods of investigating anticompetitive practices and the detection of gun-jumping practices. Moreover, the PCA has affirmed that

it will pay close attention to the end use of algorithms and artificial intelligence to prevent these being used as a means of evading responsibility. Following this trend, in 2020, the PCA created an inter-departmental task force for the digital sector, which will continue to operate in 2024. As such, further developments in this sector can be expected.

The PCA will continue to promote its leniency policy as an essential instrument for cartel investigations. As mentioned above, the leniency programme gave rise to most of the investigations into cartel cases cited here, and to the banking case initiated through a leniency application (although it was not considered to be a cartel).

Antitrust: restrictive agreements and dominance

As previously indicated, the Act prohibits agreements, concerted practices and trade association decisions, including cartels, whose object or effect is to restrict competition.^[19] It also prohibits undertakings in a position of dominance from abusing their position.^[20]

The Portuguese legal framework on restrictive practices and the abuse of dominant position is very similar to that applied at EU level; however, the Act also includes provisions on the abuse of a situation of economic dependence. 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 goods or services at issue are 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). 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 Energias de Portugal (EDP), the former electric grid operator incumbent. In 2017 the PCA concluded a case of abuse of dominant position, fining EDP and SONAE a total of €38.3 million for alleged anticompetitive market-allocation practices.^[21] This case was appealed first to the Competition Court, which upheld the decision with a 10 per cent fine reduction, and subsequently to the Lisbon Court of Appeal, which submitted a request for a preliminary ruling to the ECJ, in 2021. On 26 October 2023, the ECJ issued its decision on the matter, providing further clarity on the concept of the 'potential competition'; however, the Lisbon Court of Appeal has yet to issue its final decision.^[22]

In 2019 the PCA imposed a fine of €48 million on EDP for abuse of a dominant position through manipulation of its production infrastructure to obtain greater revenues.^[23] The investigation started in 2016 and the PCA found the existence of anticompetitive practices in EDP's control of the provision of teleregulation and secondary reserve services under the contractual balance maintenance costs (CMEC) regime. According to the PCA, in diverting the provision of services from its CMEC regime infrastructure to other channels, EDP had a significant negative impact on the national electricity system and harmed consumers.

In 2020, the PCA opened an investigation into SIBS for alleged abuse of dominant position in the payment services sector, which led to a statement of objections in 2022, according to which SIBS leveraged its position in the payment services market by tying other secondary services to it.^[24] This investigation has originated, through the judicial appeal of one intermediate decision, one of the three preliminary ruling requests mentioned above, on the matter of the PCA's email apprehension powers.^[25]

Following its commitment to focus on digital markets, in May 2022 the PCA opened an investigation into Google for alleged abuse of dominant position in the form of self-preferencing behaviour at various stages of the digital advertising value chain. However, the case was closed in September 2022 as a result of the European Commission (EC) opening its own EU-wide investigation into the same alleged practices.^[26]

In connection with vertical restrictions, and looking at the PCA's recent decision practice, in 2019, following two complaints from former Super Bock distributors, the PCA sanctioned Super Bock, together with a board member and one of the company's directors, with fines totalling €24 million for fixing minimum resale prices and other commercial conditions for its products (i.e., beer and other beverages) in hotels, restaurants and cafés. According to the PCA, this practice was implemented through the imposition of commercial conditions, including sanctions in cases of non-compliance, which ultimately resulted in the fixing of distributors' resale prices.

In 2021 the PCA sanctioned Natus Medical Incorporated, a producer of medical devices, for market allocation and prohibition of passives sales with a fine of €100,000 after benefiting from a 20 per cent fine reduction under the settlement mechanism.^[27]

Most recently, in 2022 the PCA fined Farmodiética – Cosmética, Dietética e Produtos Farmacêuticos SA, a supplier of food supplements and diet foods, €1.3 million for imposing resale price maintenance on its products. According to the PCA this practice was implemented through a monitoring and economic incentive system.^[28] In late 2023, following a statement of objections in May, the PCA fined Dietmed - Produtos Dietéticos e Medicinais, SA, a supplier of food supplements and health food products, €1.04 million also for retail price maintenance on its products.^[29] Finally, at the very beginning of 2024, the PCA also issued a statement of objection against a company active in the enterprise application software market for restricting its distributors' capacity to submit bids in private and public tenders.^[30]

ii Trends, developments and strategies

For a certain period in the past, the PCA favoured closing cases subject to the adoption of commitments whenever important procedural gains could be anticipated. For example, in 2015, the PCA opened several vertical antitrust investigations in the automobile sector which were closed with commitments.^[31] In 2016, the PCA opened proceedings against DIA Portugal (a supermarket chain) for alleged antitrust concerns arising from the company's franchise system. To address the PCA's concerns, DIA Portugal offered commitments designed to clarify that it did not impose minimum prices to its franchisees' network.^[32] The commitments were later accepted and deemed mandatory by the PCA.^[33] In 2018, the PCA closed an abuse of dominance case subject to conditions by the postal service incumbent CTT, which has undertaken to offer access to its postal network to competitors.^[34] However, this was the last time the PCA closed proceedings of this

nature through the acceptance of commitments. In addition, only one other case, involving a regional association of bread makers in 2019,^[35] was closed with commitments, which might indicate that the PCA no longer favours this solution and now prefers to pursue the application of sanctions.

iii Outlook

For 2024, the PCA has established as one of its priorities the detection and investigation of abuses of a dominant position, especially in digital ecosystems. Indeed, in November 2023, the PCA issued an Issues Paper, on Competition and Generative Artificial Intelligence, also mentioned in its enforcement agenda for 2024, which signals that this sector continues to be a priority.^[36] Moreover, and due to the uncertainty generated by the PCA's proof apprehension powers, it is possible that 2023 could mark a turning point for the PCA's enforcement agenda, with vertical and abuse of dominance causes being pushed up in the priority list, as the discovery and investigation of such conducts can be done through other elements of proof, such as contracts and internal analysis.

The most recent cases of vertical restraints are connected with the health and wellbeing sector, which, together with the above-mentioned cartel cases in this sector, could indicate that the PCA, in a post-pandemic society, is increasingly preoccupied with strengthening the overall health system.

Sectoral competition: market investigations and regulated industries

The Act applies to all areas of the economy, including regulated sectors. The Act provides for interactions with sector regulators whenever the PCA takes decisions, whether on anticompetitive practices or merger control, regarding companies operating in regulated sectors. In this context, the PCA has been monitoring several sectors in recent years and its supervisory powers have been strengthened.

i Significant cases

To date, 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.

Within the scope of merger control, the PCA is constantly analysing regulated markets, in particular the markets for energy,^[37] media and telecommunications,^[38] aviation,^[39] etc.

The PCA has also 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, on relations between large food retailers and their suppliers, and on FinTech operators, digital operators, transport operators, liberal professions and ports.^[40]

ii Trends, developments and strategies

The PCA will continue to conduct market studies and surveys in various sectors of the economy to better identify possible anticompetitive conduct.

By way of example, in 2021 the PCA issued its best practice guidance for the award of public tenders for road passenger transport services^[41] and issued its opinion regarding the application of the Framework of Waste Management.^[42] In 2022, the PCA also published its recommendations within the context of the updating process over the technical specifications for packaging waste.^[43] In 2022, the PCA also published its opinion submitted to the government in relation to approval of the aforementioned Decree-Law No. 108/2021, amending Article 9 of the Act, prohibiting all parity clauses in contractual relations between undertakings active in the tourism accommodation sector and intermediaries operating on online platforms, as well as other relevant dispositions, engendering heavy criticism of this alteration – which was, nevertheless, disregarded by the government. More recently, in 2023, the PCA published its comments on the Draft Action Plan for the Circular Economy (PAEC II) 2023-2027,^[44] and, at the beginning of 2024, issued a study on competition and electrical mobility, promoting six recommendations to the government to address certain barriers identified in this market.^[45]

In general, the PCA is also competent to advise public institutions and organisations on legislative, regulatory and administrative measures that may have an impact on competition. In this context, it constantly publishes its comments on the various relevant public initiatives.^[46]

iii Outlook

As indicated, the PCA's supervisory powers have been strengthened by the Act and, as well as being able to demand information from undertakings or associations, the authority has the option to carry out inspections and audits. These have proven to contribute to the detection of inefficiencies by the PCA in some markets and sectors, and will continue to do so increasingly. The PCA will likely continue to be attentive to matters of possible concerted practices in public procurement.

State aid

Article 65 of the 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, and it may request information from any party for this purpose. The recommendations are published on the PCA's website.

The PCA's powers in this matter are very limited, as the EC is the entity with jurisdiction to assess the compatibility of state aid with the EU's rules on state aid. In any case, the PCA follows the EC's activities closely, having identified the monitoring of state aid matters as one of its international cooperation goals.^[47]

i Significant cases

In one of the most important rulings on state aid involving Portugal, in the Azores case, the ECJ ruled on the application of territorial selectivity criteria in cases involving autonomous regions and set the conditions necessary for an autonomous region to be considered the benchmark, rather than the national territory as a whole.^[48]

In December 2020, after conducting an in-depth investigation into the implementation of the Madeira Free Zone aid scheme, the EC concluded that the scheme was not implemented according to EU rules. The EC found evidence that the number of jobs used by Portugal for the calculation of aid under the scheme included jobs created outside the free zone and even outside the EU. Moreover, the profits benefiting from the tax reduction were not limited to those linked to activities effectively and materially performed in Madeira. The EC therefore imposed an eight-month deadline for recovery of the unlawful aid and, throughout 2021 and 2022, the Portuguese Tax Authority has been conducting the adequate procedures to recuperate unlawfully given aid.^[49] Both Portugal and the autonomous region of Madeira had appealed the EC's decision before the General Court; however, both appeals were dismissed on 21 September 2022 for the appeal lodged by the Portuguese republic^[50] and on 21 June 2023 for the appeal lodged by the autonomous region of Madeira. Following these dismissals, the Portuguese Republic and the autonomous region of Madeira lodged appeals with the Court of Justice, which have not yet been decided.^[51]

In 2021 and 2022, the EC approved several state-aid schemes related to the covid-19 pandemic, directed at several sectors of the Portuguese economy. In particular, schemes provided state aid to two Portuguese airlines, TAP and SATA.^[52]

In 2021, Portugal also notified two aid schemes in the form of direct grants for the purchase of electricity and hydrogen-powered buses, with the purpose of meeting greenhouse gas reduction goals, to which the EC decided not to raise any objections.^[53]

In 2022, the EC approved several state aid regimes, in addition to the aforementioned schemes related to covid-19 and airlines, including in relation to the energy production sector,^[54] in relation to the Azores and Madeira autonomous regions.^[55] In addition, in 2022, the EC also approved Portugal's aid schemes directed at helping the decarbonisation of its economy and the increase in costs derived from the EU emission trading system^[56] as well as its strategic recapitalisation programme following the economic crisis caused by the covid-19 pandemic.^[57]

In 2023, within the ambit of the State Aid Temporary Crisis and Transition Framework, adopted by the EC to support measures in sectors that are key to accelerate the green transition and reduce fuel dependencies,^[58] the EC approved a €140 million state aid scheme to support the production of renewable hydrogen and biomethane to foster the transition to a net-zero economy in Portugal.^[59]

ii Trends, developments and strategies

In the past few years, owing to the covid-19 pandemic and the war in Ukraine, the main focus of state aid has been on helping overall economic recovery and tackling the increase in inflation. In this context, in August 2020 the EC decided not to raise any objections to the creation of a Portuguese promotional bank, Banco do Fomento, a state-owned bank aiming to promote the growth of the Portuguese economy, mainly by supporting small and

medium-sized enterprises and mid-caps, as well as large companies considered important in terms of the national economy and, in 2022, it cleared an increase of €250 million in the Portuguese state's share in Banco do Fomento.^[60] In addition, the state-aid decisions taken by the government in recent years regarding airline companies demonstrate their strategic value to Portugal's tourism-dependent economy.

iii Outlook

In 2022, under EU state aid rules, the EC approved Portugal's state aid plan for 2022–2027. The EU guidelines set out the conditions whereby 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 70.23 per cent of Portugal's population will be eligible for regional investment aid at maximum aid levels ranging from 15 per cent of the eligible costs of the relevant investment projects in mainland Portugal to over 40 to 50 per cent in the Madeira and the Azores regions.^[61] In 2023, the EC increased the aid intensities for the geographical areas of the national territory that can benefit from public funding in the field of regional development.^[62]

Merger review

The PCA has exclusive jurisdiction to enforce the merger control rules established in the Act. Only concentrations^[63] that 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 Act is similar to that used in the EU Merger Control Regulation (EUMR) (i.e., the possibility of exercising decisive influence on an undertaking).

Unlike the EUMR and the laws of most Member States (except Spain), the Act 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:

1. 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;
2. the concentration results in the acquisition, creation of or increase in a market share in Portugal equal to or greater than 50 per cent; or
3. the concentration results in the acquisition, creation of or increase in 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 each 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 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 the parties are invited to comment on the PCA's draft decision.

The PCA has approved filing forms, including a simplified form to be used in concentrations that will not raise competition concerns in relation to certain parameters (e.g., no market overlap or limited joint market shares).^[64]

Since the enactment of the Act, and similarly to the EUMR provisions, the parties no longer have a specific notification deadline. Nevertheless, the parties 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 Act, any act or transaction implementing the concentration prior to clearance from the PCA is unenforceable.

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

The Act adopts the significant impediment to effective competition 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 a special administrative appeal would only be upheld if the benefits to the national economy outweigh the disadvantages to competition resulting from the prohibited merger).

i Significant cases

The PCA has extensive experience in merger cases, reviewing and deciding around 50 to 60 cases a year on average; it has issued only seven prohibition decisions in merger control cases since its incorporation in 2003, although several notifications were withdrawn by the notifying parties in view of the obstacles posed by the authority.^[65]

Notably, in relation to these prohibitions, and further to a special administrative appeal provided for in the PCA's articles of association, the Minister for the Economy overturned a PCA decision prohibiting a merger in the highway management sector.^[66] Another of the PCA's prohibition decisions, 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).^[67]

With regard to merger remedies, the PCA's guidelines are in line with EU law and practice.

The PCA has also imposed structural and behavioural remedies on several occasions. In 2018, divestment remedies were offered in the Rubis/Repsol GLP case to overcome the horizontal competition concerns identified by the PCA.^[68] For the first time, the divestment in question was made through a 'fix it first' solution (i.e., with a suitable buyer already identified and accepted by the PCA prior to the clearance decision).

In 2020, in the Pigments/Ativos Ferro case, a transnational concentration in the tiles and pigments sector, the acquiring company committed to divest the totality of the targets' business in Portugal.^[69]

In 2022, in the JCDecaux/Concessão de Publicidade Exterior em Lisboa case, the PCA considered that the awarding, through a public tender, of a right of exploration of public domain for the purposes of advertising constituted a concentration for the purposes of Article 36(1) of the Act. As such, and in light of JCDecaux's high market share in the national market, it proposed a upfront buyer solution, divesting 40 per cent of the contract at hand to a competitor.^[70]

In 2023, the PCA approved 75 transactions without conditions, opened one in-depth investigation (Phase II)^[71] and acknowledged in six cases that the notification was not mandatory, given that the thresholds established in Article 37(1) had not been met.^[72]

ii Trends, developments and strategies

In terms of its recent activity, the PCA has given increased importance and attention to gun-jumping cases, imposing more severe fines. Between 2019 and 2023, the PCA opened more than 15 investigations for alleged merger implementations without prior authorisation from the PCA and it has already issued six sanctioning decisions^[73] related to this class of infringement. Before this period, the PCA had issued only two sanctioning decisions, with minor fines.^[74]

Since 2019, the authority has taken a much stricter approach to merger control compliance. Most notably, in 2019, in the Grupo HPA Saúde/Hospital São Gonçalo de Lagos merger, the PCA adopted a clearance decision based on the failing-firm defence. This was the first time this argument had been used successfully in Portugal. However, an investigation concerning the failure to notify this merger promptly was concluded by the PCA in 2020, with the application of a fine of €155,000. It was also the first case in which the PCA accepted payment of the fine by instalments.

Also in 2019, the PCA started an investigation into HCapital, SCA–SICAR for failing to notify the acquisition of control over Solzaima in 2016. The transaction was notified in February 2019 and approved without condition. After the approval, the PCA initiated a gun-jumping investigation and, according to publicly available information, this is still ongoing.

In August 2021, the PCA issued a final decision sanctioning Fidelidade SGOIC with a fine of €300,000 for failure to notify a merger related to the acquisition of a real estate investment fund – a concentration that was also found to raise competition concerns and had to be abandoned by the parties. The acquirer returned the management of the fund to the previous managing undertaking. Later in 2021, the PCA sanctioned two more companies, SFI Group Gestión de Participaciones Minoritarias with a fine of €60,000 and AOC Health GmbH with a fine of €35,000, for failure to notify the acquisition of White and Green Natural and Stemlab, respectively.

In 2022, the PCA also sanctioned Santa Casa da Misericórdia de Lisboa over its acquisition of CVP – Sociedade de Gestão Hospitalar for failing to notify the merger with a fine of €2.5 million, a fine that was further reduced by the Competition Court to €160,000, considering the concept of negligence in the assessment of the obligation to notify and the company's public utility functions.^[75]

In 2023, the PCA also sanctioned LusoPalex to pay a fine totalling €75,000 after a settlement procedure.

This increased control is accompanied by an attempt to simplify merger control proceedings. As an EU Member State, Portugal requires a notification to be submitted by completing one of two types of notification form, namely the regular form or the simplified (short) form, depending on the potential impact of the transaction on the market and taking into account certain market share thresholds. In December 2021, the PCA adopted a new regulation to extend the applicability of the simplified form, which requests a less burdensome amount of information. It is now possible to use the short form where the parties' combined market share does not exceed 20 per cent when they are active in the same market. Under the previous regulation, this threshold was 15 per cent. The PCA has also reduced the amount of information requested in the regular form.

This is in line with the increasing use in recent years of the simplified filing form and pre-notification contacts, enabling swifter assessment and earlier decisions in uncomplicated matters.^[76]

iii Outlook

Over the past few years, there has been wide-ranging discussion in the EU, and worldwide, about the adequacy of the existing merger control tools to capture and sufficiently assess concentrations that could significantly impede effective competition. These discussions are starting to materialise at the EU level with direct impact in Portugal. For instance, the new guidance issued by the EC on the application of the referral mechanism set out in Article 22 of the EUMR,^[77] or the Towercast jurisprudence,^[78] which allow a competition authority to challenge a transaction if an abuse of a dominant position, admittedly resulting from the transaction, can be established; or even the Digital Market Acts^[79] that broaden the EC's jurisdiction in the digital markets. Even if, to date, the PCA has not used these mechanisms, they will necessarily have a significant impact at national level, requiring careful assessment of any transaction that could warrant merger control despite not exceeding the national or EU notification thresholds. Ultimately, this introduces more uncertainty for businesses, increased costs, potential delays to closing and increased burdens in the drafting of transaction documents.

The more stringent approach to gun-jumping practices mentioned above is consistent with the generally tougher and more sophisticated practice of merger control discernible in recent years.

Outlook and conclusions

In Portugal, the PCA is expected to remain active in investigating and sanctioning infringements of competition law in all sectors of the economy. In this respect, 2024 is expected to be marked by a considerable level of cases, both at the administrative stage and in judicial appeals against the Competition Authority's decisions. The PCA's focus continues to be combating cartels and anticompetitive practices, and it is particularly vigilant in relation to trade associations, public tenders and the digital economy. At the same time, it is expected that the level of litigation relating to private enforcement actions will continue to increase, particularly through class actions, as associations and law firms specialising in this area are created.

The PCA will also closely monitor mergers, relying on the new mechanisms designed at European level to catch more operations than those that fall under the notification thresholds, particularly in the digital sectors. This new European focus will necessarily bring at national level new and more sophisticated approaches to merger control analyses. The PCA will also continue monitoring mergers, ultimately to detect cases of gun-jumping.

Endnotes

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