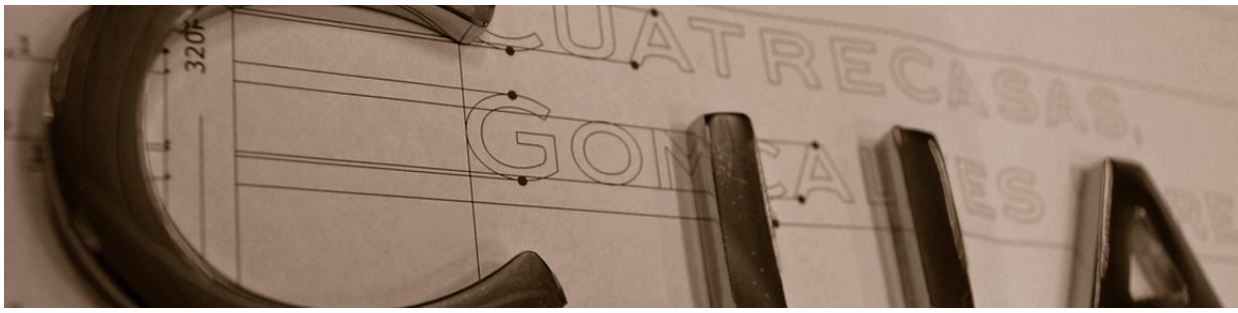
CUATRECASAS, GONÇALVES PEREIRA




# NEWSLETTER | COMPETITION

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# NEWSLETTER COMPETITION

## I NATIONAL HIGHLITHS

### Legislation

#### New Statutes of the Competition Authority were published

On 18 of August, the Decree-Law Nr 125/2014, that adopts the new statutes of the Portuguese Competition Authority ("PCA"), was published in the Official Gazette. The statutes were adapted to the Framework Law of the Regulatory Authorities (Law Nr 67/2013, of 28 of August).

The revision of the Statutes, the first since the creation of the PCA in 2003, aimed at clarifying the competences of the Regulator, as well as restating its independence (as imposed by the Troika) and reinforcing the guarantees of transparency, cooperation, control and responsibility of the PCA's enforcement.

With that purpose, the Statutes set out new internal organization rules, including, namely, a 6-year mandate, non renewable, for the PCA's Board members, and a new incompatibilities regime. New rules pertaining to the financing of the Regulator are also established: a single rate, annually determined, between 5.5% and 7%, in the definition of the contributions of the sectoral regulatory authorities. The Securities Market Commission and the Health Regulatory Authority will now contribute to the PCA's budget.

The Statutes maintain the possibility appealing prohibition decisions in merger proceedings to the Minister of Economy, for the defense of other relevant legal interests. Until today, the Minister of Economy has only once overturned a prohibition decision, in the Case Ccent. 22/2005 – *Brisa/AEO/AEA*.

The new statutes of the PCA came into force on the 1st September 2014.

### Portuguese Competition Authority

#### Competition Authority issues a prohibition decision in a merger proceeding

On 31 July 2014, the Portuguese Competition Authority has adopted a decision prohibiting the acquisition of joint control by Controlinveste Media – SGPS, S.A., NOS SGPS ("NOS", initially ZON SGPS) and Portugal Telecom, SGPS, S.A. ("PT") over Sport TV Portugal, S.A. ("Sport TV"), Sportinveste Multimédia, SGPS, S.A. e P.P.TV – Publicidade de Portugal e Televisão, S.A. ("PPTV").

PT and NOS are electronic communications firms and the main pay-TV players in Portugal. Sport TV is leading provider of premium sports channels for pay TV.

The relevant markets analyzed by the Competition Authority were the markets for broadcasting rights for premium sports contents, paid premium sports content channels, premium sports content for internet and mobile communications and downstream

markets. In these markets, the Competition Authority concluded that the merger would raise significant impediments in competition, namely in terms of customer and input foreclosure and coordinated effects.

As to customer foreclosure, the Competition Authority claimed that the merger would increase the ability and the incentive by NOS and by Portugal Telecom to foreclose the market for paid premium sports content channels and for TV broadcasting rights for premium sport content. According to the Authority, the merger was likely to make entry of Sport TV's competitors more difficult and to harm Sport TV's current competitors, such as the football clubs' own TV channels. As to the input foreclosure, the Competition Authority found that the vertical integration resulting from the merger was likely to foreclose the access, by NOS and PT's competitors at the downstream level, of paid premium sports content channels. As to the horizontal concerns the Competition Authority feared the risk of coordinated effects.

The commitments offered by the parties were considered by the Competition Authority (after a market test) as not sufficient to set aside the Authority's competition concerns.

These proceedings lasted for more than a year and a half and were one of the longest merger proceedings the Competition Authority PCA had to deal with. This was due to the number of interested third parties that opposed to the merger, to the renegotiation of the commitments and to several incidents that delayed the adoption of a final decision.

**The Competition Authority fines companies for failure to notify a merger prior its implementation**

In its press release of 7 August 2014, the Competition Authority announced it had fined the undertakings Farminveste 3 – Gestão de Participações, SGPS, Lda., Farminveste – Investimentos, Participações e Gestão, S.A. ("Farminveste") and Associação Nacional de Farmácias for the implementation of a merger consisting in the acquisition of control over ParaRede/Glintt, without previously notifying the merger to the Competition Authority.

During the proceedings, the companies made a settlement offer, where they acknowledged the facts and assumed responsibility for the facts. This is the first time the settlement procedure is used in a merger control proceedings.

Due to their settlement proposals, the fines of the undertakings Associação Nacional de Farmácias and Farminveste were reduced by one third, namely to €6,879.14 and to €111,958.24, respectively. Farminveste 3 – Gestão de Participações, SGPS, Lda. was not fined as it did not achieved any turnover in 2013.

For the application of the fines, the Competition Authority took into consideration the fact that the merger ParaRede/Glintt had not, in fact, caused direct negative and irreparable effects.

**Competition Court**

**Competition Court upholds the fining decision against Sport TV for abuse of dominant position**

On 4th June 2014, the Competition, Regulation and Supervision Court ("Competition Court") upheld the fining decision applied by the Portuguese Competition Authority against Sport TV for abuse of dominant position in the market of paid premium sports content channels.

In 2013, the PCA concluded that Sport TV had applied a discriminatory remuneration system in its distribution agreements for Sport TV television channels, entered into by Sport TV and the companies providing pay television services. The PCA condemned Sport TV in the payment of a fine of €3.7 million.

On 4th June 2014, the Competition Court maintained the PCA's finding of an abuse of dominant position, although it reduced the amount of the fine to €2.7 million.

## II EUROPEAN HIGHLIGHTS

### European Commission

### European Commission adopts new *De minimis* Notice

On 25 June 2014, the European Commission adopted a revised notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") ("*De Minimis* Notice"), which is accompanied by a Commission's guidance on restrictions of competition "by object".

Article 101 of the Treaty on the TFEU prohibits agreements between companies which have as their object or effect to appreciably restrict competition. The *De Minimis* Notice defines what the Commission considers not to be an appreciable restriction of competition by reference to market share thresholds (which remained unchanged from the previous 2001 Notice). It creates a "safe harbour" for companies whose market shares do not exceed 10% for agreements between competitors or 15% for agreements between non-competitors. This safe harbor does not mean that agreements between companies which exceed the market share thresholds will constitute automatically an appreciable restriction of competition but will have to be assessed individually.

The *De Minimis* Notice clarifies that agreements which have as their object the prevention, restriction or distortion of competition (the so-called restrictions "by object") do not benefit from the safe harbor, and will always constitute an appreciable restriction of competition. This is in line with the judgment of the ECJ in the *Expedia* case (Case C-226/11).

The Commission Guidance has the purpose to help the companies defining which agreements may benefit from the *De Minimis* notice, by identifying the restrictions in agreements between competitors and non-competitors which are generally considered as restrictions by object, namely the ones already considered object restrictions by the case law of the European Courts and the Commission's decisional practice.

**Court of Justice of the European Union**

**Judgment of the European Union Court of Justice of 11 September 2014 (Case C-67/13P)**
***Groupement des cartes bancaires v European Commission***

On 11 September 2014, the European Court of Justice ("ECJ") handed down its judgment on the appeal by Groupement des Cartes Bancaires ("GCB") against the General Court of the European Union's ("General Court") judgment. The judgment by the General Court had upheld the European Commission's decision of 17 October 2007 against GCB, whereby the pricing measures adopted by GCB were considered to be anti-competitive both by their object and their effects. In fact, the Commission concluded that that the pricing system was adopted in such as a way as to hinder the issuing of bank cards in France at competitive rates by certain member banks.

The GCB brought an action before the General Court for the annulment of the Commission's decision. On 29 November 2012, the action was dismissed by the General Court on the ground that the Commission could properly conclude that the pricing measures restricted competition because of their anti-competitive object, and therefore there was no need to examine the effects of the measures on the market. GCB appealed to the ECJ claiming that the General Court had erred in law in the application of the concept of the restriction of competition by object.

In its judgment, the ECJ recalled that the case law establishes that in order to ascertain whether coordination between undertakings constitutes a restriction of competition "by object" such coordination must be found to reveal in itself a sufficient degree of harm to competition. Certain types of coordination between undertakings, such as price-fixing cartels, can be regarded, by their very nature, as being harmful to the proper functioning of normal competition. Where the analysis of a type of coordination does not reveal a sufficient degree of harm to competition, case law determines that effects of that coordination need to be considered in order to determine that competition has in fact been prevented, restricted or distorted to an appreciable extent.

In determining whether there is a sufficient degree of harm for a restriction to be considered by object, the ECJ stated that regard must be taken to the content of its provisions, its objectives and the economic and legal context of which it forms part, as well to the nature of goods and services affected and the real conditions of the functioning and structure of the markets in question. Although not a necessary factor, the parties' intention may also be taken into account.

The ECJ concluded that the General Court failed to have regard to the case-law of the Court of Justice and therefore had not explained in what respect the restriction of competition revealed a sufficient degree of harm in order to be characterized as a restriction "by object". The ECJ also concluded that the General Court erred in finding that the concept of restriction of competition by 'object' must not be interpreted 'restrictively', as the concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual

effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.

The ECJ therefore annulled the judgment of the General Court and referred the case back to it could examine the measures anti-competitive effects.

This judgment is important as it defines a stricter approach to establishing the existence of a restriction by object.

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