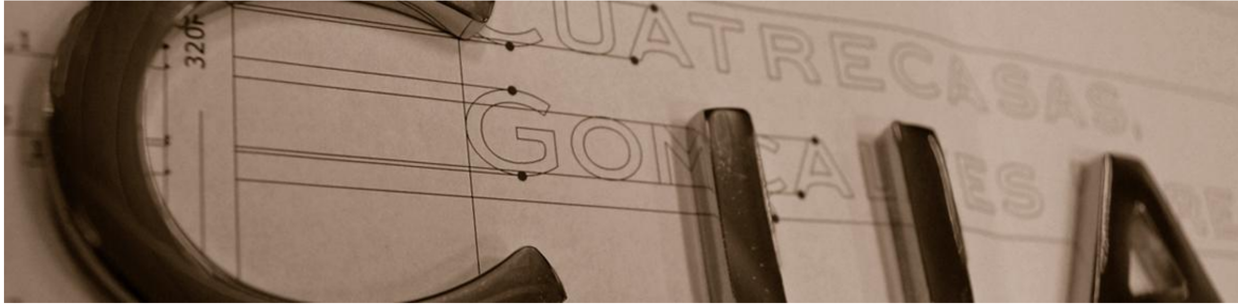
Cuatrecasas, Gonçalves Pereira



NEWSLETTER | COMPETITION

NEWSLETTER COMPETITION I 3rd Quarter 2013

I National Highlights 2

II European Highlights 4

NEWSLETTER COMPETITION

I NATIONAL HIGHLITHS

Portuguese Competition Authority

New Board of the Competition Authority

On 16 September 2013, the new Board of the Competition Authority ("CA") took office, headed by Professor António Ferreira Gomes and, as members, by Mr. Nuno Rocha de Carvalho and Professor Jaime Andrez (member of the precedent Board that will continue in the Board during the initial period of this mandate).

The new Board has already adopted one of its first measures, approving a new organization of the services, including the appointment of new Directors and, it should be emphasized, creating a Cartel task force. After much criticism has been directed at the former Board of the CA for relaxing competition law enforcement, a new phase of better enforcement of the competition rules is now expected.

Competition Authority fined three companies in the sector of foams for comfort for participation in a cartel

On 18 July 2013, the CA fined three companies of manufacture, transformation and sale of flexible polyurethane foam (FLEX 2000, FLEXIPOL and EUROSPUMA) €993,000.00 for participation in a cartel in the Portuguese market of foams for the comfort sector. Between 2000 and 2010, the three companies, responsible for 90% of the market, concerted the prices of their products and exchanged sensitive information in the Portuguese market of foams for comfort.

The investigation of the CA started with a leniency application by FLEX 2000, which was exempted of the fine. FLEXIPOL and EUROSPUMA benefited from fines reductions.

Five managers of the companies part to the cartel were fined €7,000.00 (similarly to the companies they represented, they have also benefited from the reduction of fines in the context of the leniency procedure and of the settlement submissions).

In its press release, the CA announced it has applied the settlement procedure in the investigation phase ("*instrução*"), *i.e.* after a statement of objections ("SO") has been issued.

With the settlement procedure, the CA imposes a smaller fine than the one that would have been imposed when the companies, in the phase of enquiry ("*investigação*") or investigation ("*instrução*") acknowledge their liability in a breach to the competition rules. Differently from the Portuguese legal framework, the European regime only allows for a settlement procedure before the SO has been issued.

In its press release, the CA also stressed that the fight against cartels and the punishment of the offenders will continue to be one of the priorities of its activity.

Portuguese Competition Authority

Competition Authority fines Roche for abuse of dominant position

In 2012, the CA fined the pharmaceutical company Roche Farmacêutica Química ("Roche") €900,000.00 for an alleged abuse of dominant position, carried out in the context of hospital public tenders for the supply of medicines in 2006.

According to the CA, in some of the public hospital tenders for the acquisition of antianemic drugs in which Roche participated in the year at stake, the firm offered a pricing system whereby the granting of discounts for the products in markets where it held a dominant position depended on the acquisition of other products in markets where it did not hold a dominant position.

In certain specific circumstances, such practice may constitute an abuse of dominant position, in the form of illegal bundled offers and fidelity rebates.

This fining decision, which occurred in 2012, was only now made public by the CA in its 2012 Activities Report.

Competition Authority

Competition Authority authorizes the merger between Optimus and Zon, with commitments

On 26 August 2013, the CA approved the merger between Optimus (the third largest mobile player in Portugal, also present in the fixed markets) and Zon (the Pay TV market leader, with a negligible presence in the mobile markets).

The merger was decided in first phase, with the assumption of commitments by the Notifying Parties, which were mainly aimed at addressing horizontal concerns due to the disappearance of Optimus from the market. Optimus is one of the alternative operators that had invested more in new generation fixed network infrastructure (optical fiber), notably, through a network sharing agreement with Vodafone (the second mobile operator in Portugal, but with little presence in the fixe business).

The commitments accepted aim, *inter alia*, at guaranteeing that Vodafone will not be prevented from providing services based on Optimus' fiber network (in addition, it gives Vodafone a call option on Optimus network, having as purchase price the accounting value net of depreciation), and, on the other hand, guaranteeing that other operators, such as Cabovisão, may use Optimus network to provide fiber services.

Competition Court

The Competition Court annuls CA's fining decision for non notification of a concentration

In September 2013, the fine of €150,000.00 levied by the CA against *Associação Nacional de Farmácias*, *Farminveste 3* and *Farminveste* was annulled by the Competition,

Regulation and Supervision Court ("Competition Court"). The judgment regards the fining decision of the CA, dated December 2012, following the implementation of a merger – the acquisition of control of Pararede/Glintt by the three fined companies – that had not been previously notified to the Authority.

The Competition Court annulled the fine on the grounds of the violation of defense rights of the parties. The CA is now expected to readopt the decision.

This was the first fining decision by the CA for violation of the obligation of prior notification of a merger.

Competition Court

New Court of Appeal

Appeals against decisions of the Competition Court must be brought before the Lisbon Court of Appeal as from 26 August 2013 (and no longer before the Évora Court of Appeal).

II EUROPEAN HIGHLIGHTS

European Commission

The European Commission is reviewing its merger control rules

The Commission is considering an amendment to the EU Merger Regulation (EC Regulation 139/2004) that could lead to the inclusion in its assessment of non-controlling minority shareholdings. A new Regulation is likely to be approved in 2014.

At present, minority shareholdings held by one company in another one, but that do not confer control, are not analyzed by the Commission as the Merger Regulation applies only to transactions leading to an acquisition of control. However, in some specific instances, the acquisition of a non-controlling minority stake, even without gaining control, may harm competition and consumers, in particular in the context of acquisition of stakes of competitors or suppliers of important inputs.

General Court of the European Union

Judgment of the General Court, 6 September 2013, Joined cases T-289, 290, 291/11 - *Deutsche Bahn AG v Commission*
Practical limits of the Commission's right of inspection during dawn raids

The General Court of the European Union ("General Court") handed down its judgment dismissing in their entirety appeals by Deutsche Bahn and its subsidiaries against three decisions of the Commission that authorized unannounced inspections at their premises.

The General Court clarifies, in this judgment, the practical limits of the Commission’s right of inspection during dawn raids.

The General Court rejected that the Commission’s decision infringed the applicants' fundamental rights to inviolability of premises due to the lack of prior judicial authorization, considering that the absence of prior judicial warrant does not necessarily entail the illegality of administrative interference. It also added that, even in the absence of prior judicial authorization, the system established by Regulation 1/2003 provides five categories of protection in place.

The European Court also dismissed Deutsche Bahn's claim that the Commission's second and third decisions were unlawful because they were based on information obtained by the Commission in the course of implementing the first inspection decision, in the context of a very broad inquiry (amounting to a fishing expedition). Information obtained during the course of an inspection can only be used for the purposes indicated in the inspection decision, for the protection of professional secrecy and of the rights of undertakings. However, the General Court clarified that the Commission is not barred from initiating an inquiry in order to verify or supplement information which it obtained during a previous investigation if that information indicates the existence of conduct contrary to the EU competition rules.

Court of Justice of the European Union

Order of the Vice President of the Court, 10 September 2013, Case C-278/13 P(R) – *European Commission v Pilkington Group Limited*
Practical limits of the Commission’s right of inspection during dawn raids

On 10 September, the Court of Justice of the European Union (“ECJ”) dismissed the appeal made by the Commission against a General Court order where it had partially upheld an application for interim relief by Pilkington Group Ltd, in the context of the car glass cartel. This order clarifies the conditions to grant interim relief in the case of requests for confidential treatment. For interim measures to be rendered they must be justified, *prima facie*, in fact and in law; urgent; and necessary to avoid serious and irreparable harm to the applying party’s interests.

The Order concerned the Commission's refusal decision (of August 2012) to grant confidential treatment to certain information which the Commission intended to include in a second public (non-confidential) version of the 2008 car glass decision. Pilkington had requested for confidential treatment in relation to information on customers and products (Category I information); information on pricing calculations/changes, shares of the applicant (Category II information); and (iii) information which could identify certain members of its staff who were allegedly involved in implementing the cartel (Category III information).

Pilkington appealed to the General Court, alleging breach of the fundamental right to the protection of professional secrets and the right to an effective remedy, and also sought interim measures ordering the Commission to refrain from publishing the more complete non confidential decision. On March 2013, the General Court upheld Pilkington’s

application and granted interim measures preventing the Commission from publishing Categories I and II information, but dismissed Pilkington's application in relation to Category III information, as the risk of serious and irreparable harm was to third parties and not to Pilkington. The Commission appealed this decision.

The ECJ concluded that the General Court erred in law in finding that the alleged breach of Pilkington's fundamental rights was sufficient for the purpose of establishing the likelihood of serious and irreparable harm in this case. However, it considered that the damage resulting from the publication of the alleged confidential information (covered by business secrecy) would be serious and irreparable. Finally, the ECJ concluded that there was no reversal of the burden of proof by the General Court: in relation to disputes about interim protection for information allegedly confidential, the judge may, as rule, only conclude that there is no *prima facie* case where the information at issue is obviously not confidential.

CONTACT

CUATRECASAS, GONÇALVES PEREIRA & ASSOCIADOS, RL
Sociedade de Advogados de Responsabilidade Limitada

LISBOA
Praça Marquês de Pombal, 2 (e 1-8º) I 1250-160 Lisboa I Portugal
Tel. (351) 21 355 3800 I Fax (351) 21 353 2362
lisboa@cuatrecasasgoncalvespereira.com I www.cuatrecasasgoncalvespereira.com

PORTO
Avenida da Boavista, 3265-7º I 4100-137 Porto I Portugal
Tel. (351) 22 616 6920 I Fax (351) 22 616 6949
porto@cuatrecasasgoncalvespereira.com I www.cuatrecasasgoncalvespereira.com

This Newsletter was prepared by Cuatrecasas, Gonçalves Pereira & Associados, RL for information purposes only and should not be understood as a form of advertising. The information provided and the opinions herein expressed are of a general nature and should not, under any circumstances, be a replacement for adequate legal advice for the resolution of specific cases. Therefore Cuatrecasas, Gonçalves Pereira & Associados, RL is not liable for any possible damages caused by its use. The access to the information provided in this Newsletter does not imply the establishment of a lawyer-client relation or of any other sort of legal relationship. This Newsletter is complimentary and the copy or circulation of the same without previous formal authorization is prohibited. If you do not want to continue receiving this Newsletter, please send an e-mail to lisboa@cuatrecasasgoncalvespereira.com.