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NOV. 19

LEGAL INSIGHTS

EU AND COMPETITION LAW

# News - Competition law and policy 3rd quarter 2019

Below, you will find the issue of our competition law and policy newsletter for the 3rd quarter of 2019, which compiles the most significant news in this area.

## IN FOCUS

### PORTUGAL

## I. Courts

The first class action for damages caused by antitrust infringements is being brought before a court

**Read more**

## II. Portuguese Competition Authority

Portuguese Competition Authority issues notice on the use of algorithms in the digital market

**Read more**

Portuguese Competition Authority conducts search in the waste sector

**Read more**

Portuguese Competition Authority accuses APAN and APAP

**Read more**

Portuguese Competition Authority fines Super Bock for allegedly fixing minimum resale prices for its products in hotels, restaurants and cafés

**Read more**

Portuguese Competition Authority imposes biggest fine to date in the banking sector

**Read more**

Portuguese Competition Authority orders EDP Produção to pay a fine of EUR 48 million for alleged abuse of dominant position

**Read more**

Portuguese Competition Authority accuses HCapital, SCA - SICAR of having implemented a concentration without prior notification

**Read more**

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**EUROPEAN UNION**

## I. Courts

The Court of Justice clarifies that actions for damages for breaches of competition rules may be brought in the place where the damage occurred.

**Read more**

Advocate General Kokott clarifies scope of actions for damages for alleged infringements of competition law

**Read more**

German court suspends decision against Facebook on collection of personal data for lack of reasoning

**Read more**

Advocate General Bobek maintains that a cartel agreement may at the same time restrict competition by object and effect

**Read more**

The General Court annuls the decision of the European Commission on alleged State aid granted to Starbucks

**Read more**

The General Court gives judgment against Luxembourg for allegedly granting unlawful State aid to Fiat.

**Read more**

## II. European Commission

European Commission fines Sanrio for alleged territorial vertical restraints

**Read more**

European Commission opens investigation into possible exchange of sensitive information between Amazon and independent retailers selling products on its platform

**Read more**

European Commission fines Qualcomm in EUR 242 million for alleged predatory pricing

**Read more**

European Commission issues Statement of Objections for alleged network sharing agreement in the Czech Republic

**Read more**

European Commission fines companies for alleged participation in a canned vegetables cartel

**Read more**

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**PORTUGAL**

# I. Courts

### The first class action for damages caused by antitrust infringements is being brought before a court

On 11 September 2019, a Portuguese court gave consumers 30 days to opt out of the first ever class action for damages caused by antitrust infringements against Sport TV, a premium TV cable network that operates in Portugal. They had already been sanctioned in 2013 by the Portuguese Competition Authority with a fine of EUR 3.7 million for imposing discriminatory conditions upon the cable TV operators and thus abusing their dominant position.

**"The Observatory is now bringing an action for damages on behalf of around three million consumers, including not only cable TV customers who have subscribed to a Sport TV package, but also all cable TV customers in Portugal."**

The Portuguese Competition Observatory (a private entity formed by academics) had already brought this action in 2014, but the first instance court decided that it could not prosecute on behalf of consumers, a decision that was reversed at second instance. The Observatory is now bringing an action for damages on behalf of around three million consumers, including not only cable TV customers who have subscribed to a Sport TV package, but also all cable TV customers in Portugal.

According to the Observatory, Sport TV caused an artificial increase in prices in the Portuguese retail pay-TV market, limited development and investment in this market and excluded end consumers from the benefit of its channels. Between 2005 and 2013, Sport TV allegedly prohibited pay-TV operators from carrying out commercial programmes or campaigns involving their company, imposed recommended resale prices in the wholesale market and charged discriminatory prices in the wholesale market in order to favour its shareholder NOS to the detriment of other cable pay-TV operators.

# II. Portuguese Competition Authority

### Portuguese Competition Authority issues notice on the use of algorithms in the digital market

As part of the publication of a study document on digital ecosystems, big data and algorithms, on 1 July 2019, the Portuguese Competition Authority (PCA) informed economic agents operating in the digital market that they are responsible for the algorithms they use on their platforms if this use violates competition rules, by being used as tools for the illegal purposes of coordinating prices and/or excluding competitors.

According to the PCA, there is still no widespread use of these algorithms, although it may represent a challenge in terms of competition policy in the future. Another concern expressed by the PCA relates to aggressive mergers in digital markets, with regard to the risk of preventive mergers. The aim of these mergers is both to expand or strengthen the power of a company, and to limit the introduction of new products in the market. The PCA is concerned because these mergers are not subject to the control of competition authorities as they do not meet the criterion of global turnover of the target companies and thus are not obliged to notify the competition authority.

Finally, the PCA is concerned that incumbent platforms may be able to adopt strategies to exclude competitors by restricting their ability to access the data necessary for them to operate.

## Portuguese Competition Authority conducts search in the waste sector

On 2 July 2019, the Portuguese Competition Authority (PCA) announced the carrying out of search and seizure procedures in seven entities active in the waste sector, based on suspicions of anti-competitive practices.

As judicial secrecy was declared in this case, the PCA only made it known that the investigations took place in the district of Lisbon.

## Autoridade da Concorrência acusa APAN e APAP

On 17 July 2019, the Portuguese Competition Authority (PCA) issued a Statement of Objections accusing APAN (Portuguese Association of Advertisers) and APAP (Portuguese Association of Advertising, Communication and Marketing Agencies) for alleged practices that hinder the normal functioning of the market.

The PCA complains both associations allegedly imposed on their members a rule according to which customers should limit participation in tenders for advertising services to three or four companies.

According to the PCA, failure by the undertakings to comply with these rules would allegedly give rise to warnings on the part of their associations.

After the Statement of Objections, those concerned now have the possibility to exercise their rights of hearing and defence.

## Portuguese Competition Authority fines Super Bock for allegedly fixing minimum resale prices for its products in hotels, restaurants and cafés

On 25 July 2019, the Portuguese Competition Authority (PCA) ordered Super Bock Bebidas S.A. (Super Bock), and two directors of the company, to pay fines of more than EUR 24 million for allegedly setting minimum prices and other transaction conditions applicable to the resale of its products to hotels, restaurants and cafés, in a period between 2006 and 2017.

The process began in June 2016 following complaints from former Super Bock distributors. In 2017, the PCA carried out search and seizure procedures at the company's premises, and in August 2018 adopted a Statement of Objections.

According to the PCA, Super Bock, as a supplier, allegedly interfered in the determination of prices and other transaction conditions applied by independent distributors, who purchase their products for resale.

## Portuguese Competition Authority imposes fine in the banking sector

On 9 September 2019, the Portuguese Competition Authority (PCA) ordered 14 banks operating in the Portuguese market to pay fines totalling EUR 225 million. The PCA reached a finding against the banks for allegedly exchanging sensitive information relating to housing loans, consumer loans and corporate loans.

The decision is the culmination of a long process, that started with a Statement of Objections issued in 2015 by the PCA.

## Portuguese Competition Authority orders EDP Produção to pay a fine of EUR 48 million for alleged abuse of dominant position

On 18 September 2019, following a Statement of Objections, the Portugese Competition Authority (PCA) condemned EDP - Gestão da Produção de Energia, S.A. (EDP Produção), to the payment of a fine in the amount of EUR 48 million, for alleged abuse of dominant position in the secondary regulation band market in mainland Portugal between 2009 and 2013.

**"EDP Produção thus allegedly obtained higher public compensation paid under the CMEC regime, and simultaneously benefited from higher revenues in the market through its non-CMEC power plants."**

According to the PCA, EDP Produção allegedly manipulated its offer of the tele-regulation service or secondary regulation band, limiting the offer capacity of its power plants under the Contractual Equilibrium Maintenance Costs (CMEC) regime: a mechanism created by the Portuguese Government to guarantee the power plants had a remuneration equivalent to that which they would obtain in exchange for the early termination of the Power Purchase Agreements (PPAs) to offer it through their plants under market regime, so as to receive twice the benefit.

EDP Produção thus allegedly obtained higher public compensation paid under the CMEC regime, and simultaneously benefited from higher revenues in the market through its non-CMEC power plants.

Since EDP Produção is the main supplier of tele-regulation to the National Electricity System and holds a dominant position in a market with strong rigidity of demand, it has allegedly been able to influence price formation to its advantage.

## Portuguese Competition Authority accuses HCapital, SCA – SICAR of having implemented a concentration without prior notification

On 17 September 2019, the Portuguese Competition Authority (PCA) accused HCapital, SCA – SICAR of having acquired sole control of Solzaima without having previously notified the transaction to PCA and having obtained a non-opposition decision from it.

The concentration in question was implemented on 5 August 2016 and was only notified to the PCA on 1 February 2019. Besides the fact the transaction in question was the subject of a non-opposition decision by the PCA on 8 March 2019, its implementation without prior notification may result in a fine of up to 10% of the turnover of the target undertaking.

The accusation resulting from the PCA's Statement of Objections does not yet lead to a conviction. At this procedural stage, the defendant is now given the opportunity to exercise its rights of hearing and defence.

**European Union**

# I. Courts

## The Court of Justice clarifies that actions for damages for breaches of competition rules may be brought in the place where the damage occurred

In a reference for a preliminary ruling, on 29 July 2019, the Court of Justice of the European Union (ECJ) held that it is possible to bring an action for damages for anti-competitive practices in a country where the damage has occurred, even if that country is not the one where the infringing companies have actually put together and concerted practices.

The European Commission (EC) concluded that the practices took place throughout the European Economic Area (EEA) and the ECJ explained that the affected market is that of the territory of the specific Member State. Thus, according to the Court, the action can be brought in countries where the damage was caused or suffered.

Another question in the case was whether the allegedly injured party to the cartel could bring a claim against a company participating in the cartel, given that the claimant never negotiated directly with that company. The ECJ said that, despite the absence of a direct contractual relationship, the damages suffered by the injured party result directly from the practice of illegal and restrictive acts of competition, so the infringer has standing to be sued.

## Advocate General Kokott clarifies scope of actions for damages for alleged infringements of competition law

In 2007, the European Commission (EC) imposed on Otis, KONE, Schindler and ThyssenKrupp a fine of EUR 992 million for alleged price-fixing practices, bid manipulation and market sharing of elevator installations between 1995 and 2004. The Austrian Federal Competition Authority also imposed a fine of EUR 88 million.

During this period, the State of Northern Austria (Oberösterreich), through its State body (Land Oberösterreich), granted contributions for social housing construction projects where the lifts needed to be installed. The State body argued that they are liable for losses, since the alleged cartel inflated the size of the loans it granted at a favourable interest rate, which meant that the public body received less interest than it would have received if it had invested those funds elsewhere.

In the Opinion of Advocate General (AG) Kokott of 29 July 2019, she argued that the State body should be able to bring an action for damages even though it does not participate directly in the cartelised market. The AG argued that the effectiveness of European Union (EU) law against cartels would be undermined if only the participants in the affected market could claim damages.

The AG says that the damage suffered by the Land Oberösterreich on the loans granted is covered by EU law, since to accept otherwise would exclude public bodies from the benefit of the protection of EU law. There is thus a sufficiently direct causal link between the price increases in elevators caused by the cartel and the damage suffered by the State body.

The Court of Justice of the EU will now rule on the matter and the case will then be referred to the Austrian Supreme Court.

**"In the Opinion of Advocate General (AG) Kokott of 29 July 2019, she argued that the State body should be able to bring an action for damages even though it does not participate directly in the cartelised market."**

### German court suspends decision against Facebook on collection of personal data for lack of reasoning

The Düsseldorf Regional High Court has suspended the decision of the German Competition Authority (*Bundeskartellamt*) against Facebook due to doubts about its legality. The *Bundeskartellamt* has announced it will appeal to the German higher court.

The German Competition Authority had concluded that Facebook had abused its dominant position on the social media market in Germany by forcing users to provide their data when linking their account to other company services as well as to third party websites.

The *Bundeskartellamt* has ordered Facebook to stop combining user data collected on its main site with data collected without the user's consent from other sites and applications. By combining user data collected from various sources, Facebook can, in the opinion of the German Competition Authority, optimise its service helping the company to improve its advertising activities so as to become a mandatory platform for advertisers.

According to the Court's decision, the conclusion of the German Competition Authority that Facebook abused its dominant position by collecting data from users lacks reasoning, since it did not explain how the alleged infringements of the General Data Protection Regulation (GDPR) resulted in an undermining of competition, nor did it demonstrate that Facebook held a dominant position in the online advertising market, or that the company's market power allowed it to exploit users' data. Moreover, the *Bundeskartellamt* did not distinguish between the collection, processing and proper use of consumer data and the excessive collection of such data.

### Advocate General Bobek maintains that a cartel agreement may at the same time restrict competition by object and effect

On 5 September 2019, Advocate General (AG) Bobek delivered his Opinion in a reference for a preliminary ruling made by a Hungarian court, arguing that an agreement within the meaning of Article 101 of the Treaty on the Functioning of the European Union (TFEU) may be restrictive by both object and effect. In both cases, it is restrictive of competition and therefore prohibited. According to the AG, the difference between object and effect concerns only the type of analysis and procedure employed by the competition authorities when assessing the compliance of agreements with the competition rules.

Within the context of a finding against a possible agreement on interchange fees investigated by the Hungarian Competition Authority, the AG argued that the criteria for assessing whether a given agreement is restrictive by object (to be interpreted strictly) or effect are the same inter alia, the nature of the goods or services and the actual and structural functioning of the respective markets, varying only in intensity.

The AG maintained that the analysis through the objective criterion seeks to establish whether there are other elements that can justify the conclusion of an agreement that would be a restrictive one. The effects analysis seeks to establish what concrete effects the agreement will have on the relevant market, taking into account the economic and legal circumstances under which the agreement was concluded.

## The General Court annuls the decision of the European Commission on alleged state aid granted to Starbucks

On 24 September 2019, the General Court of the European Union (GC) annulled a decision of the European Commission (EC) concerning alleged state aid which, according to the EC, would have been granted to the Starbucks group by the Netherlands through a favourable tax agreement APA (Advance Pricing Agreement), thus allowing it to obtain a selective advantage.

The EC then concluded Starbucks used two means of reducing its tax base: it paid Alki, a UK-based Starbucks group company, excessively high royalties that did not reflect market prices, thus allowing Starbucks to reduce the tax burden and shifting its taxable profits to Alki. At the same time, Starbucks was also acquiring from a Swiss-based company of its corporate group at an inflated price green and unroasted coffee beans.

The Dutch Government and Starbucks appealed to the GC against the decision, claiming that the EC had used an incorrect reference system to examine the selectivity of the tax ruling, further stating that the EC could not use the arm's length principle to assess whether an advantage existed or not.

In its decision, the GC considered that the EC had not sufficiently substantiated that the tax agreement between Starbucks and the Netherlands constituted an advantage and not merely a failure to comply with the methodological requirements for determining transfer prices between companies within the same group, which cannot alone be framed as state aid.

According to the GC, the EC has not demonstrated the existence of methodological errors in the tax agreement leading to a reduction in the tax burden. The GC also explained that the burden of proof rested with the EC.

## The General Court gives judgment against Luxembourg for allegedly granting unlawful State aid to Fiat

On 24 September 2019, the General Court of the European Union (GC) gave judgment against Luxembourg for allegedly granting State aid to the Fiat Finance Group (Fiat) in the form of a favourable tax regime, which gave the company a selective advantage, confirming the decision of the EC.

Fiat appealed against that EC decision, claiming that the latter had incorrectly analysed the selectivity of the tax measures, which would result in an attempt at 'disguised' tax harmonisation by the EC through the application of the arm's length principle. Luxembourg also argued that the arm's length principle would infringe the fiscal autonomy of the Member States.

According to the GC, state intervention, even in non-harmonised areas, may constitute state aid if it discriminates between companies in a comparable situation conferring a selective advantage.

The GC concluded that, using the arm's length principle, the EC can check whether the price charged between a corporate group corresponds to the market price to determine whether the charges included in the company's budget are mitigated and the company has therefore obtained an illegal advantage.

# II. European Commission

### European Commission fines Sanrio for alleged territorial vertical restraints

On 9 July 2019, the European Commission (EC) decided to impose a fine of EUR 6.2 million on Sanrio for banning its licensees from marketing their products in countries of the European Economic Area (EEA) other than those for which there was an agreement, leading to a geographical partition of the single market.

According to the EC, in order to ensure compliance with this prohibition expressly provided for in the contract, the company carried out audits and refused to renew the licence contracts if the companies did not comply with this obligation. In addition, the company required licensed companies to report their cross-border sales and limited the use of different languages in products.

The fine imposed was reduced by 40%, due to the company's admission of its practices and cooperation with the EC "beyond its legal duty" to cooperate.

### European Commission opens investigation into possible exchange of sensitive information between Amazon and independent retailers selling products on its platform

On 17 July 2019, the European Commission (EC) decided to open an investigation into Amazon for its use of information from independent retailers operating on its platform. The EC aims to ensure that the competitive gains that European consumers would benefit from the expansion of e-commerce are not outweighed by the anti-competitive practices of large digital platforms.

Amazon has a dual role as an e-commerce platform, simultaneously selling products on its platform as a retailer, while at the same time also providing its platform so that other independent retailers can sell their products directly to consumers.

As an online platform provider to other retailers, Amazon collects information about the activity, products and transactions of these retailers on its platform. Preliminary EC enquiries seem to indicate that this may be commercially sensitive information.

The investigation will focus in particular on: (ii) the standard contracts entered into between retailers operating within Amazon that enable Amazon to analyse and use data from third party vendors; (ii) the role of the information in the selection of "Buy Box" winners; and (iii) the impact of Amazon's potential use of commercially sensitive information from resellers for that selection. The "Buy Box" allows consumers to purchase products directly from specific retailers and add them to their shopping cart. It is through the "Buy Box" that most transactions are made so winning it seems to be critical for retailers operating on Amazon.

### European Commission fines Qualcomm EUR 242 million for alleged predatory pricing

On 18 July 2019, the European Commission (EC) imposed a fine of EUR 242 million on Qualcomm for alleged abuse of dominant position in the computer chip market. According to the EC, the company sold products below cost to force a competitor out of the market and this constitutes an antitrust practice by a company is in a dominant position.

The EC concluded that Qualcomm held a dominant position in this market with approximately a 60 per cent market share for 3G handset chips between 2009 and 2011 and took advantage of this position to limit competition by imposing below cost predatory prices. According to the EC, this practice took place at a time when its competitor Icera was becoming a viable alternative to the company found to have abused its dominant position, in a sector that is essential for the mobile phone market. The EC also found no evidence of any efficiencies gained in the market created by this practice.

## European Commission issues Statement of Objections for alleged network sharing agreement in the Czech Republic

On 7 August 2109, the European Commission (CE) issued a statement of objections to the mobile operators' Czech subsidiaries of O2 and T-Mobile and the communication infrastructure provider CETIN, which belongs to the same corporate group as O2. The EC argues that the network sharing agreement of these companies may be contrary to European Competition rules.

"The EC concluded that Qualcomm held a dominant position in this market with approximately a 60 per cent market share for 3G handset chips between 2009 and 2011 and took advantage of this position to limit competition by imposing below cost predatory prices."

Network sharing agreement agreements can prove beneficial in facilitating the development of mobile networks and benefit consumers in terms of faster roll out, cost savings and coverage in rural areas. However, the EC points out that, given the weight of the two telecoms operators in the Czech Republic and the fact that the market in this country is very concentrated, this agreement could lead to a restriction of competition by facilitating the elimination of their competitors, and it could reduce the incentives for these companies to improve their services.

These companies can now exercise their rights of defence.

## European Commission fines companies for alleged participation in a canned vegetables cartel

On 27 September 2019, the European Commission (EC) fined Coroos and Groupe CECAB a total of EUR 31 million for allegedly participating for over 13 years in a cartel of canned vegetables operating within the European Economic Area (EEA). During this period, these companies allegedly fixed prices, divided the market and customers, rigged bids and exchanged commercially sensitive information.

According to the EC, Bonduelle was also involved in antitrust practices but as it had applied for leniency, it was granted a full waiver of the fine. Both Coroos and Groupe CECAB subsequently applied for leniency and benefited from a reduction in the fine.

Unlike these companies, Conserve Italy, also an alleged participant in the cartel, has not yet admitted its guilt and is currently under investigation by the Commission.