



SEP. 20

**EU AND COMPETITION LAW**

# News - Competition law and policy 2<sup>nd</sup> quarter 2020

Below, you will find the issue of our competition law and policy newsletter for the 2<sup>nd</sup> quarter of 2020, which compiles the most significant news in this area.

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## PORTUGAL

# I. Portuguese Competition Authority

### **Portuguese Competition Authority publishes final version of its analysis of loyalty policies in telecommunication contracts**

In April 2020, the Portuguese Competition Authority (PCA) published the final version of its report on "Loyalty policies in telecommunication services".

Among its recommendations to the legislator and regulator of the sector, the PCA advocates that consumers should be able to terminate a contract, by phone or online, with the same ease and simplicity with which they can subscribe to a service. This possibility is especially important in the context of the current pandemic in which telecommunications services are critical for a large part of the Portuguese population.

The PCA is of the opinion that current loyalty policies reduce the share of consumers who are available to switch their telecommunications operator, thus weakening incentives to competition. This is aggravated by the general practice of renewing these clauses and by other factors such as the complexity of the contract termination process or the lack of transparency in the information communicated.

### **Portuguese Competition Authority warns associations of the need to comply with competition rules in the context of the Covid-19 pandemic**

On 21 May 2020, the Portuguese Competition Authority (PCA) issued guidelines to the ANF (National Association of Pharmacies), APB (Portuguese Association of Banks) and ASFAC (Association of Specialised Credit Institutions), reaffirming the need for compliance with competition rules in the current scenario of the Covid-19 pandemic.

**"The PCA is of the opinion that current loyalty policies reduce the share of consumers who are available to switch their telecommunications operator, thus weakening incentives to competition."**

The PCA's guidelines for the APB and ASFAC were based on the adoption of a moratorium to protect credit contracts in the context of the pandemic. In the PCA's view, these two associations should refrain from promoting exchanges of information between members that are not strictly necessary to define the credit moratorium rules to be applied. The guidance given to the NFA was based on a proposal regarding the maximum margin to be applied in the sale of individual products for protection against the pandemic.

The PCA also stated that it is available to provide informal guidance to companies that need to adopt forms of cooperation between each other. It also stated that any such measures will always have to be temporary and proportional to the issues that companies may face.

### **Portuguese Competition Authority imposes suspension of no-poach agreement as an interim measure**

On 26 May 2020, the Portuguese Competition Authority (PCA) imposed an interim measure that suspended the Portuguese Professional Football League's (LPFP) resolution that prevented clubs in the First and Second Leagues from contracting players who unilaterally terminated their employment contracts with other clubs due to issues relating to the Covid-19 pandemic.

According to the PCA, it was necessary to take this interim measure while the investigation into the LPFP is ongoing, given the serious potential impact of this practice on competition rules.

The PCA argues these horizontal agreements, in which companies refrain from hiring workers from other companies, constitute severe restrictions of competition.

### **Portuguese Competition Authority accuses supermarket chains and Bimbo Donuts of illegal practice to the detriment of the consumer**

On 24 June 2020, the Portuguese Competition Authority (PCA) issued a Statement of Objections accusing three food distribution groups (Modelo Continente, Pingo Doce and Auchan) and Bimbo Donuts of an allegedly illegal practice involving the latter's food products.

The PCA concluded that there is evidence that these distribution companies used their commercial relationship with supplier Bimbo Donuts to align the retail prices of these products, to the detriment of consumers.

The companies targeted by the decision will now have the opportunity to exercise their right of defence.

**"The PCA concluded that there is evidence that these distribution companies used their commercial relationship with supplier Bimbo Donuts to align the retail prices of these products, to the detriment of consumers."**

## **EUROPEAN UNION**

### **I. Courts**

#### **Court of Justice states that certain conduct may constitute by-object and by-effect infringement**

On 2 April 2020, the Court of Justice of the European Union (CJUE) issued a ruling following a reference for a preliminary ruling stating that the rules set out in European Union law must be interpreted as meaning that certain conduct may constitute competition infringements by both object and effect.

The decision was given after the Hungarian Supreme Court asked the CJUE questions relating to an appeal against a decision of the Hungarian competition authority that concluded that an alleged cartel restricted competition both by object and effect. The Supreme Court asked the CJUE whether or not the Hungarian competition authority had erred in classifying the conduct as a restriction in both those meanings.

The CJUE concluded that, while an assessment of the effects of such conduct is not necessary to conclude that a conduct constitutes a restriction by object, the qualification as a restriction by object does not prevent the competition authorities from assessing the effects of the conduct on the competitive process.

#### **Court of Justice overturns part of European Commission's decision for breach of rights of defence**

On 14 May 2020, the Court of Justice of the European Union (CJUE) partially annulled the European Commission (EC)'s power cables cartel decision against NKT, reducing NKT's fine by EUR 200,000 to EUR 3.6 million, because the EC breached the company's defence rights.

The CJUE concluded that: (i) NKT had not been able to defend itself against a portion of the judgment which included a reference to the alleged involvement of the company in the infringement that had concerned countries outside the European Economic Area, since the EC had not included such a reference in its Statement of Objections; (ii) the EC failed to prove that NKT knew that the remaining companies participating in the cartel had refused to supply accessories and technical assistance to competitors outside the conspiracy, and the EC considered this refusal to be an essential part of the infringement; and (iii) the EC failed to prove that NKT had participated in the cartel from July to November 2002.

The decision comes almost two years after the General Court of the European Union (GC) dismissed NKT's arguments against the Commission's decision.

## II. European Commission

### **European Commission approves a EUR 13 billion state aid scheme to be implemented in Portugal**

On 4 April 2020, the European Commission (EC) approved a state aid scheme with an estimated budget of EUR 13 billion to support companies affected by the Covid-19 outbreak.

This aid scheme will be implemented through direct grants with a limit of EUR 800,000 per company and state guarantees for commercial bank loans with a maximum term of six years (under the rules and limits provided in the Temporary Framework for state aid measures in support of the economy in the current context of the Covid-19 outbreak).

More information on the implications of coronavirus on state aid and competition can be found [here](#).

### **European Commission issues rare guidance letter on business cooperation**

On 8 April 2020, the European Commission (EC) addressed a "comfort letter" to the pharmaceutical association Medicines for Europe, giving its assent to a pharmaceutical cooperation scheme between generic drug manufacturers that seeks to mitigate the risk of shortages of critical hospital medicines used to treat Covid-19. The EC issued the letter under temporary regulations that came into force that same day that allow cooperation initiatives between companies to ensure the supply and distribution of scarce goods during the Covid-19 outbreak.

The regulations relax competition rules, allowing for cooperation measures between companies to ensure the supply and adequate distribution of scarce products and services deemed essential.

The EC also stated that it has been giving guidance to companies, not excluding, in exceptional cases, the use of comfort letters, especially in cases where there are doubts about the compatibility of certain initiatives with competition rules.

### **European Commission opens in-depth investigation into Air Canada's acquisition of Transat**

On 25 May 2020, the European Commission (EC) decided to open an in-depth investigation (Phase II) into the acquisition of Transat by Air Canada, two Canadian aviation operators.

According to the EC, since Air Canada and Transat are the companies with greater presence on the routes between the European Economic Area and Canada, this merger could lead to a loss of competition in this market. According to the EC's preliminary analysis, these two companies have always competed with each other. Therefore, if this merger were to be approved, there could be higher prices, worse quality of service or less choice for consumers.

Although the EC has admitted that the aviation sector has been particularly affected by the current pandemic, it has expressed concern about the effects that this merger could have in the medium/long term on this sector.

The EC has until 30 September 2020 to make a decision.

### **European Commission waives Takeda and Shire's merger conditions**

On 28 May 2020, the European Commission (EC) waived the conditions it had imposed to approve the merger consisting of the purchase of the Shire company by its competitor Takeda.

In 2018, the EC considered that the sale of Shire to Takeda could harm competition in the market for the treatment of inflammatory bowel disease, the only sector in which there would be an overlap in both companies' products. For this reason, in order to approve this operation, the EC ordered the divestment of Shire's product which was under development.

**"The EC claims to have waived the condition imposed on Takeda due to permanent, significant and unforeseeable developments."**

Now, the EC claims to have waived the condition imposed on Takeda due to permanent, significant and unforeseeable developments, both in the competitive panorama of the treatments in question and in the very development of the drug previously held by Shire, making this divestment no longer necessary for the merger to be compatible with the single market.

### **European Commission unveils plan to correct competition problems after market investigation**

On 2 June 2020, the European Commission (EC) published details about a possible proposal for a new tool that would allow the EC to intervene in the market to correct competition problems without there having to be a previous conviction for illegal acts.

"The EC justified the need for these new powers by the fact that the current rules do not allow it to solve structural competition problems in the most efficient way. It hopes to issue a legislative proposal by the end of 2020."

The EC stated that it is consulting on four different forms of intervention: (i) with its first proposal, the EC details a tool that would enable it to tackle unilateral conduct by dominant companies that could harm competition, through the imposition of structural and behavioural commitments; (ii) with the second proposal, the EC has designed a power similar to that explained in (i), but this time limited to markets where risks to competition or a structural failure in competition are more prevalent. Under both proposals, the EC would be able to intervene without a previous conviction for violation of Article 102 of the Treaty on the Functioning of the European Union (TFEU).

Differently, (iii) with the third proposal, the EC is considering creating a tool that, in addition to proposing legislative reforms, would allow the EC to intervene, where there are risks to competition or structural failure in competition, by imposing structural and behavioural commitments on companies that were not yet dominant; (iv) finally, with the fourth proposal, the EC has designed a power similar to that explained in (iii), but restricted to those markets where risks to competition and its structural flaws are more prevalent.

The EC justified the need for these new powers by the fact that the current rules do not allow it to solve structural competition problems in the most efficient way. It hopes to issue a legislative proposal by the end of 2020.

### **European Commission approves State aid to TAP worth EUR 1.2 billion**

On 10 June 2020, the European Commission (EC) approved a EUR 1.2 billion loan from the Portuguese State to TAP.

The EC argues that this loan guarantees the resources necessary for the company to face the liquidity problems it is dealing with without unduly distorting competition in the single market.

According to the EC, this State aid to TAP will also help support the Portuguese tourism sector, which has been greatly affected by the Covid-19 outbreak. ■