

COMPETITION ENFORCEMENT AGENCIES

HANDBOOK 2019

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Van Bael & Bellis



Competition Enforcement Agencies Handbook 2019

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Competition Enforcement Agencies Handbook 2019

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Global Competition Review's 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

We would like to thank all those who have worked on the research and production of this publication: the enforcement agencies and our external contributors.

The information listed is correct as of April 2019.

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Overview

Gonçalo Anastácio and Luís Seifert Guincho

SRS Advogados

Over the past year, the enforcement activity of the Portuguese Competition Authority (AdC) remained strong, confirming the trend from recent years of enhanced competition enforcement in Portugal, having improved its presence in the eye of the public.

This has been recognised by stakeholders, as well as by the AdC's nomination for 'Government Agency of the Year' by GCR and its recent upgrade on GCR's agencies' ratings.

The (late) transposition of the EU Private Damages Directive was also a turning point at the level of private enforcement, with a growing number of both follow-on and standalone actions having been filed in Portugal.

Figures and facts

Over the course of 2018, the AdC adopted two sanction decisions in cartel proceedings, with fines totalling €12.37 million, and issued a decision with commitments to close an abuse of dominance probe.

In merger control proceedings, the AdC initiated five investigations into potential gun-jumping and non-notified mergers, and undertook 12 pre-notification procedures (which have been growing in practical consequence what is perceived as a sign of maturity of the merger control system). Two merger control proceedings went to in-depth investigation.

Moreover, the AdC carried out dawn raids in four investigations (raiding eight premises of seven entities) and issued four statements of objections (SO).

Anticompetitive practices

Decisions

The AdC issued six infringement decisions, imposed two fines – together amounting to €12.37 million – and adopted one decision with commitments.

The AdC's fining decisions were rather novel, being the first 'hybrid' cases in Portuguese competition law. These decisions concerned cartels in the railway maintenance and insurance sectors.

In the former, the AdC reaped the fruits of several of its initiatives in the context of public procurement as the case began following a complaint received in connection with the AdC's campaign against collusion

in the sphere of public procurement – having fined Sacyr Neopul €365,400.

The case involved four other railway maintenance companies that had agreed to submit bids above the standard price of a tender launched by Infraestruturas de Portugal, which led to an increase in the price paid by the public company for maintenance work on the railways.

The latter has confirmed the AdC's capability to speed-up the timing of its investigations. The case started in May 2017, following a leniency application by Seguradoras Unidas. In August 2018, the AdC issued SOs against five insurers for participating in a cartel in the area of insurance contracted by large corporate clients in the work, health and car accident sub-branches, a practice that began in 2010 and involved five insurers with 14 directors of these companies having participated as well.

At the end of 2018, the AdC settled with Fidelidade and Multicare for €12 million and, already in early 2019, has granted full immunity to Seguradoras Unidas under the leniency programme.

Another highlight of the year was the investigation into the postal sector incumbent operator, CTT. After uncovering the existence of a breach of competition rules in the access to CTT's standard mail delivery network by competing postal operators, the AdC closed its probe through the adoption of legally binding commitments that ensure that CTT's Postal Network Access Offer is available to competing postal operators.

In three related cases on the commercialisation and broadcasting of sports premium rights, the AdC closed its investigations without imposing sanctions or commitments.

First, in two separate proceedings against MEO and NOS – regarding an exclusivity agreement with nearly all the major football clubs in Portugal – the AdC concluded that there were several competition issues at stake, but preferred to close the case and issue a recommendation to the government calling for legislative action (considered to be the only effective means to address those issues).

Second, the AdC closed its investigation into Altice, MEO, NOS, NOWO and Vodafone in the context

of a reciprocal agreement for the sharing of sports TV rights. The AdC reached a similar conclusion as in the MEO and NOS investigations, believing that the relevant competition issues required far-reaching action which is not possible with competition law enforcement.

Work in progress

With regard to new investigations, the AdC received one leniency application, and undertook search and seizure procedures in four cases (in the advertising, telecommunications and food sectors), conducted in eight facilities of seven entities.

In the context of ongoing investigations, the AdC issued four SOs (in the electricity, insurance, distribution and railway maintenance sectors), covering cartels, vertical restraints and abuses of dominant position. There are two SOs that are particularly worth mentioning.

First, the AdC is charging EDP Produção for an alleged abuse of dominant position between 2009 and 2013, through a practice that, if confirmed, significantly increased the electricity prices paid by consumers. The investigation has been ongoing for quite some time, with Margarida Matos Rosa being the third AdC president to deal with the case. The SO was adopted in September 2018 and EDP submitted its reply to the SO in late November 2018.

Second, the AdC issued an SO against Super Bock, a leading undertaking in the production and sale of beer (among other beverages), under suspicion of behaviour concerning the fixing of minimum resale prices of its products in hotels, restaurants and cafés. The investigation was initiated by the AdC in June 2016, following two complaints lodged by Super Bock's distributors.

In this case, the AdC's provisional findings were that the restrictive practice lasted for at least 12 years. According to the AdC, the practice was implemented through the imposition of certain commercial conditions (for example, sanctions in cases of non-compliance) in the relationships established between Super Bock's distributors and the latter's clients that resulted in the fixing of resale prices.

In March 2019, SOs were released regarding the first investigations into hub&spoke cases in Portugal. This involved six major supermarkets (as alleged spokes) as well as drinks' producers (as alleged hubs).

Elsewhere, it is important to stress the AdC's enforcement trend to include board members, and directors as addressees of most SOs. If, up until last year, there had only been two cases where natural

persons had been fined, this new approach indicates that the AdC will likely resort to this mechanism more frequently, which is unknown in EU law. This trend, nevertheless, is also raising some fears of it being used as leverage for leniency and/or settlement situations.

Merger Control

In addition to the 48 notified mergers in 2018, the AdC received 12 prior assessment requests and initiated five investigations into potential gun-jumping (an interesting trend that, despite there being only two precedents so far, may lead to several 'quick wins' for the AdC due to the high rate of non-notified mergers and gun-jumping inherent to the market share mandatory threshold for merger control).

From all the merger decisions taken in 2018, the two highlights of the year are proceedings initiated in 2017.

Altice/Media Capital

This was a highly controversial merger in Portugal, which raised public opinion and stakeholder voices (most competitors of both undertakings were openly against the merger).

The AdC was concerned about vertical effects, namely the foreclosure of rival pay TV platforms' access to key media content. There were long-lasting commitment negotiations between the AdC and the parties: the AdC declining the first commitments package proposed by Altice and raising serious doubts about the second. Altice, faced with the imminent adoption of a draft prohibition decision, decided to withdraw the notification.

All-in-all, although the AdC did not officially block the merger, it certainly contributed considerably to its outcome.

Rubis/Repsol

Although the AdC had already initiated an in-depth investigation of the proposed acquisition of Repsol's liquid petroleum gas (LPG) distribution business in the Azores and Madeira islands in 2017, the deal was approved in the third quarter of 2018, exactly one year after its filing.

As it had done in recent cases (such as *Grupo Sousa/Portline*), the AdC paid closed attention to the coordinated effects theory of harm (it was a three-to-two merger) and focused its analysis on the trade-off between increased market power and efficiency defences. In the end, the AdC cleared the deal after accepting heavy divestiture commitments put forward by Rubis.

Judicial review

In 2018, the AdC reached success in the rate of its litigation efforts (covering dawn raids, search and seizures of evidence, digital evidence gathering, access to files, confidentiality, withdrawal of documents, effects of an appeal and right of defence), reflecting improved checks and balances for the legal robustness of its decisions from an early stage of the proceedings and throughout the investigation life cycle, and a more favourable law than used to be the case.

The most remarkable judicial decision was in the *MEO v AdC* case. Following an investigation into an abuse of dominance complaint lodged by MEO against GDA, the AdC decided to close the case, concluding that there was no effective restriction of competition. MEO appealed the decision before the Competition Court, which, after the written pleadings phase, decided to request a preliminary ruling from the Court of Justice of the European Union (CJEU).

The CJEU decision – followed closely by the Competition Court – has been deemed to be a significant clarification of article 102 of the Treaty on the Functioning of the European Union, as both courts addressed the issue of ‘competitive disadvantage’ and anticompetitive effects.

Another point of interest relates to a set of decisions on the contested constitutionality of article 84(4) in Portuguese Competition Law, which establishes that appeals of decisions by the AdC have a non-suspensive effect. This was one of the most far-reaching changes introduced by the current competition law, as it shifted the balance in favour of the AdC.

In 2016, different sections of the Constitutional Court rendered contradictory conditions on the constitutionality of article 84(4), both from appeals of decisions of the Competition Court that considered this provision unconstitutional. In 2018, in a case involving EDP and Sonae, the Competition Court considered the provision unconstitutional once more, a decision later confirmed by the First Section of the Constitutional Court.

This dispute is not yet resolved, since there are divergent judgments between sections of the Constitutional Court that will have to be settled by the Plenary of the Constitutional Court (what recently occurred regarding Energy infringements, in favour of constitutionality).

Promotion of competition

In the scope of its market studies and monitoring powers, the AdC published an issues paper regarding innovation and competition in the financial services (Fintech) sector, recommendations on ports, insurance and liquid fuels and around 20 opinions on several other sectors, such as energy, transport, telecommunications and payments.

The AdC has continued to invest in its Campaign to Combat Collusion in Public Procurement, issuing Guidelines for the Evaluation of the Competitive Impact of Public Policies and publishing recommendations following a cooperation project together with the Organisation for Economic Co-operation and Development Competition Division, identifying obstacles to competition resulting from the legislation in force in the maritime and road transport sectors and 13 liberal professions.

On another note, the AdC has been actively organising conferences, seminars and podcasts on some of the most topical competition law topics. The highlight of the year was certainly the Lisbon Conference, which took place on 18 and 19 October 2018 and also served to commemorate the AdC’s 15th anniversary. The programme was intense and diverse, featuring highly qualified speakers in competition law and economics from all over the world.

The year ahead

The AdC has once more established several main priorities for 2019, of which two main objectives come to mind in terms of competition enforcement:

- to maintain activity in the detection and investigation of anticompetitive practices, both through its leniency programme and ex officio detection; and
- to keep up to speed with disruptive innovation and its impact on the economy, the AdC proposes to deepen its knowledge on the use of algorithms and artificial intelligence by undertakings.

Last but not least, the EU Private Damages Directive was finally transposed into Portuguese law. Initially, the transposition process went rather smoothly, as the AdC was in charge of drafting the first proposal and organised wide public consultations, but the government took an unexplainably long time to send the draft law to be approved by the parliament and Portugal ended up being the last member state to transpose the Directive.

Soon after the transposition of the Directive, there was word of the first proceedings based on the new law and it will be interesting to follow the developments and outcomes of those cases.



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Gonçalo Anastácio is an equity partner, board member and head of the competition law department at SRS Advogados – one of Portugal's leading law firms – having previously been a partner at Simmons & Simmons.

Gonçalo is one of the leading names in the competition law field in Portugal, is ranked in the top band by *Chambers and Partners* and *The Legal 500* and is consistently involved in high-profile cases before the Portuguese Competition Authority and the European Commission.

Gonçalo studied at the University of Coimbra, holds a post-graduate degree in European studies from the Sorbonne (Paris I), and a master's degree in European (competition) law from the University of Lisbon, where he lectured on EU, competition and regulatory law at an undergraduate and postgraduate level. He is currently the president of the Competition Commission of the International Chamber of Commerce in Portugal, a founding member of the Circle of Portuguese Competition Lawyers and was part of the first group of lawyers to be awarded the title of 'Specialist in Competition Law' by the Portuguese Law Society. He is a regular speaker at international competition law conferences and the author of wide number of publications on competition law, including co-editor of three major market reference books: the only Portuguese article-by-article commentary on the Lisbon Treaty; the only Portuguese manual on vertical restrictions; and the article-by-article Coimbra commentary on the Portuguese Competition Law.



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SRS Advogados is a full-service, multi-practice Portuguese law firm advising clients on all aspects of domestic and international law, with extensive experience in arbitration and mediation, competition and EU, corporate and commercial, dispute resolution, employment and social security, energy, environmental, finance, immigration and Golden Visa, insurance and pensions, intellectual property, life sciences and healthcare, M&A, private equity and venture capital, projects, real estate, tax, transport and shipping and white-collar crime.

Our lawyers are focused on their clients' business and are highly experienced in advising large national and international groups. We are organised by specialist practice areas and sector groups. This dynamic structure allows the firm to combine a diverse range of experts within a group, all of whom with sector knowledge and experience.

The competition law department at SRS Advogados advises clients on all areas of competition law, EU law and industry regulation. Within the context of competition law, our activities include consultancy and support on mergers and acquisitions (national and international), cartels, bid-rigging, joint ventures, horizontal and vertical agreements, abuses of dominant positions, complaints to competition authorities, dawn raids, training programmes, investigations by authorities, sector inquiries, unfair competition, private enforcement and state aid. *Chambers Europe* and *The Legal 500* rank SRS Advogados's competition law team in the first tier for Portugal.

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