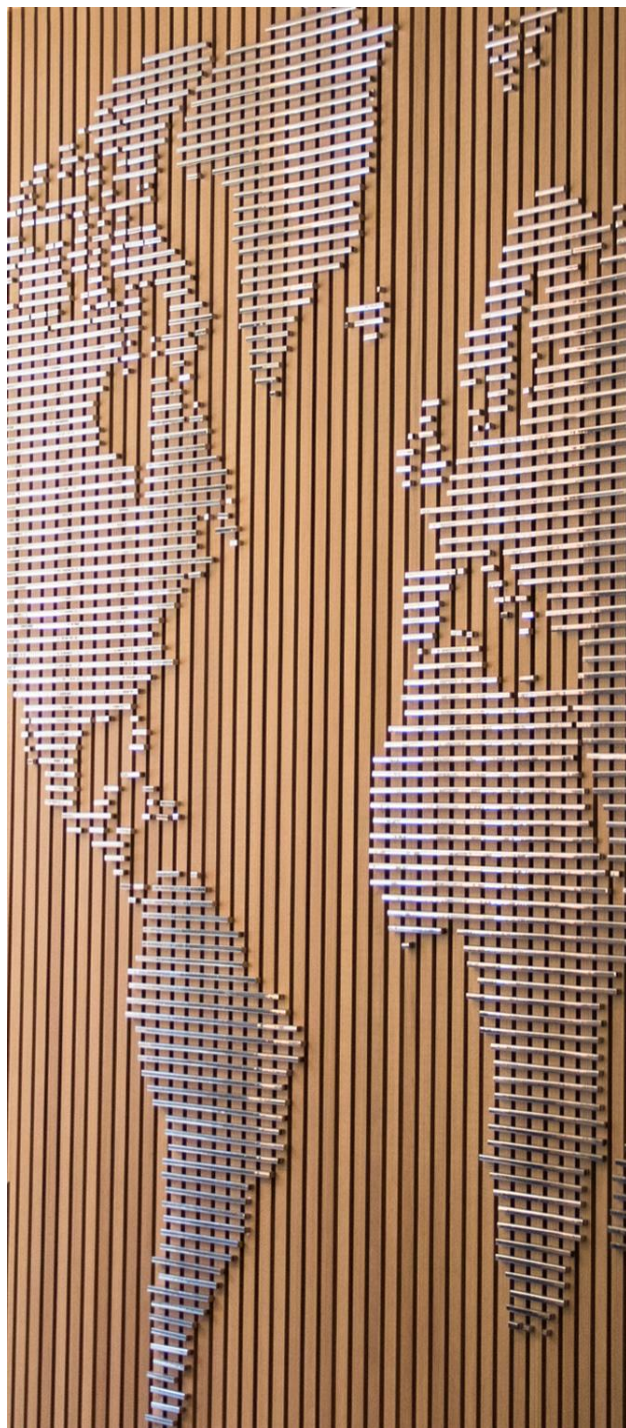

European and Competition Law

Newsletter Portugal

4th Quarter 2019



Contents

- > Portuguese Constitutional Court decides Portuguese Competition Law rule forcing companies to pay fines immediately or provide guarantees in lieu is not unconstitutional
- > Portuguese Competition Authority accuses telecommunications companies of cartel
- > Portuguese Competition Authority approves Cofina's acquisition of Media Capital
- > Portuguese Competition Authority legislation draft to transpose ECN+ Directive
- > Portuguese Competition Authority's Policy Priorities for 2020
- > European Commission investigates possible collusion by two French retailers in purchasing alliance
- > European Commission imposes interim measures during an antitrust investigation
- > Portuguese Competition Authority in 2020
January 29, 2020 | Porto
Cuatrecasas Conference



I – Portuguese Constitutional Court decides Portuguese Competition Law rule forcing companies to pay fines immediately or provide guarantees in lieu is not unconstitutional

In Judgment 776/2019 of December 17, 2019, the Portuguese Constitutional Court definitively declared the constitutionality of the non-suspensive effects of appeals filed against the Portuguese Competition Authority (the “AdC”) decisions imposing fines.

The provision concerned is article 84 (4 and 5) of the Portuguese Competition Law (the “LdC”), under which judicial appeals filed against these AdC decisions have, as a rule, a non-suspensive effect, except when enforcement of said decisions causes “*considerable harm*” to the company or where the company provides “*a guarantee in lieu,*” which suspends the immediate payment of the fine.

In other words, when the AdC imposes a fine, payment is due immediately, regardless of whether the company filed an appeal against this decision in court; companies may only suspend the immediate payment of the fine if they prove that enforcement of the decision causes them considerable harm or where they provide a guarantee in lieu of the fine.

The main issue decided by the Portuguese Constitutional Court was whether article 84 (4 and 5) of the LdC possibly restricts effective judicial protection and the presumption of innocence principle (combined with the proportionality principle), which is guaranteed under the Portuguese Constitution. It was important to clarify whether the regime resulting from article 84 (4 and 5) of the LdC is a relevant restriction, or whether it is a disproportionate restriction of those constitutional guarantees.

In its judgment, the Portuguese Constitutional Court underlined that, currently, there are several specific regimes for administrative offenses that deviate from the general regime by giving non-suspensive effects to judicial appeals filed against decisions imposing fines made by administrative authorities, thus allowing for their immediate execution before the final judicial decision that confirms, amends or revokes that decision.

By applying these considerations to the Portuguese Competition regime, the Portuguese Constitutional Court concluded that the non-suspensive effects of appeals provided in article 84 (4 and 5) of the LdC does not breach the constitutional principles of effective judicial protection and the presumption of innocence.



Specifically, the court considered, as an *a fortiori* argument, that providing a guarantee in lieu of the immediate payment of the fine, in the amount and in the way the court considers appropriate (i.e., considering the circumstances of the case), makes “*the sacrifice of the presumption of innocence in this regime [...] a moderate or slight constitutional devaluation.*”

To conclude, this judgment indirectly strengthens the AdC’s enforcement powers by forcing companies either to pay the fine immediately or prove considerable harm and provide a guarantee in lieu.

It remains to be seen how the AdC and the courts will apply this rule, particularly regarding what should be considered “*considerable harm*” for a certain company, as well as the specific determination of the guarantee as the only way to obtain the suspensive effect while the matter is decided in court.

II - Portuguese Competition Authority accuses telecommunications companies of cartel

On December 20, 2020, the Portuguese Competition Authority (the “AdC”) announced it has accused Meo and Nowo of participating in a cartel.

According to the AdC’s press release, the two telecommunications companies have allegedly taken part in a cartel for market sharing and price fixing of mobile services, either sold separately or in packages of fixed and mobile telecommunications services.

Also, according to the AdC, this cartel would have been implemented through regular contact between the two companies and constant monitoring of the agreement, lasting for at least one year (between 2017 and 2018). The AdC also states that this illegal agreement has resulted in higher prices and a reduction in the quality of the services provided, as well as in geographical restrictions on providing these telecommunications services.

The proceedings were opened in November 2018, following a leniency request, and the AdC carried out inspections in the companies’ premises between November and December 2018.

The AdC’s press release only refers to the accusation against these two companies. Procedurally, the investigation will continue until the AdC makes a final decision on the infringement or ends the proceedings.

This type of infringement could lead to fines of up to 10% of the companies’ annual turnover (in the business year preceding the decision). The companies may file an appeal against an



AdC decision imposing a fine, although the immediate payment of the fine is required unless the company proves that enforcing the decision causes considerable harm and offers to pay a guarantee in lieu of the fine.

III – Portuguese Competition Authority approves Cofina’s acquisition of Media Capital

At the end of 2019, the Portuguese Competition Authority (the “AdC”) announced its decision not to oppose the acquisition by Cofina SGPS S.A. (which owns Correio da Manhã, CMTV and Sábado magazine) of the sole control of Grupo Media Capital SGPS, S.A. (which owns TVI, Rádio Comercial and Plural).

After conducting an in-depth analysis that took approximately three months (the merger was notified to the AdC on October 1, 2019), the AdC concluded that the transaction is unlikely to harm competition in any of the relevant markets, namely the market for TV advertising and the market for online advertising, from the advertisers’ perspective; and the market for (wholesale) supply of basic pay-TV channels, press and digital content, from the users’ perspective.

Although acknowledging that the entity resulting from the merger will have significant positions in several markets, the AdC concluded not only that these positions already existed before the transaction, but also that, where there is an overlap, the structural change in the market resulting from the operation is of reduced significance, making it unlikely to give rise to competition concerns.

According to the press release issued by the AdC, and as an example, although the merger will combine the second and fifth largest operators in the market for access to pay-TV channels (after the transaction, it will become the main operator in this market), the AdC concluded that the merger does not show “*a particularly high level of concentration*” and that the “*structural change resulting from the transaction is therefore of little significance.*”

Finally, the AdC stated that, in its analysis, it considered not only the questions and observations raised by third parties (Impresa, Global Notícias and the Journalists’ Trade Union), but also the views of two associations representing the media buying agencies and one association representing advertisers, both confirming that “*countervailing buyer power of customers is sufficient to make implausible any negative impact resulting from the merger.*”



According to the available information, the transaction is likely to be finalized by the end of the first quarter of 2020.

IV – Portuguese Competition Authority legislation draft to transpose ECN+ Directive

Directive (EU) 2019/01, of the European Parliament and the Council of December 11, 2018 (the “ECN+ Directive”), published on January 14, 2019, envisages the empowerment of national competition authorities of EU Member States to be more effective enforcers in ensuring the proper functioning of the internal market. This is a fundamental legislative instrument for the enforcement of competition law.

The Portuguese Ministry of Economy appointed the Portuguese Competition Authority (the “AdC”) as the entity responsible for preparing a draft legislation proposal to transpose the ECN+ Directive, which was presented in October 2019, along with the launching of a public consultation period until January 15, 2020.

The main innovations in this preliminary draft include the following:

- During an inspection, the AdC may access all technological devices, including smartphones, tablets and cloud servers.
- Possibility of the AdC accessing unread emails.
- Possibility of the AdC continuing the inspection at its own premises (it may therefore copy and take large volumes of information without making a prior analysis of the documents and before the inspection is formally concluded).
- Non-protection of the legal privilege of companies’ internal lawyers.
- Collection of fines from infringing companies more effective, even when they are not physically present in Portugal.
- Parental liability for possible infringements committed by subsidiaries, in line with the EU jurisprudence on the concept of company (economic group).
- Possibility of considering the worldwide turnover of an economic group (and not only the turnover of the company directly involved in the infringement) when determining the amount of the fine to be imposed.

The ECN+ Directive must be transposed into national law by February 4, 2021.



V - Portuguese Competition Authority's policy priorities for 2020

On December 23, 2019, under article 7(3) of the Portuguese Competition Law, the Portuguese Competition Authority (the "AdC") established and publicized its competition policy priorities for 2020.

The AdC intends to maintain as a priority the detection, investigation and sanctioning of practices that distort the functioning of markets, with a particular focus on cartels. It will reinforce its capacity to detect anticompetitive practices, either on its own initiative, by consulting market information, or through complaints made by companies, consumers or other market players, and even through leniency applications, which the AdC considers a crucial mechanism for detecting secret agreements between companies.

Regarding legal proceedings and due process, the AdC has committed to maintaining respect for the rights of defense, as well as improving its checks and balances, to strengthen the legal and economic robustness of its decisions.

In merger control, the AdC maintains as its priority the speed of decision making, as well as rigorous and efficient analyses.

Generally, the AdC intends to promote its intensive advocacy activity throughout the economy's different sectors, particularly those considered to be the most structuring sectors, but also those that are the most vulnerable (such as public procurement).

Regarding accountability, the AdC intends to enhance the transparency of its actions through better and easier access on its website, not only to its decisions, but also to judicial decisions, studies, opinions and recommendations.

The AdC's main innovation in its competition policy priorities for 2020 is the creation of a task force to tackle new challenges emerging from the digital economy, as well as to prioritize its internal capacity building on digital ecosystems, algorithms and big data on competition.



VI – European Commission investigates possible collusion by two French retailers in purchasing alliance

On November 4, 2019, the European Commission (the “Commission”) announced that it has opened a formal antitrust investigation to assess whether two of the largest French groups of retailers, Casino Guichard-Perrachon (known as “Casino”) and Les Mousquetaires (known as “Intermarché”), have coordinated their conduct in the market, in breach of EU competition rules.

In November 2014, Casino and Intermarché set up a joint venture for a purchasing alliance of their branded products. Although these alliances usually aim to create purchasing power, leading to economic efficiencies, sometimes they are a sign of anticompetitive practices.

As the Commissioner in charge of competition policy, Margrethe Vestager, puts it: “[b]uying alliances between retailers have become a key component of grocery supply chains. They can bring lower prices to consumers [...]. Such benefits can however disappear quickly if retailers use these alliances to collude on their sales activities.”

The Commission is concerned that these retailers went beyond the purpose of their alliance, given that multiple contacts between retailers can lead them to collude on their retail sales activities and engage in anticompetitive conduct by coordinating the development of their shop networks and their pricing policy towards consumers.

In its press release, the Commission also states that market developments in recent years, such as the growth in the number of alliances and the changes in partners in alliances, have enhanced the opportunities and risks of collusion.

VII – European Commission imposes interim measures during an antitrust investigation

On October 16, 2019, the European Commission (the “Commission”) imposed an interim measure on Broadcom during an antitrust investigation, ordering it to stop applying certain provisions contained in agreements with six of its main customers.

Broadcom is the world leader in the supply of chipsets for TV set-top boxes and modems, and it was allegedly infringing competition rules by abusing its dominant position in those markets. This conduct is prohibited by article 102 of the Treaty on the Functioning of the European Union.



The EC considered that these interim measures were necessary to prevent serious and irreparable damage to competition from occurring in those markets (such as the exit or marginalization of Broadcom's competitors) and to ensure the effectiveness of a final decision made by the EC in the future.

The Commission ordered Broadcom to (i) unilaterally cease to apply the anticompetitive provisions; (ii) refrain from agreeing the same provisions or ones with an equivalent object or effect in other agreements with these customers; and (iii) refrain from implementing retaliatory practices with an equivalent object or effect.

These interim measures will, in principal, apply until the final decision on the merits of Broadcom's conduct (the investigation is ongoing).

Under article 34 of the Portuguese Competition Law, the Portuguese Competition Authority may also order interim measures to prevent serious and irreparable (or difficult to repair) damage for competition for up to 90 days.

VIII – Portuguese Competition Authority in 2020

January 29, 2020 | Porto

Cuatrecasas Conference

On January 29, 2020, Cuatrecasas will hold a conference in Porto addressed mainly to representatives of companies and of their legal departments.

The conference will focus the Portuguese Competition Authority's (the "AdC") recent enforcement activity, discussing its new inspection powers, the infringement trends for 2020, as well as deconstructing and explaining the huge amounts of fines the AdC has been imposing.

Check the agenda below:



Portuguese Competition Authority in 2020: Is your company ready?

Porto, January 29, 2020

[ONLINE REGISTRATION](#)



The Portuguese Competition Authority (the "AdC") has been sanctioning companies and members of their boards of directors, imposing fines amounting to over €350 million, for engaging in anticompetitive practices such as vertical and horizontal restrictions and abuse of dominant position in the distribution, banking, insurance and energy sectors.

In recent years, the companies have seen a sharp increase in the number of inspections, a diversification of the sectors investigated and the type of infringements, as well as an increase in the AdC's success rate in court.

What should companies expect from the AdC in 2020? How should they prepare themselves and how should they react? How are fines calculated and who is responsible for paying them?

Speakers:

Introduction - **Paulo de Sá e Cunha**, managing partner of Cuatrecasas' Porto Office; Speakers - **Pedro Marques Bom**, **Luís Bordalo e Sá** and **Bruno Zêzere Barradas**, European and Competition Lawyers



Agenda

9:00 a.m. Reception and breakfast

9:30 a.m. Enforcement: how does the AdC conduct its inspections?

Inspections, high-tech tools and (some) trade secrets
ECN+ Directive: new powers for the AdC? Old rights of defense?

10:15 a.m. Coffee break

10:30 a.m. New infringements and trends

Hub and spoke collusion and the retail sector: new type of infringement?
Exchange of sensitive information: what type of information can be shared and with whom?
Online sales: new market, new problems?
Public procurement, the AdC's new task force and the digital economy

11:15 a.m. Fines: recent fines of millions deconstructed and explained

How does the AdC calculate fines? How can companies anticipate amounts of fines? Who can be held responsible? When is payment required?

12:00 a.m. Litigation or competition compliance? Debate and conclusions

How to prevent the infringement and the fine. How to remedy it or react. Does compliance (or "crime") pay off?

**DATE AND TIME**

January 29, 2020
9:00 a.m. to 12:00 p.m.

**ADDRESS**

Palácio da Bolsa
Rua de Ferreira Borges
4050-253 Porto

Map

**ADDITIONAL INFORMATION**

Limited seats, subject to prior confirmation.

Contact: Filipa Pimentel
conferencias@cuatrecasas.com
Tel: (+351) 21 355 38 00

**ONLINE
REGISTRATION**

CUATRECASAS



© Cuatrecasas, Gonçalves Pereira & Associados, Sociedade de Advogados, SP, RL 2020. É proibida a reprodução total ou parcial. Todos os direitos reservados. Este documento é uma compilação de informações jurídicas consideradas relevantes para os tópicos em questão e não é uma compilação exaustiva de todos os desenvolvimentos legais para este período. A informação incluída não constitui nenhum tipo de aconselhamento jurídico.

Informação sobre o tratamento dos seus dados pessoais:

Responsável pelo tratamento: Cuatrecasas, Gonçalves Pereira & Associados SP, RL ("Cuatrecasas").

Finalidade: Gestão da relação contratual e/ou comercial com a Cuatrecasas, incluindo o envio de novidades legislativas e convites para eventos promovidos pela Cuatrecasas.

Legitimidade: Execução de contrato, interesse legítimo da Cuatrecasas e/ou consentimento do titular dos dados.

Destinatários: Terceiros aos quais a Cuatrecasas esteja contratualmente ou legalmente obrigada a comunicar os dados, bem como a empresas do grupo.

Direitos: Aceder, retificar, apagar, opor-se, pedir a portabilidade dos seus dados e/ou limitar o seu tratamento, conforme descrevemos na informação adicional. Para obter informação mais detalhada sobre a forma como tratamos os seus dados, aceda à nossa [política de proteção de dados](#).

Caso tenha alguma dúvida sobre a forma como tratamos os seus dados, ou caso não deseje continuar a receber comunicações da Cuatrecasas, pedimos-lhe que nos informe através do envio de uma mensagem para o seguinte endereço de e-mail data.protection.officer@cuatrecasas.com



Contacts

Cuatrecasas, Gonçalves Pereira & Associados,
Sociedade de Advogados, SP, RL
Sociedade profissional de responsabilidade limitada

Lisbon

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

Porto

Avenida da Boavista, 3265 - 5.1 | 4100-137 Porto | Portugal
Tel. (351) 22 616 6920 | Fax (351) 22 616 6949
cuatrecasasporto@cuatrecasas.com | www.cuatrecasas.com

For additional information on the contents of this document, please contact Cuatrecasas.

© Cuatrecasas, Gonçalves Pereira & Associados, Sociedade de Advogados, SP, RL 2020.

The total or partial reproduction is forbidden. All rights reserved. This communication is a selection of the news and legislation considered to be relevant on reference topics and it is not intended to be an exhaustive compilation of all the news of the reporting period. The information contained on this page does not constitute legal advice in any field of our professional activity.

Information about the processing of your personal data

Data Controller: Cuatrecasas, Gonçalves Pereira & Associados, Sociedade de Advogados, SP, RL ("Cuatrecasas Portugal").

Purposes: management of the use of the website, of the applications and/or of your relationship with Cuatrecasas Portugal, including the sending of information on legislative news and events promoted by Cuatrecasas Portugal.

Legitimacy: the legitimate interest of Cuatrecasas Portugal and/or, where applicable, the consent of the data subject.

Recipients: third parties to whom Cuatrecasas Portugal is contractually or legally obliged to communicate data, as well as to companies in its group.

Rights: access, rectify, erase, oppose, request the portability of your data and/or restrict its processing, as described in the additional information.

For more detailed information on how we process your data, please go to our [data protection policy](#).

If you have any questions about how we process your data, or if you do not wish to continue receiving communications from Cuatrecasas Portugal, we kindly ask you to inform us by sending a message to the following email address data.protection.officer@cuatrecasas.com.